



REPUBLIC OF KENYA



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Ndonye & 225 other Cited Parties v Director of Land Adjudication & 15 others (Environment & Land Petition 1 of 2024) [2025] KEELC 330 (KLR) (29 January 2025) (Ruling)

Neutral citation: [2025] KEELC 330 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ENVIRONMENT & LAND PETITION 1 OF 2024

TW MURIGI, J

JANUARY 29, 2025

**IN THE MATTER OF ARTICLES 22, 23, 24, 40, 60, 61
AND 162(1) OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT NO. 19 OF 2011

AND

IN THE MATTER OF THE REGISTERED LAND ACT (CAP 300) LAWS OF KENYA

AND

IN THE MATTER OF TRUST LAND ACT (CAP 288) LAWS OF KENYA

AND

IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT (NO 11A) OF 2011

AND

**IN THE MATTER OF SECTIONS 1,2,4,5,7,8,9,11,15,17,19,20,22 OF
THE LAND CONSOLIDATION ACT (CAP 283) LAWS OF KENYA**

AND

IN THE MATTER OF SECTIONS 17, 18 AND 19 OF THE OF THE LAND COURT ACT 2011

AND

**ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER
ARTICLES 24(1), 27(1), 29, 40(2)(3), 47 AND 50 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE REGISTRATION OF TITLES
ACT, CHAPTER 281 OF THE LAWS OF KENYA (REPEALED)**

AND



**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF SECTIONS
5 AND 6 OF THE NATIONAL LAND COMMISSION ACT, 2012 AND
PART VIII AND SECTION 134 AND 134 OF THE LAND ACT, 2012**

BETWEEN

**PATRICK KYENGO NDONYE AND 225 OTHER CITED
PARTIES PETITIONER**

AND

THE DIRECTOR OF LAND ADJUDICATION 1ST RESPONDENT

THE CHIEF LAND REGISTRAR 2ND RESPONDENT

THE LAND REGISTRAR MAKUENI 3RD RESPONDENT

THE NATIONAL LAND COMMISSION 4TH RESPONDENT

THE CHIEF COUNTY SURVEYOR MAKUENI 5TH RESPONDENT

THE OFFICER COMMANDING STATION EMALI 6TH RESPONDENT

**FREDRICK NKUYAYU, THE ASSISTANT COUNTY COMMISSIONER 7TH
RESPONDENT**

PAUL MUTIO, CHIEF WOLWA LOCATION 8TH RESPONDENT

NIXON KYALO MUSYOKI, CHIEF NGUU LOCATION 9TH RESPONDENT

**NANCY KATEE MUTHIANI, CHIEF KANYILILIA SUB
LOCATION 10TH RESPONDENT**

**GIDEON KITENGÉ., SUB CHIEF MASAMUKYE SUB
LOCATION 11TH RESPONDENT**

**NGUNGU MAKAU, SUB CHIEF WOLWA SUB LOCATION 12TH
RESPONDENT**

KIAMBA SUB CHIEF THITHI SUB LOCATION 13TH RESPONDENT

MUTHIANI SUB CHIEF THITHI SUB LOCATION 14TH RESPONDENT

**PATRICK KATISIA, SUB WARD ADMINISTRATOR NGUU
WARD 15TH RESPONDENT**

**MONICA MWOLOLO, SUB CHIEF THUNGUI SUB LOCATION 16TH
RESPONDENT**

RULING

1. Before me for determination is the Notice of Motion dated 26th February, 2024 brought under Order 40 Rule 2, Order 51 Rule 1 of the Civil Procedure Rules, Section 13(7) of the *Environment and Land Court Act* (No.19) of 2011, Rules 23(1) and (2) and 24(1) of *the Constitution* of Kenya (Protection of Fundamental Rights and Freedoms Practice and Procedure Rules 2013, Article 40 of *the Constitution*



2010 and Sections 1A, 1B and 3A of the Civil Procedure Act, in which the Applicants seeks the following orders: -

1. Spent.
 2. That this Honourable Court be pleased to issue an order prohibiting the 1st, 2nd and 3rd Respondents from processing documents, effecting transfers, issuing title deeds or in any manner whatsoever interfering with the status quo in land ownership within the suit property pending the full hearing and determination of this application and suit.
 3. That this Honourable Court be pleased to issue orders restraining the 6th to 16th Respondents individually, collectively or by themselves, their agents, employees or servants from trespassing into, arresting, arraigning in court, harassing, detaining, prosecuting or in any other manner whatsoever, interfering with the Petitioners right to possession, quiet enjoyment, possession and/or use of the suit property pending the hearing and determination of this application and suit.
 4. That the Respondents be condemned to bear the Costs of this application.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Kyengo Ndonge sworn on even date.

