



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC PETITION NO. E9 OF 2020

IN THE MATTER OF

ARTICLES 22, 23(3) & 258 OF

THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF

THE ALLEGED CONTRAVENTION OF ARTICLES 2 (5) & (6),

10, 11, 20 (5), 22, 40 (3), 42, 47, 62, 69 & 70 OF

THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF

THE IMPLEMENTATION OF THE AFRICAN (BANJUL)

CHARTER ON HUMAN AND PEOPLE'S RIGHTS

ARTICLES 2, 3, 7, 13, 14 & 24;

AND

IN THE MATTER OF

THE FAIR ADMINISTRATIVE ACTION ACT (NO. 4 OF 2015),

SECTIONS 4, 5, 6 & PART III THEREOF;

AND

IN THE MATTER OF

THE CIVIL PROCEDURE RULES (2010), ORDER 53

AND

IN THE MATTER OF

THE NATIONAL LAND COMMISSION ACT,

NO. 5 OF 2012

BETWEEN

NYASAIKI FAMAU ATHMAN.....PETITIONER

AND

KILIFI PLANTATIONS COASTAL LIMITED..... 1ST RESPONDENT

KIRIKIRI LIMITED.....2ND RESPONDENT

REGISTRAR OF TITLES, MOMBASA..... 3RD RESPONDENT

THE NATIONAL LAND COMMISSION.....4TH RESPONDENT

COUNTY GOVERNMENT OF KILIFI.....5TH RESPONDENT

DIRECTOR OF SURVEYS.....6TH RESPONDENT

RULING

1. By the Notice of Motion dated 28th September, 2020 as filed herein on 1st October, 2020, Nyasaidi Famau Athman (*the Petitioner*) prays for orders:

3. *That the Honourable Court be pleased (to) issue a conservatory order barring the 1st and 2nd Respondents herein from whether by themselves or their agents, servants, employees or any other person acting at their behest or to their benefit from construc(ing), developing, fencing, entering into occupation or in any other manner howsoever dealing with the suit property herein being LR V/278, currently LR V/1625 and LR V/279, currently LR V/1626 as private property or in any manner to the adverse interest of the Petitioner herein and the residents of Kilifi County, pending the hearing and determination of this Petition;*

4. *Spent.*

5. *That the Honourable court do issue conservatory orders barring the 3rd Respondent from making any entries in the Register in respect of the suit property herein*

6. *That the Honourable Court do issue any other conservatory order, writ or directions as may be necessary to safeguard and protect the rights and interests of the petitioner and the residents of Kilifi County under the Constitution as regards use and enjoyment of the public utility being LR V/278 currently LR V/1625 and LR V/279 currently LR V/1626 situate in Kilifi County.*

7. *That the Honourable Court be pleased to issue any other order as may be necessary, fair and just in the circumstances.*

8. *That (the) costs of this application be provided for.*

2. The application which is supported by an affidavit sworn by the Petitioner is premised on the grounds inter alia:-

(i) *That the Petitioner is a resident of Kilifi County and has filed the Petition on her own behalf and on behalf of other residents of the County who benefit from the usage and enjoyment of the suit properties;*

(ii) *That the said properties were designated as a beach access road with sea frontage thereto and was set apart for use by members of the public to access the Kilifi Creek vide the Survey Plan FR 111/37, which designation created a legitimate expectation upon the residents of Kilifi that their enjoyment of the said property as a public utility would remain unimpeded and uninterfered with;*

(iii) *That however, on or about 13th February, 1993, an irregular, unlawful and illegal survey was carried out and an unlawful allocation done, without public participation and in total disregard of the public interest, which hived off the access to sea from the road and introduced a 6 metre wide road as beach access road while converting the 150 metre wide sea frontage into Plots LR V/278 and LR V/279;*

(iv) *That after the allocation, the new owners applied for change of user causing a re-survey to be done on or about 10th May, 2012 and the two parcels of land were thereafter issued with new numbers with LR V/278 being re-numbered as LR V/1625 and LR V/274 being re-numbered as LR V/1626;*

(v) *That on or about 3rd August, 2020, the petitioner discovered that the 1st and 2nd Respondent were now placing beacons and treating the beach access as private property and there is now*

a real danger that the 1st and 2nd Respondents shall proceed to develop the property and prevent members of the public from accessing the same; and

(vi) That there is also a likelihood that the said Respondents may transfer the properties to third parties thus complicating any prospects of recovery of the same.

3. Kilifi Plantations Coastal Limited – the 1st Respondent herein is opposed to the Petitioner’s application. In a Replying Affidavit sworn on its behalf by its Director Christopher Denis Wilson and filed herein on 18th January, 2021, the 1st Respondent avers that it is the bona fide owner of the suit property Group V/278 that was subsequently registered as Group V/1625 following change of user.

4. The 1st Respondent avers that it complied with and fulfilled all legal requirements in acquiring the said property. It asserts that the said property was initially on 9th March, 1994 registered in the name of Kilifi Plantations Limited before being transferred to the 1st Respondent in the year 2010. The 1st Respondent thereafter applied for change of user from residential to commercial use and duly obtained all approvals from the Kilifi County Government.

5. The 1st Respondent asserts that it holds a valid title for the land now known as Group V/1625 after the change of user and that the land originally known as Group V/89 R from which the suit property emanated has never been public land as purported or at all.

