



REPUBLIC OF KENYA

IN THE ENVIROMENT AND LAND COURT

AT MALINDI

ELC PETITION NO. 15 OF 2021

IN THE MATTER OF:

**ARTICLES 1,2,3,6,10,19,20,21,22,23,25,27,28,29,40,43,47,52,56,60,61,
62,63,64,67,68,69 AND 258 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF:

**THE TRUST LAND ACT, LAND ADJUDICATION ACT, COMMUNITY LAND
ACT NO. 27 OF 2016, LAND REGISTRATION ACT OF 2012 AND
THE NATIONAL LAND COMMISSION ACT**

AND

IN THE MATTER OF: CHAKAMA, PLOT NO. 13472/1 AND 13472/3.

AND

IN THE MATTER OF: CHAKAMA, PLOT NO. 13472/2

AND

BETWEEN

TAIREN ASSOCIATION OF MIJIKENDA.....PETITIONER

-VS-

CHAKAMA RANCHING COMPANY LIMITED.....1ST RESPONDENT

NEW AGRICULTURAL LIMITED.....2ND RESPONDENT

CABINET SECRETARY, MINISTRY OF LAND AND

PHYSICAL PLANNING.....3RD RESPONDENT

DIRECTOR OF LAND ADJUDICATION

AND SETTLEMENT.....4TH RESPONDENT

CABINET SECRETARY, MINISTRY OF INTERIOR AND

COORDINATION OF NATIONAL GOVERNMENT.....5TH RESPONDENT
COUNTY GOVERNMENT OF KILIFI.....6TH RESPONDENT
THE CHIEF LAND REGISTRAR OF TITLES.....7TH RESPONDENT
ATTORNEY GENERAL8TH RESPONDENT

AND

NATIONAL LAND COMMISSION.....1ST INTERESTED PARTY
CONTINENTAL CREDIT FINANCE LIMITED.....2ND INTERESTED PARTY
CHAKAMA LANDS ACQUISITION PROJECT..... 3RD INTERESTED PARTY

RULING

This ruling is in respect of a Notice of Motion by the Petitioners dated 13th August 2021 seeking for the following orders:

a) *Spent*

a) *That pending the hearing and determination of this application or further orders, a conservatory order does issue against the 7th Respondent prohibiting or stopping and or restraining it and its agents, servants or any other person acting on its statutory powers from further registering and issuing title deeds to any or all persons who became beneficiary of the adjudication carried on the suit land by the 4th Respondent.*

b) *That pending the hearing and determination of this application or further orders, a conservatory order of stay does issue against any and all person (s) who are made proprietors of any part of the suit land from occupation, mortgaging, selling, leasing, renting, sub dividing and transferring any part and or portion of such parcel to anybody and or doing anything on the said parcel(s), which would be prejudicial to the preservation of the suit land.*

c) *That this Honourable Court do certify that the subject matter in the Petition raises substantial question of law and this Honourable Court be pleased to transmit it to the Chief Justice for the empanelment of uneven bench of Judges for the final disposal.*

d) *That the cost of this application be borne by the Respondents.*

Counsel agreed to canvas the application vide written submissions whereby only the petitioner filed the submissions. The 1st respondent filed a replying affidavit to the application and the 3rd, 4th, 5th, 7th and 8th Respondents filed grounds of opposition to the application.

PETITIONERS' SUBMISSIONS

Counsel submitted on the jurisdiction of the court to hear and determine this petition and cited Articles 60, 162 and 165 of the Constitution of Kenya 2010. Counsel further submitted that titles had already been issued therefore Section 30 of the Land Adjudication Act does not apply.

Mr. Oduor submitted that the petitioners have locus standi to bring this petition and relied Articles 22(1) (2), 40, 258, 260 of the Constitution and the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.

It was counsel's submission that the Land Adjudication Act and Section 8 of the Community Land Act, provides for public participation and that whenever the County Government or National Government has declared any section for adjudication as a principle under Articles 1(2) and 10(1) (c) and (2)(a) of the Constitution, 2010.