The Applicants Case

3. The deponent averred that he is the de facto chairman of Nguu Squatters Association and is conversant with the facts of this case.
4. He deposed that L.R No. 11924 was initially occupied by white settlers but was later allocated to ADC. That in the year 1968, L.R No. 11924 was subdivided into two portions namely L.R No. 12134 measuring 10,713 hectares and L.R No. 12135 measuring 5,664 hectares. He further averred that L.R No. 12135 was taken over by Masaku County Council after it was infiltrated by squatters from Mweni area in consideration of L.R. No.12971 which was handed over to Nguu Ranching and Dairy Cooperative Society.
5. He averred that on 3rd July 2006 the late president Daniel Arap Moi directed that L.R No. 12971 be subdivided and allocated to the landless. That consequently, the land was taken over by the Government as trust land and was thereafter surveyed and demarcated. That during a public baraza held at Vololo trading centre, it was resolved that each squatter in Wayani area be allocated land according to the historical location and size of each squatter's parcel and title deeds were issued thereof.
6. He further averred that the suit property was established as part of Nguu Settlement Scheme by a presidential decree issued in the year 1992.
7. That on 16/7/1994, Nguu Ranching Cooperative Society surrendered the suit property to the government for purposes of settling the landless. That on 2/10/1996 the Permanent Secretary, Ministry of Lands appointed a Committee to undertake a verification exercise on the suit property to ascertain ownership and prepare a report thereof. He went on to state that in its report, the verification committee established that squatters, amongst them the Petitioners were in occupation of the suit property while the title deeds for the same had been issued to other people by the 2nd, 3rd and 4th Respondents.
8. He contended that the local verification committee was improperly constituted. He further contended that the verification committee conducted an incomplete, irregular and unprofessional adjudication process which created an aftermath of confusion and chaos within Nguu Adjudication Section. That



thereafter, the agents of the 1st, 2nd, 3rd and 5th Respondents conducted a balloting process for the suit property that was riddled with double allocations, allotment of land reserved for public utility and riparian land within the suit property.

9. He explained that in the course of the infamous verification exercise, affluent persons who were not part of the original landless squatters colluded with the 1st, 2nd, 3rd and 5th Respondents agents and acquired allotment letters and were subsequently issued with title documents for land already allocated and occupied by squatters .He went on to state that between the year 2007 and 2015, the illegal allottees attempted to forcefully take possession of their illegally acquired portions but were repulsed by squatters. He explained that the illegal squatters have enlisted the 6th - 16th Respondents to harass, intimidate and coerce the squatters amongst them the Petitioners so as to evict them from their portions.
10. He contended that despite the existence of an order of status quo issued in June 2015 by the 4th Respondent prohibiting any further dealings with land, the 2nd 3rd and 5th Respondents have continued to issue summons, process titles and effecting transfers rendering obsolete the order of status quo. He claimed that the 1st, 2nd and 3rd Respondents are planning to issue title documents to persons who are not squatters to the detriment of the squatters among them the Petitioners herein. In light of the foregoing, the Applicants urged the court to allow the application as prayed.

The 1st, 2nd, 3rd 5th -16th Respondents Case

11. The 1st, 2nd, 3rd, 5th -16th Respondents opposed the application through the grounds of opposition dated 26th April 2024 raising the following grounds: -
 - a. The application is fatally defective, incompetent, malapropism and untenable both in substance and form and contrary to the provisions under which it is brought thus proper for dismissal.
 - b. The Notice of Motion application is hopeless, misleading and devoid of any merit as the Applicants have failed to demonstrate reasons to compel the court to invoke its discretionary powers in granting the orders as prayed.
 - c. That no evidence was laid to demonstrate that the Respondents violated the rules of natural justice or that the Petitioners alleged proprietary rights over the suit land have been infringed by the alleged acts of the Respondents and this court must reject such allegations without evidence.
 - d. That the application is an abuse of the court process as from a reading of the supporting affidavit and annexures availed the Petitioners/Applicants are clearly attempting to curtail the statutory and constitutional mandate of the Respondents.
 - e. That the Applicants have not demonstrated any reasons as to why the Respondents have to be estopped from issuing of titles to successful third parties as they are merely conducting their mandated statutory and constitutional duties.
 - f. That the Notice of Motion and Petition is premised on the misconstrued notion that the suit land was subject to allocation under the adjudication process which is further from the fact as the allocation were to be done under the settlement scheme regime under the mandate of the Agriculture Act.
 - g. That the Applicants have not demonstrated any reason why the 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th and 16th Respondents have been enjoined as parties to this suit as they have



no proprietary interest over the suit land and are merely statutory bodies with the duty to investigate, detain and arrest persons upon a complaint received.