6. The 2nd Respondent – Kirikiri Limited is equally opposed to the application. In a Replying Affidavit sworn by its Director Peter Bateman and filed herein on 18th November, 2020, the 2nd Respondent avers that it was incorporated on 5th January, 2016 and that prior to purchasing the property, all necessary steps were undertaken to ensure due diligence by its Advocates.

7. The 2nd Respondent avers that having been satisfied that the 1st Respondent was in possession and was using the suit property, it proceeded to purchase the land and to have the same transferred to itself on 5th April, 2016. Accordingly the 2nd Respondent avers that the placing of beacons as stated in the Petition is clearly within its rights as a legitimate land owner.

8. I have carefully perused and considered the Petitioner’s application and the response thereto by the 1st and 2nd Respondents. I have similarly looked at the written submissions and authorities placed before me by the Learned Advocates for the parties. The Registrar of Titles Mombasa (*the 3rd Respondent*), the National Land Commission (*the 4th Respondent*), the County Government of Kilifi (*the 5th Respondent*) as well as the Director of Surveys (*the 6th Respondent*) have neither entered appearance nor responded to the Petitioner’s application.

9. The Petitioner herein Nyasaidi Famau Athman has asked the Court to grant a number of conservatory orders against the Respondents, in particular the 1st, 2nd and 3rd Respondents pending the hearing and determination of her Petition.

10. The law on granting of conservatory orders is now fairly settled. As was stated by the Supreme Court in **Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & 2 Others (2014) eKLR**:

“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.”

11. In **Centre of Rights Education and Awareness (CREAW) and Another -vs- The Speaker of the National Assembly & 2 Others (2017) eKLR**, the Court was emphatic that:-

“A party who moves the court seeking conservatory orders must show to the satisfaction of the court that his/her rights are under threat of violation; are being violated or will be violated and that such violation, 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 violation of rights and fundamental freedoms and preserve the subject matter pending the hearing and determination of the pending case or Petition.”

12. Similarly in **Kenya Association of Manufacturers & 2 Others -vs- Cabinet Secretary – Ministry of Environment and Natural Resources & 3 Others (2017) eKLR**, the Court observed thus:-

“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. The jurisdiction of the Court at this point is limited to examining and evaluating the material placed before it, to determine whether the applicant has made out a

prima facie case to warrant the grant of a conservatory order. The court is also required to evaluate the materials and determine whether; if the conservatory order is not granted, the applicant will suffer prejudice. Thirdly, it is to be borne in

mind that conservatory orders in public law litigation are meant to facilitate ordered functioning within the public sector and to uphold adjudicatory authority of the Court in the public interest.”

13. In the matter before me, the Petitioner avers that she is a resident of Kilifi County and that she brings this Petition on her own behalf and on behalf of other residents of the County who are entitled to benefits from the usage and enjoyment of the suit properties. The Petitioner avers that the said properties were initially designated as a beach access road with sea frontage thereto and that the same were set apart for use by members of the public to access the Kilifi Creek.

14. It is the Petitioner’s case that all those plans changed on 13th February, 1993 when an irregular and unlawful survey was carried out which hived off the access to sea from the road and introduced a 6 metre-wide road as beach access road while converting the 150 metre wide sea frontage into the suit properties before they were allocated to the 1st and 2nd Respondents herein.

15. The Petitioner further asserts that the 1st and 2nd Respondents have since 3rd August, 2020 placed beacons on the properties and are now treating the same as private property with the real danger that the Petitioner and other members of the public are now prohibited from accessing the beach using the access that had been created earlier on.

16. While the Respondents deny any wrong doing and assert that the suit properties have never been public land and that the same were duly allocated to and/or acquired by themselves, the Petitioner has annexed to her Supporting Affidavit a Survey Plan No. FR/1/1/37 (Annexure “NFA – 1”) which appears to suggest on the face of it that there was a public access road on the parcels now designated as Group V/1625 and Group V/1626.

17. The Petitioner has also annexed two other Survey Plans No. FR/237/6 and FR 237/7 created on 13th February, 1993 through which she claims the two properties were irregularly created.

18. In view of the circumstances herein, I think the Petitioner has raised a legitimate concern and that there is need for the Court to interrogate the circumstances under which the two suit properties were created from what was possibly public land hitherto. As it were, I did not think that a *prima facie* case is one that must succeed at the hearing of the main case. The Petitioner’s case herein discloses arguable constitutional issues as the creation of the suit properties may have been done against the public interest and the right to equal access to public property.

19. In its response to the application, the 2nd Respondent has infact stated at Paragraph 14 of the Replying Affidavit that it intends to develop the portion of the land. From the Petitioner’s own Further Affidavit sworn on 10th December, 2020, it would appear that the 1st and 2nd Respondent have since embarked on some sort of developments on the suit properties and I am persuaded that there is an urgent need to preserve the same pending an inquiry into how the same came to be created.

20. In the premises, I am persuaded that there is merit in the Petitioner’s application dated 28th September, 2020. I allow the same in terms of prayers 3 and 5 thereof with costs in the cause.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI THIS 27TH DAY OF JANUARY, 2022 VIA MICROSOFT TEAMS.

In the presence of:

No appearance for the Petitioner

No appearance for the Respondents

Court assistant - Mugambi

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J. O. OLOLA

JUDGE