



Kiptoo & 23 others v CECM for Lands, Physical Planning, Housing And Urban Development County Government of Baringo & another (Environment & Land Petition E003 of 2023) [2023] KEELC 22116 (KLR) (29 November 2023) (Ruling)

Neutral citation: [2023] KEELC 22116 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KABARNET
ENVIRONMENT & LAND PETITION E003 OF 2023
L WAITHAKA, J
NOVEMBER 29, 2023**

BETWEEN

MIRAJI KIPTOO & 23 OTHERS PETITIONER

AND

**CECM FOR LANDS, PHYSICAL PLANNING, HOUSING AND URBAN
DEVELOPMENT COUNTY GOVERNMENT OF BARINGO . 1ST RESPONDENT
COUNTY GOVERNMENT OF BARINGO 2ND RESPONDENT**

RULING

1. On or about November 29, 2022, the respondents issued an enforcement notice requiring the petitioners /applicants to demolish the buildings/structures they had erected on livestock sale/auction yard without approval of the 2nd respondent, (County Government of Baringo).
2. Aggrieved by the enforcement notice, the petitioners/applicants filed the suit/petition herein seeking, among other declaratory orders, an order of *certiorari* to remove to this court for purpose of being quashed the enforcement and order of prohibition to restrain the respondents from depriving them the enjoyment of their properties.
3. Simultaneously with the petition, the petitioners filed the notice of motion dated April 26, 2023 seeking among other orders, a conservatory order staying the execution of the impugned enforcement notice pending the hearing of the application and the petition.
4. When the application came up for hearing on May 22, 2023, the court issued an order restraining the respondents by themselves, their officers and/or agents from interfering with the structures erected by the petitioners. The court also restrained the petitioners from erecting new structures on the suit property pending the hearing and determination of the application.



5. When the application came up for hearing on June 27, 2023, counsel for the petitioners urged the court to treat the application as unopposed as the replying affidavit filed in respect thereof was not served on them. The court ruled that the replying affidavit would not be considered.
6. Arising from the foregoing, the court will proceed and determine whether the petitioners/applicants have made up a case for stay of execution of the impugned enforcement notice pending the hearing and determination of the petition.
7. With regard to that issue, I note that both the petition and the application are hinged on alleged violation of the petitioners' rights in issuance of the impugned enforcement notice. For instance, the petitioners /applicants contend that the portion they have erected the structures forming the subject matter of the enforcement notice belongs to them; that it is different from the public utility reserved as livestock sale/auction yard and that in issuing the impugned enforcement notice, the respondents acted without legal justification and in excess of their constitutional and legal mandate.
8. Terming the issuance of the impugned enforcement notice arbitrary and prejudicial to them, the petitioners/applicants accuse the respondents of having neglected, refused and or failed to constitute the County Physical and Land Use Planning Committee thereby hindering their right to lodge an appeal against the notice to the Committee as by law required.
9. The petitioners/applicants further contend that ordering stoppage and construction and demolition of structures on their private land, amounts to arbitrary search, seizure and deprivation of property.
10. It is the petitioners/applicants' case that under section 72 of the [Physical And Land Use Planning Act No.13 of 2019](#), the 1st respondent can only issue an enforcement notice on them if they have breached a condition in the development permit.
11. Terming stoppage of the construction and ordering demolition of the developments they had effected on their parcels of land a violation of their fundamental rights and freedoms and a violation of Articles 10, 27, 28, 31, 35, 40(2), 47, 48 and 50 of the [Constitution of Kenya](#), the petitioners/applicants contend that the impugned enforcement notice is incorrect, illegal, irregular and improper. They urge the court to set it aside ex debito justiciac.
12. I have carefully considered the uncontroverted issues of fact arising from the application and the applicable law. I have also reminded myself that at this stage, this court should not venture into the merits of the petition which is the province of the trial court.
13. To be entitled to the conservatory reliefs sought, the petitioners/applicants must
 - (a) demonstrate that they have a *prima facie* case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that they will suffer prejudice as a result of the violation or threatened violation of the [Constitution](#); and that if the conservatory order sought is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory.

The public interest must also be considered before grant of a conservatory order. See the case of *Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board and others* Nairobi High Court Constitutional Petition No.154 of 2016 (2016) eKLR

Also see the case of In [Board of Management of Uhuru Secondary School vs. City County Director of Education & 2 others](#) [2015] eKLR, where the Court summarized the principles for grant of conservatory orders as: -



- i. The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.
- ii. The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
- iii. Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.

(i) Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.

14. In applying those principles to this case, I begin by pointing out that the petition is premised on impugned issuance of an enforcement notice. Under section 57 and 58 of the [*Physical and Land Use Planning Act*](#),

“57.

- (1) A person shall not carry out development within a county without a development permission granted by the respective county executive committee member.
- (2) A person who commences any development without obtaining development permission commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding two months or to both.
- (3) A county executive committee member shall require a person who has commenced a development without obtaining development permission to restore the land on which the development is taking place to its original condition or as near to its original condition as is possible and that such restoration shall take place within ninety days.
- (4) Where a person who is required to do so fails to comply with the provisions of sub-section (3), the relevant No.13 of 2011 No.17 of 2012 Development permission. 641 No. 13 2019 Physical and Land Use Planning county executive committee member may undertake to restore the land as required and shall recover the cost of the restoration from the person required to undertake the restoration.
- (5) A county executive committee member may revoke development permission if the applicant has contravened any provision of this Act or conditions imposed on the development permission for any justifiable cause.
- (6) A county executive committee member may modify the conditions imposed on development permission where circumstances require it or for any justifiable cause.



58.

- (1) A person shall obtain development permission from the respective county executive committee member by applying for development permission from that county executive committee member in the prescribed form and after paying the prescribed fees.
- (2) An applicant for development permission shall provide documents, plans and particulars as may be required by the respective county executive committee member to indicate the purposes of the proposed development.
- (3) An applicant for development permission shall indicate the proposed uses to which the land shall be put, the population density to which that land shall be subjected and the portion of the land the applicant shall provide for easements as a consequence of the applicant's proposed development.
- (4) Where an applicant is not the registered owner of the land for which development permission is being sought, that applicant shall obtain the written consent of the registered owner of that land and the applicant shall provide that written consent to the respective county executive committee member at the time of applying for development permission.
- (5) The development permission granted by a county executive committee member shall be subject to compliance with the provisions of any other written law.
- (6) Where an applicant does not receive written"

15. It is not in public interest to permit development being undertaken without proof of adherence/ compliance with applicable law and procedures.

16. The upshot of the foregoing is that the petitioners/applicants have not demonstrated a *prima facie* case with probability of success to warrant issuance of a conservatory order staying the enforcement of the impugned enforcement orders. Consequently, I dismiss the application with no orders as to costs as the same was deemed to be undefended.

DATED, SIGNED AND DELIVERED THIS 29TH DAY OF NOVEMBER, 2023

L. N. WAITHAKA

JUDGE

Ruling delivered virtually in the presence of:-

Mr. Boiwo for the petitioner

Ms. Kaimogut for the respondents