- h. That the court lacks jurisdiction to grant the orders sought as it cannot direct the Respondents from effecting their executive discretion with regard to allocation of land to prospective individuals.
 - i. That the Notice of Motion application dated 26-2-2024 is devoid of any merit and hopeless as the Applicant is seeking substantive orders without giving third parties not part of this proceedings an opportunity to ventilate their case.
 - j. The Petitioners/Applicants have miserably failed to demonstrate by evidence or at all which of their fundamental rights and freedoms were violated or threatened to be violated hence the Notice of Motion and Petition remains unproven, hearsay and devoid of substance and specificity.
 - k. The Notice of Motion application is an afterthought, non-starter, without basis and premised on mistaken position that the perceived allotments and title issues are irregular and thus a nullity as they have failed to demonstrate the manner they acquired interest over the suit land.
 - l. The Notice of Motion application is bad in law and orders sought are untenable as the Applicants have failed to demonstrate any threat whatsoever to their purported rights over the suit parcels of land.
 - m. That the Notice of Motion lacks any merit as it falls short of meeting the threshold of granting conservatory orders as enumerated in the case of *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others*.
 - n. That the Notice of Motion application dated 26-2-2024 is thus misconceived, without merit and an abuse of the court process and the same should be dismissed with costs.
12. From the foregoing, the Respondents urged the court to dismiss the application with costs.

The Response

- 13. The Applicants filed a supplementary affidavit in response to the Respondents grounds of opposition. In summary, the supplementary affidavit reiterated the contents of the affidavit in support of the application.
- 14. The 4th Respondent did not file any response despite being duly served.
- 15. The parties were directed to canvass the application by way of written submission.

The Applicants Submissions

- 16. The Applicants filed their submissions dated 15th October 2024.
- 17. On their behalf, Counsel identified the following issues for the court's determination: -
 - a. Whether the Petition meets the threshold for the grant of conservatory orders.
 - b. Whether the Honourable Court has jurisdiction to grant the reliefs sought in the Notice of Motion.
 - c. Whether the Petitioners stand to suffer loss or injury if the reliefs sought are not granted.
 - d. Who ought to bear the costs of the application.



18. On the first issue, Counsel submitted that the Petition herein is premised on Article 40, 47, 50(1) 259 of *the Constitution*. Counsel further submitted that the Petitioners have attached material evidence in support of the specific constitutional provisions. It was submitted that the Petition has met the threshold for the grant of conservatory set out in the case of *Anarita Karimi Njeru vs Republic (1979)eKLR*.
19. With regards to the second issue, Counsel submitted that the court’s jurisdiction is anchored on Article 162(2)(b) of *the Constitution*, Section 13 of the *Environment and Land Court Act* and Sections 13(7) and 150 of the *Land Act*. Counsel further submitted that the reliefs sought in the Petition fall under the jurisdiction of this court. Counsel contended that this court has jurisdiction to issue conservatory orders stemming from the constitutional violations touching on rights accruing from ownership and possession of land.
20. On the third issue, Counsel submitted that the Petitioners have outlined the specific violation of their fundamental rights ranging from arbitrary arrests, detentions, trespass, forcible detainer suits and outright evictions arising from possession and ownership of land. Counsel invited the court to exercise its inherent jurisdiction to prevent further abuse of powers by the Respondents. Counsel further urged the court to be sensitive to the plight of the Petitioners whose constitutional rights have been violated during the pendency of this Petition.
21. On costs, Counsel submitted that the Applicants have established a prima facie case and urged the court to allow the application with costs.
22. As at the time of writing this ruling, the 1st, 2nd, 3rd, 5th – 16th Respondents had not filed their submissions as directed.

Analysis and Determination

23. Having considered the application, the respective affidavits and the rival submissions the only issue that arises for determination is whether the Applicants have met the threshold for the grant of conservatory orders. Article 23(3) of *the Constitution* empowers a court to grant appropriate reliefs in any proceedings brought under Article 22 where there has been violation or threat of a violation of a fundamental right or freedom. The relief may include a conservatory order.
24. The law on issuance of conservatory orders is well settled. Conservatory orders were defined in the case of *Judicial Service Commission vs Speaker of the National Assembly & Another (2013) eKLR* as follows;

“Conservatory orders in my view are not ordinary civil remedies but are remedies provided for under *the Constitution*, the supreme law of the land. They are not remedies between one individuals 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.”
25. The principles in regard to granting of interim conservatory orders were outlined by the Supreme court in the case of *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others (2014) EKR* 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 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”,

