



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

CONSTITUTION PETITION NO. 8 OF 2020

IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLES 22, 23 AND 258 OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLES 27, 40 AND 64 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF PROTECTION OF FUNDAMENTAL RIGHTS TO PROPERTY KNOWN AS TITLE NO. NTIMA/ITOKI/1149

BETWEEN

YASSIN ABDULRAHMAN (administrator to the Estate of ABDALAMIN ABDALA

Alias ANDALA AMIN ABDALA alias ABDULRAHMAN BIN ABDULLA alias

ABDAHMAN ABDARA (Deceased).....PETITIONER/APPLICANT

VERSUS

SUAN HOLDINGS LIMITED..... 1ST RESPONDENT

AUTOMATIC KENYA LIMITED.....2ND RESPONDENT

LAND REGISTRAR MERU COUNTY.....3RD RESPONDENT

CHIEF LAND REGISTRAR.....4TH RESPONDENT

THE DIRECTOR OF SURVEYS.....5TH RESPONDENT

HON. ATTORNEY GENERAL.....6TH RESPONDENT

RULING

1. Through a notice dated 11.6.2020, the petitioner seeks a conservatory order barring and restraining the respondents jointly and severally from charging, encroaching, trespassing, seeking transfer of or subdividing, developing, constructing or in any way whatsoever interfering with **L.R Ntíma/Igoki/1149 and Title No. Meru/Municipality/Block II/270** pending hearing and determination of the petition and secondly, a mandatory injunction directed at the 3rd, 4th and 5th respondents jointly and severally to conduct a survey in the presence of the parties and file a report relating to the location, placement of beacons and relationship between **L.R Ntíma/Igoki/1149 and Title No. Meru Municipality/Block II/270** and the OCS/OCPD Meru Central police station to provide security and ensure the maintenance of peace in compliance or enforcement of these court orders.

2. The application is supported by an affidavit of Yassin Abdulrahman sworn on the even date.

3. The grounds upon which the application is premised are that, the estate of the deceased holds title over **Ntíma/Igoki/1149** since 1970 but a

- new title has been created known as **Meru/Municipality Block 11/270** covering the petitioner's property through a parallel registration; it is contrary to law for a parcel of land to be covered by two different titles; the new title was irregularly, unprocedurally and through corrupt scheme hence inferring with the private property herein; there is likelihood of the petitioner's property exchanging hands and or being charged or permanently being developed to defeat the course of justice; the estate stands to suffer irreparably if the property is disposed and or interfered with.
4. In support of the application, the applicant has attached copies of grant of letters of administration (as **annexture YA "1"**, official search as **YA "2"**, copy of land register for the new parcel of land as **YA "5"**).
5. The 1st respondent opposed the application through a replying affidavit by the 1st respondent sworn on 9.3.2021.
6. It is averred that he became the registered owner of the said **Meru Municipality Block II/270** on 20.5.2013 following a sale and transfer from the estate of Cecilia Mwendwa Ntara; that he undertook due diligence as shown in the copy of a white card and marked as **SH1** and the official record marked **SH2**.
7. The 1st respondent avers the official records confirmed the suit parcel of land recorded size and location corresponded with the size and location on the ground; that the property was charged in favour of M/s Barclays Bank of Kenya Ltd and part of the purchase price went towards clearing the outstanding loan hence the petitioner's claim lacked merit and that if the petitioner had any legitimate claim, he would have raised it in 1991 when the leasehold was registered in favour of 2nd respondent and not 30 years down the line; the 1st respondent was not party to the survey and registration of **Meru/Municipality/Block II/270** which had taken place in 1991 long before it purchased the property hence the particulars of illegality on it lacked any basis and lastly there could have been no violation of the alleged petitioner's rights as it was the legitimate and lawful owner of the property and the petitioner or his agents had no right of ingress or egress on that property.
8. With leave of court, parties filed written submissions dated 22.10.2021 and 23.11.2021 respectively.
9. The petitioner submitted that other than the 1st respondent, the rest of the respondents had not opposed the application even after they were served through substituted service.
10. It was submitted there was double allocation which was irregular, unprocedural and or procured through corrupt scheme hence infringing on the rights of the estate of the deceased.
11. The petitioner submitted he has raised a constitutional question under **Article 23 of the Consolidation Act** as read together with the **Mutunga Rules** and demonstrated his rights as to protection to property under **Article 40** which had been violated. Reliance was placed on *Evelyn College of Design Ltd –vs- Director of Children Department & Another [2013] eKLR, Serah Mweru Muhu –v-s Commissioner of Lands & 2 Others [2014] eKLR and Nation Media Group Ltd –vs- Attorney General [2007] EA 261* on the proposition that a constitutional court should be literal in dispensing justice by looking at the substantive justice rather than technicality; *Martin Lemaiyan Mokoosia & Another –vs- Reshma Praful Chandra Vadera & 3 Others [2012] eKLR* on the proposition that a mere fact that a matter ought to have been brought as an ordinary suit did not deprive the court jurisdiction to entertain a matter; *Habre International Co. Ltd –vs- Kassam and Others [1999] 1 EA 125* on the proposition that a consumer of justice should not be sent or turned away from the seat of justice unheard as long as questions of law are raised and in this case the court should interpret **Article 40** in accordance with **Article 259 of the Constitution** so as to promote its purposes, values and freedoms in the Bill of Rights.
12. As regards whether the petitioner deserved the prayers sought, the court was urged to find the applicant had made out a prima facie case to warrant the grant of conservatory orders. Reliance was placed on *Progress Welfare Association of Malindi & 3 Others –vs- County Government of Kilifi & 4 Others [2020] eKLR, (CREAW) & 7 Others –vs- Attorney General [2011] eKLR, Kelvin K. Mwiti & Others –vs- Kenya School of Law & Others.*
13. Further, the petitioner submitted it had established and demonstrated that there was parallel registration which violated his rights. Reliance was placed on *Wreak Motors Enterprises –vs- The Commissioner of Lands and Others [1997] eKLR* on the proposition that where there were two competing titles, the first in time took priority. This same position was reiterated in *Getwany Investment Ltd –vs- Tajmal Ltd & 3 Others [2006] eKLR.*
14. It was therefore submitted by the petitioner that he had a title deed to the property which under Section 26 of the Land Registration Act was first to be registered before the creation of **Meru Municipality Block II/270** hence the need for conservatory orders to safeguard the property.
15. As regards irreparable harm, if the orders are not granted, the petitioner relied on *Kevin K.Mwiti & Others –vs- Kenya School of Law (supra)* for there was likelihood of the suit property being altered in its quality if there were to be permanent development or transfer to third parties.
16. The petitioner urged the court to grant prayer 4 of the application as held in *Kenya Breweries Ltd & Another –vs- Washington Okeyo [2002] 1 E.A 109* since there existed special circumstances to wit two title deeds held by different parties hence the need for verification through statutory established institutions so that a comprehensive report availed to help the court identify the rights of all parties in order for the court to make an informed decision and if granted, there would be no prejudice to any party.
17. The 1st respondent submitted a prima facie case had not been established as held in *Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others [2002] eKLR* given that the 1st respondent had a title deed and it had taken the petitioner 30 years to challenge it.