Counsel submitted that communities whose land had been declared as adjudication section, were bulldozed, boxed and intimidated by a large contingents of the police force. The community in occupation of the suit land were not allowed to exercise their sovereign power to make direct decision on the subject matter.

Mr. Oduor submitted that the action contravened the provisions of the constitution and infringed on the rights of the people/communities as the County Assembly of Kilifi and the County Government of Kilifi did not give an endorsement or approval for the portion of the suit land registered in the name of the 1st Respondent to be declared as an adjudication section. Counsel relied on the case of *Hon. Fatuma Adan Dulo & 5 others versus Cabinet Secretary Ministry of Lands & Physical Planning & 2 others* and urged the court to allow the application with costs to the Petitioners.

1ST RESPONDENT'S CASE

The 1st respondent filed replying affidavit to the Petition which gave the background to the allocation of the suit parcels. The 1st respondent deponed through Alfred Mukare Mwachethe that the ranching blocks were mainly used for livestock rearing, by the Giriama community who requested the government of Kenya to grant them the ranch for livestock rearing.

The 1st respondent further deponed that the Government through the Ministry of Agriculture, sent a team of experts to conduct research within the subject locality and found out that the area was good for livestock keeping. That this led to the community organizing themselves into a group which was registered in 1976 and a lease granted in 1985.

The 1st respondent also stated that the parcel was never occupied until 1990 when some people moved on the partial suit land which turned violent necessitating the government to buy a portion to settle them and the suit was registered as L. R. No.13472/1 and L. R. No. 13472/2

The 1st respondent further deponed that squatters sold off their portions allocated to them in the land registered as 13472/2 and moved to the portion registered in the name of the 1st respondent hence the instant petition is a preemptive suit. Further that the petitioner is not an association envisaged or contemplated under Article 22(2) (d) of the Constitution of Kenya, 2010 and it is a stranger to the said association and urged the court to dismiss the application with costs to the respondents.

3RD, 4TH 5TH 7TH AND 8TH RESPONDENTS' GROUNDS OF OPPOSITION

Counsel for the 3rd 4th 5th 7th and 8th respondents filed grounds of opposition to the application and submitted that the Petitioner does not have any demonstratable legal or beneficial title to the said suit lands known as LR No. 13472/1 and LR No.3472/2 and accordingly the Petitioner has no locus standi to institute any suit seeking any relief in connection with them.

It was counsel's submission that the applicants have not met the threshold for grant of conservatory orders and/or the prayers sought against the Respondents as the constitutional rights alleged to have been breached are not absolute but limited and that the Petitioners have not demonstrated that they are deserving of the remedies they are seeking.

Further that the lawful adjudication exercise done pursuant to the statutory provisions under the Land Adjudication Act cannot amount to a violation of the rights of an individual or entity and that proof of ownership is cardinal when determining violation of the right of property.

Counsel submitted that the petition is imprecise regarding the rights violated as it makes general references to omnibus provisions of the law thus violating the criteria set out in **Anarita Karimi Njeru V R (1979)**.

It was counsel's submission that the petition is not ripe for hearing as the petitioner has not demonstrated that it has exhausted all known and available remedies under the Adjudication Act and further that the petition does not have merit as claims of historical injustice do not satisfy the criteria provided under **Section 15 of the National Land Commission Act, 2015**. That the 1st Respondent admits that communities have been in occupation of the suit land and was used for livestock rearing but has not discredited the affidavit of Mzee Kenga Kembi Guyo and the persons who have identified with the suit land whose identity cards have been annexed.

Counsel urged the court to dismiss the application with costs to the respondents.

ANALYSIS AND DETERMINATION

It should be noted from the onset that the petitioner has argued the application as if it is dealing with the final orders in the petition. The issues for determination in this application are as to whether the petitioners have made a case for grant of conservatory orders and whether this petition raises substantial questions of law that should be transmitted to the Chief Justice to empanel an uneven bench of Judges for hearing and determination.

The court will only deal with the two issues.

In an application for conservatory orders an applicant must demonstrate that unless the conservatory order is granted there is real danger which may be prejudicial to him or her. In the case of ***Centre for Rights Education and Awareness (CREAW) & another v Speaker of the National Assembly & 2 others (2017) eKLR*** the Court held as follows: -

“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 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 freedom and preserve the subject matter pending the hearing and determination of a pending case or Petition.”