26. In the case of *Wilson Kaberia Nkunja vs The Magistrates and Judges Vetting Board and Others Nairobi High Court Constitutional Petition NO 154 of 2016*, the court summarized the principles in granting conservatory orders as follows: -
- a. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of *the constitution*.
 - b. Whether if a conservatory order is not granted, the petition alleging violation of or threat of violation of rights will be rendered nugatory.
 - c. The public interest must be considered before grant of a conservatory order.
27. The first issue for determination is whether the Petitioners have established a prima facie case that warrants the grant of conservatory orders. It has been held in various decisions that a prima facie case is not a case which must succeed at the hearing of the main case but which discloses arguable issues in a case alleging violation of rights.
28. A prima facie case was defined in the case of Kevin K Mwititi & Others vs Kenya School of Law & Others (2015) eKLR where the court stated:-
- “.....A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, the Petitioner has to show that he or she has a case that discloses arguable constitutional issues.”
29. The Petitioners are claiming ownership over the suit property in their capacity as squatters. The Petitioners gave a historical background of the suit property. They contended that they are in occupation of the suit property where they have put up permanent and semi-permanent structures.
30. The Petitioners alleged that the Permanent Secretary Ministry of Lands appointed and gazetted a verification committee to undertake a local verification exercise on the suit property to ascertain ownership thereof. The Petitioners claim that the local verification committee was improperly constituted and conducted an incomplete, irregular and unprofessional adjudication process.
31. The Petitioners contended that affluent persons who were not part of the original landless squatters colluded with the 1st, 2nd, 3rd and 5th Respondents and acquired allotment letters and were subsequently issued with title documents for land already allocated and occupied by squatters including the Petitioners.
32. The Respondents opposed the grant of conservatory orders on the grounds that the Applicants have not demonstrated the manner in which they acquired rights or interest in the suit property. The Respondents contended that the allocation was done through the settlement scheme and not under the adjudication process.
33. They further contended that the Applicants have not met the threshold for the grant of conservatory order. In addition, the Respondents contended that the court lacks jurisdiction to direct the



Respondents from effecting their executive discretion with regard to allocation of land to prospective individuals.

34. The Petitioners are challenging the validity of the adjudication and verification process that led to the issuance of letters of allotment and title documents.
35. In an application seeking for a conservatory order, it is imperative that the court warns itself that it is required not to make any definitive finding of fact or law. This position was enunciated in the case of Kenya Association of Manufacturers & 2 Others v Cabinet Secretary – Ministry of Environment and Natural Resources & 3 Others (2017) eKLR where the court stated as follows:-
- “In an application for a conservatory order, the court is not invited to make any definite or conclusive findings of fact or law on the dispute before it because that duty falls within the jurisdiction of the court which will ultimately hear the substantive dispute”.
36. A close perusal of the Petition reveals that the Petition raises the question of ownership and occupation of the suit property. The Petitioners averred that the titles for the portions that they occupy have been issued to affluent persons who are not squatters.
37. The issue of ownership and validity of the adjudication and verification process are issues which cannot be determined at the interlocutory stage. These are issues which should be canvassed at a full trial where parties will have an opportunity to call and cross examine witnesses. At this stage, the Applicants are required to establish a prima facie case with a likelihood of success.
38. If the court were to determine the issues raised, it would amount to determining the Petition at the interlocutory stage. From the foregoing, I find that the Petitioners have not established a prima facie case to warrant the grant of conservatory orders.
39. Before granting conservatory orders, the court is required to evaluate the pleadings and determine whether the denial of conservatory orders will prejudice the Applicants. In the case of Centre for Rights Education & Awareness(CREAW)& Another Vs Speaker of the National Assembly & 2 others (2017) eKLR the court held that;
- “A party who moves the court seeking conservatory orders must show to the satisfaction of the court that his or her rights are under threat of violation, are being violated or will be violated and that such violations, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent the violation of rights and fundamental freedoms and preserve the subject matter pending the hearing and determination of a pending cause or petition.”
40. The Petitioners contend that the Respondents are in the process of issuing titles to affluent persons in respect of the portions that they occupy. They urged the court to stop processing of the titles. The Petitioners’ claim is based on a flawed adjudication process which cannot be proved at this stage. Having evaluated the material placed before me, I find that the Applicants will not suffer any prejudice if the conservatory orders are not granted.
41. In the end, I find that the application dated 26th February, 2024 is devoid of merit and the same is hereby dismissed with no orders as to costs.

.....
HON. T. MURIGI

JUDGE



RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 29TH DAY OF JANUARY 2025.

In the Presence of: -

Ahmed – Court Assistant

Kuria for the 1st, 2nd, 3rd, 5th – 16th Respondents.