18. Secondly, it was submitted the alleged damage by the petitioner was quantifiable and compensable by way of damages or mesne profits and that the balance of convenience tilted in not granting the orders sought since the 1st respondent's land was distinct and separate. Reliance was placed on Said Mwinyikai Thomas & 2 Others –vs- John Njoroge Mungai & Another [2019] eKLR and Ngoiri Ndari –vs- Teresia Wanjiku Wainaina [2017] eKLR on the proposition that the law and the principles for mandatory injunction were different from the criteria set in Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358 and that it could only be granted where there were special circumstances, in clear cases and that where a dispute could only be determined at the main trial, and there being no demonstration of irreparable injury, it would be unsafe to grant a mandatory injunction.

19. Based on the holding in Lucy Ngoiri –vs- Teresa Wanjiku Wainaina [2017] eKLR, the respondent submitted unlike in the instant case where there was a police investigative report over the genuineness of the documents and given there were two sets of competing title deeds, the court is unable at the interlocutory stage to hold and find that there exists a prima facie case since the petitioner lacks evidence on possession and utilization of the suit land.

20. Having gone through the pleadings and the written submissions, the issues for determination are:-

I. If the petitioner has established a right or interest in the suit parcel of land worthy protecting.

II. If the petitioner is entitled to conservatory and mandatory orders of injunction

21. The petitioner's basis his claim on the petition dated 11.6.2020 where he is seeking for declaratory orders that the estate has a legitimate claim over L.R Ntima/Igoki/1149 which is distinct from Title No. Meru Municipality/Block II/220.

22. It is averred at paragraph 9 of the petition that in **gazette notice No. 1263 of 13.5.1977**, the Government of Kenya pursuant to **Land Adjudication Act 1968** sought to compulsorily extend and or acquire land for Meru Municipality commercial and industrial area which gazette notice did not include the petitioner's land.

23. The petitioner blames the 4th and 5th respondents for opening a new register of land for **Title No. Meru Municipality Block II/270** now swallowing up 0.5182 Ha and or overlapping **L.R Ntima/Igoki/1149** now occupied by the 1st and 2nd respondents.

