



**Oyatsi v Peony Management Co. Ltd & 3 others (Environment & Land Petition E033 of 2023) [2023] KEELC 21776 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21776 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIRONMENT & LAND PETITION E033 OF 2023**  
**MD MWANGI, J**  
**NOVEMBER 23, 2023**  
**IN THE MATTER OF ARTICLE 22(1), ARTICLE 258 AND**  
**ARTICLE 23 OF THE CONSTITUTION**  
**AND**  
**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS**  
**OF FUNDAMENTAL FREEDOMS UNDER ARTICLE 60(1) (B),**  
**64, 66(1) (40) AND 27(1), (2) OF THE CONSTITUTION**  
**(IN RESPECT OF THE PETITIONER’S APPLICATION DATED 11<sup>TH</sup> OCTOBER, 2023)**

**BETWEEN**

**DESTERIO OYATSI ..... PETITIONER**

**AND**

**PEONY MANAGEMENT CO. LTD ..... 1<sup>ST</sup> RESPONDENT**

**GAO YU INTERNATIONAL LTD ..... 2<sup>ND</sup> RESPONDENT**

**STANLEY GIBSON KADIRI ..... 3<sup>RD</sup> RESPONDENT**

**FURAHA MARWA ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

**Background**

1. What is before me for determination is the Petitioner’s Notice of Motion application dated 11<sup>th</sup> October 2023. The Petitioner prays for various orders namely:
  - a) Spent



- b) Spent
  - c) Spent
  - d) Spent
  - e) A temporary injunction order be granted pending the hearing and determination of the case restraining the Respondent from disobeying or usurping the Constitutional mandate of the Court and deciding or prejudging the outcome of this case in their favour to confer land rights to themselves over the Petitioner's land LR No [particulars withheld] Nairobi being an issue that awaits determination by this Honourable Court in exercise of its jurisdiction.
  - f) A temporary injunction order be granted pending the hearing and determination of the case restraining the Respondents jointly and severally, their servants, agents or howsoever from invading the Petitioner's land LR No [particulars withheld] Nairobi, taking possession thereof and/or exercising or enjoying any land rights over the said parcel of land including occupying and/or using any portion thereof in any manner whatsoever without a valid instrument registered against the title as enacted in mandatory terms under S. 43(2) of the [Land Registration Act](#) effecting a disposition of any interest in the said land in their favour.
  - g) A mandatory injunction be granted pending the hearing of the case ordering the Respondents, their servants to obey the Petitioner's Constitutional land rights and the law as enacted or stated under S. 57 (3) of the [Physical Planning and Land Use Act](#) and demolish all illegal structures constructed on the Petitioner's land LR No [particulars withheld] Nairobi from 8th October 2023 without obtaining a development permission and to restore the Petitioner's land to its original position prior to the said illegal developments.
  - h) A mandatory injunction be granted pending the hearing and determination of this case compelling the Respondents, their servants or agents to respect the Petitioner's land rights and to use the official access granted to them by law in their land title to access public roads through the abuttal to the said public roads as demarcated on their land title.
  - i) The costs of this application be provided for.
2. The application is premised on the grounds on the face of it and on the supporting affidavit of Desterio Oyatsi sworn on the 11<sup>th</sup> October 2023.
  3. The application was opposed by the 1<sup>st</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondents through the replying affidavit of Mutua Patrick Nzioka. The gist of the Respondents' opposition as tacitly put in their submissions is that the alleged dispute was a matter directly and substantially in issue in a former suit between the same parties, litigating under the same title, in a court of competent jurisdiction which heard and finally determined the rights of parties, namely ELCC 79 of 2020. A decree was issued and as the Respondents state compelled the parties to do certain things.

### **Court's Directions**

4. The court directed parties to file written submissions. Both parties complied and had occasion to highlight them before the court on 1<sup>st</sup> November 2023. The submissions and the record of the highlights form part of the record of this court. I need not replicate them here.

### **Issues for determination**

5. The sole issue for determination in this matter is whether the Petitioner's application has merits.



## Analysis and Determination

6. I will be frugal with my words in this ruling bearing in mind that this is only and interlocutory application in order not to prejudice or embarrass the hearing and determination of the main case. The main petition is pending hearing.
7. As the Petitioner puts it in his submissions, he seeks protection of this Court from the violation of his Constitutional rights. The land the subject matter of the petition is private property. That is not in dispute. The Respondents however justify their actions on the basis of a decree in ELCC No. 79 of 2020. I have had occasion to carefully consider the said decree. Peony Management Company Limited was the Plaintiff, whereas, Desterio Oyatsi was the Defendant in the case. The terms of the Decree are:
  - a) That the Defendant's claim for mesne profits fails.
  - b) That the Plaintiff's claim to right of easement or adverse possession over the Defendant's land brought under the *Limitation of Actions Act* fails.
  - c) That in light of the nature of the Plaintiff's development on the land, and without any other access to Hatheru Road, it would not be fair to grant the reliefs the Defendant sought.
  - d) That the order that commends itself to the court is for the parties to have an easement created in favour of the Plaintiff for the portion of the Defendant's land which the Plaintiff has been using to access Hatheru Road in accordance with Section 98 of the *Land Registration Act*. The Plaintiff will pay consideration for the creation of the easement.
  - e) That for the portion of the Defendant's land that the Plaintiff's development has encroached on, parties are directed to undertake a valuation of the land affected within 60 days of the date of this judgment, with a view to determining its value for purposes of the Plaintiff compensating the Defendant. If parties do not agree on the value of the portion affected within this timeframe, they will file submissions for the Court to determine the reasonable compensation payable to the Defendant.
  - f) That the Defendant is awarded the costs of the suit.
  - g) That the Plaintiff will also meet the costs of the valuation and for the preparation and registration of the easement.
8. From my reading of the decree above, the claim by the Plaintiff against the Defendant failed. The creation of the easement over the Petitioner's parcel of Land, LR No 330/561 as subsequently ordered by the court was conditional to the payment of consideration. The Court was categorical that a valuation was to be undertaken of the affected Land within 60 days of the date of judgment to determine the value for purposes of compensation of the Defendant. In case the parties failed to agree, they were to file submissions in Court for the Court to determine the reasonable compensation payable.
9. Article 40 of the *Constitution* protects the right to property. The wording is clear and there is no doubt in mind that arbitrary deprivation of property of any description, or any interest in, or right over, any property of any description, without prompt payment in full of just compensation is prohibited.
10. Secondly, the article together with article 22 allows a person whose property right has been violated unconditional access to the Court.
11. The Supreme Court of Kenya in *Communications Commission of Kenya (CCK) & 5 others v Royal Media services Ltd and 3 others* pronounced itself on the issues. It stated that:



- (i) The Petitioner is entitled to approach this Court and to have his Constitutional grievance resolved on the basis of Article 22 and 23 of the Constitution.
  - (ii) The grievance is that the Plaintiff's rights under S. 36 of the Land Registration Act which provides and states in mandatory terms that an interest in land shall not be disposed of or dealt with except in accordance with the Land Registration Act, and any attempt to dispose of any interest in his land otherwise than in accordance with the Land Registration Act or any other law shall not extinguish, transfer, vary or affect his land rights.
  - (iii) The security of the Plaintiff's said statutory land rights is guaranteed under Article 60(1)(b) of the Constitution.
  - (iv) The above Constitutional of guarantee to the security of his land rights is sacrosanct and cannot be taken away from the Petitioner and/or the Petitioner cannot be deprived of the said security of his land rights by any person of state organ including the Court.
12. My finding is that the Respondent's access right over the Petitioner's parcel of land has not crystalized until and unless just compensation is paid to the Petitioner. The Respondent's action therefore is unconstitutional. The Petitioner had a constitutional right to approach the court as he did. This Court however, allows the Petitioner's application as in terms of prayer number 5 and 6 only, pending the hearing and determination of the Petition. The costs of the application shall be in the cause. Accordingly, the court hereby orders that:
- a. A temporary injunction order be and is hereby granted pending the hearing and determination of the case restraining the Respondent from disobeying or usurping the Constitutional mandate of the Court and deciding or prejudging the outcome of this case in their favour to confer land rights to themselves over the Petitioner's land LR No [particulars withheld] Nairobi being an issue that awaits determination by this Honourable Court in exercise of its jurisdiction.
  - b. A temporary injunction order be and is hereby granted pending the hearing and determination of the case restraining the Respondents jointly and severally, their servants, agents or howsoever from invading the Petitioner's land LR No [particulars withheld] Nairobi, taking possession thereof and/or exercising or enjoying any land rights over the said parcel of land including occupying and/or using any portion thereof in any manner whatsoever without a valid instrument registered against the title as enacted in mandatory terms under S. 43(2) of the Land Registration Act effecting a disposition of any interest in the said land in their favour.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2023.**

**M. D. MWANGI**

**JUDGE**

In the virtual presence of:

Mr. Otieno holding brief for Oyatsi & Okello for the Petitioner/Applicant

No appearance for the Respondent