Further in the case of ***Muslims For Human Rights (MUHURI) & 2 Others -vs- Attorney General & 2 Others High Court Petition No. 7 of 2011***, Ibrahim, J (as he then was), in considering the circumstances under which a Court should grant conservatory orders, observed as follows

“What is clear to me from the authorities is that strictly a “Conservatory Order is not an injunction as known in Civil matters or

generally in other legal proceedings but is an order that tends to and is intended to preserve the subject-matter or set of circumstance that exist on the ground in such a way that the constitutional proceedings and cause of action is not rendered nugatory. Through a Conservatory Order the court is able to “give such directions as it may consider appropriate for the purpose of securing of ... the provisions of the Constitution (see – BANSRAJ above)”. A Conservatory Order would enable the court to maintain the status quo or existing situation or set of facts and circumstances so that it would be still possible that the rights and freedoms of the claimant would still be capable of protection and enforcement upon determination of the Petition and the trial was not a futile academic discourse or exercise.”

From the pleadings it is evident that the communities have used the suit land for rearing livestock which is admitted by all the parties. Nothing has changed and that the same is still being used as such. The petitioner wants the court to change the status quo by raising the issue of historical injustice to determine ownership. This can only be determined at the hearing of the main petition. The issues raised in the application can only be granted upon hearing of the petition as earlier stated.

The petitioner has not demonstrated that they would suffer any prejudice or violation of their rights if the conservatory orders are not granted. This is a matter that can benefit from the case being fast tracked to have a final outcome. There is no evidence that the substratum of the case will be changed if conservatory orders are not granted.

I therefore find that the petitioners do not merit the grant of conservatory orders.

On the second issue as to whether the petition raises substantial questions of law to enable the Chief Justice empanel an uneven bench of Judges, what the petitioner is seeking for is determination that their rights have been violated due to not being consulted during the adjudication of the suit land and as such they have suffered historical injustice.

In the case of *Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone [2013] eKLR* the Supreme Court of Kenya established the principles for certification under Article 163(4)(b) of the Constitution where those principles were adopted, with modification by the Court of Appeal case in *Okiya Omtatah Okiiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR* where the court dealt with an appeal against a refusal by the High Court to certify a matter as raising substantial questions of law under Article 165(4) of the Constitution. The Supreme Court summed up the principles as follows: -

“In summary, we would state the governing principles as follows:

i. for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;

ii. where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;

iii. such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;

iv. where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;

v. mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163 (4)(b) of the Constitution;

vi. the intending applicant has an obligation to identify and concisely set out the specific elements of “general public importance” which he or she attributes to the matter for which certification is sought;

vii. determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.

As earlier alluded to, for a matter to be certified as one involving substantial questions of law an applicant must establish the it involves general public importance, that it transcends the circumstances of the particular case, and has a significant bearing on the public interest. This petition does not involve public interest but the petitioners’ interest in the suit land therefore it can be heard like any other petition involving violation of rights.

The petitioner has also not satisfied the court that the petition raises substantial point of law whose determination will have a significant bearing on the public interest and further that the petitioner has not precisely enumerated the specific elements of general importance for which it attributes to the matter for which certification is required.

Further in the case of *Vadag Establishment vs. Y A Shretta & Another Nairobi High Court (Commercial & Admiralty Division) Misc. High Court Civil Suit No. 559 of 2011* where the Court held:

“It is also my considered view that a High Court whether constituted by one judge or more than one judge exercise the same

jurisdiction and neither decision can be said to be superior to the other. True, two heads are better than one, but in terms of the doctrine of stare decisis whether a decision is delivered by one High Court Judge or handed down by a Court comprised of more judges, their precedential value is the same.”

I have considered the petition, the submissions by counsel and the relevant authorities and find that the petitioner’s application lacks merit and is therefore dismissed with each party bearing their own costs.

In the interest on justice this matter should be fast tracked and a date given on priority basis.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF JANUARY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.