24. Under **Rule 23 of Mutunga Rules 2013** the court has powers to grant conservatory orders to ensure that the circumstances do not change while a matter is before a court of law. Conservatory orders ensure nothing changes circumstantially in a matter pursuant to an existence of other factors to be determined by the court.

25. In Mohammed –vs- Ministry of Education & another; Registered Trustees of the Baptist Convention of Kenya (Interested party) (Constitutional Petition 043 of 2021) [2022] KEHC 115 (KLR) 21.2.22 (Ruling) the court held the applicable test in granting conservatory order(s), as the danger looming over the realization of rights which must be imminent, real and not theoretical. The court in so determining, is not invited to make conclusive findings of fact or law on the dispute before it.

26. The jurisdiction at this point is limited to examining and or evaluating the materials placed before the court to determine whether the applicant has made out a prima facie case to warrant the granting of a conservatory order.

27. In Board of Management of Uhuru Secondary School –vs- City County Director of Education & 2 others [2015] eKLR, the court set out the parameters to consider:- if there is demonstration of an arguable prima facie case with a likelihood of success and that in the absence of the orders, the applicant is likely to suffer prejudice and that the court should also consider whether if it refused to grant the reliefs sought, it will enhance the constitutional values and objectives of a specific right or freedom in the bill of rights; whether if the relief is not granted, the substratum of the petitioner shall be rendered nugatory and lastly if it is in public interest to grant the orders sought. See also (CREAW) & Another –vs- Speaker of the National Assembly & 2 Others [2017] eKLR, Progressive Welfare Association of Malindi & 3 Others –vs- County Government of Kilifi [2020] eKLR.

28. With the above principles in mind, I now wish to examine the application herein.

29. The petitioner at paragraph 16 of the petition avers the 1st, 2nd, 3rd, 4th and 5th respondents have committed illegalities in effecting the changes over the alleged parcels of land. At Part IV of the petition, the nature of the injuries caused or likely to be caused is itemized.

30. At paragraph 21 of the petition, the petitioner invokes **Articles (1) (I), 2 (I), 2(4), 3, 10, 27, 40 and 64 of the Constitution**. Other than **Article 40 of the Constitution**, there is no imminent danger demonstrated. In any event, what the petitioner has raised is largely statutory breach as opposed to constitutional breach of rights and freedoms. Further, there is no demonstration of any intention to transfer, sale or drastically change the suit land over and above the occupation by 1st and 2nd respondents.

31. Similarly, there is evidence the title deed in favour of the 1st respondent was issued in 2013 whereas the Block II Meru Municipality was opened on 3.1.1991. There has been inordinate delay in seeking for conservatory orders which has not been explained if at all the petitioner was a vigilant land owner.

32. My finding is therefore that the petitioner has failed to establish that he deserves the grant of conservatory orders. See Tairen Association of Mijikenda –vs- Chakama Ranching Company Limited & 7 others; National Land Commission & 2 others (Interested Parties) [2022] eKLR.

33. As regards the prayer for mandatory injunction, in Malier Unissa Karim –vs- Edward Oluoch Odumbe (2015) eKLR, the Court of

Appeal held the test for granting a mandatory injunction to be different from that enunciated in the Giella –vs- Cassman Brown & Co Ltd [1973] EA 358 given the threshold is higher.

34. In Kenya Breweries Limited & another –vs- Washington O. Okeyo [2002] eKLR, the court held there must be special circumstances, the case must be a clear one more so where the defendant attempts to steal a march on the plaintiff.

35. Further, in Jai Super Power Cash & Carry Ltd –vs- Nairobi City Council & 20 Others (as quoted with approval in Leisure Lodges Ltd –vs- Ibrahim Makanzu & 6 Others [2008] eKLR, the court held a wrongdoer could not keep what he had taken.

36. In order to prove overlaps and or trespass, the petitioner attached a report dated 30.9.2019. It was not made by a qualified land survey and therefore it was not conclusive at all on the alleged overlaps of the two disputed parcels of land. I there find no exceptional circumstances to grant mandatory injunction at this juncture as held in Locabail International Finance Ltd –vs- Agro Export & Another [1986] 1 ALL E.A 901 which was cited with approval in Said Mwinyikai Tomas & 2 others –vs- John Njoroge Mungai & another [2019].

37. In the premises, the application dated 11.6.2020 lacks merits. The same is dismissed with costs.

38. Parties to exchange pleadings and list the matter for directions on the mode of hearing within 21 days.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 16TH DAY OF MARCH, 2022

In presence of:

Ali for petitioner – present

Miss Mboluke for Kariuki for 1st respondent

2nd respondent – No appearance

Kieti for 3rd – 6th respondents

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE