



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

CONSTITUTIONAL PETITION NO. E009 OF 2021

IN THE MATTER OF

LAND ADJUDICATION ELGEYO MARAKWET

ADJUDICATION AREA

CHESOI ADJUDICATION SECTION AFFECTING PROPERTY NO. 2518

AND

IN THE MATTER OF

THE CONSTITUTION OF KENYA 2010 ARTICLES 20, 21, 22, 23, 40(2) (a), 50(1) 165(3)(a)

AND

JAMES YATOR KISANG.....PETITIONER

VERSUS

THE LAND ADJUDICATION OFFICER

ELGEYO MARAKWET.....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL..2ND RESPONDENT

WILSON TOTOITICH KITUM.....3RD RESPONDENT

PHILEMON YEGO KITUM.....4TH RESPONDENT

RULING:

1) This is a ruling in respect of Notice of Motion dated 2nd August, 2021 and a preliminary objection dated 15th September, 2021.

2) The application is brought by the Petitioner/Applicant and it seeks the following orders:-

1. Spent

2. Spent

3. This Honourable Court be pleased to issue interim orders of temporary injunction to restrain the Respondent's, their agents, servants, employees and assigns whatsoever from trespassing, wasting, damaging, alienating or cultivating the Petitioner's parcel of land known as Parcel No. 2518, Chesoi Adjudication Section or in any other way interfering with the Petitioner's / Applicant's quiet enjoyment of the suit property pending hearing and determination of the suit.

4. Costs of this application be provided for.

3) The preliminary objection is brought by the 3rd and 4th Respondent's based on the following grounds:-

1. That the prayer for an injunction is not grounded in the petition and one cannot pray for an interlocutory order if the main suit does not pray for the specific remedy.
2. That the application is an abuse of the Court process.
3. That there is no threat of sale of the said land.

4) The Petitioner filed a Constitutional Petition against the Respondents alleging that his Constitutional rights under Article 40(2) of the Constitution had been violated. In or around 1965, the Petitioner's father, Kisang Kiptoo together with four others cleared a portion of forest land which was to be shared equally among them through a process called Aewo (axe) in Marakwet traditions.

5) In 1988, the Petitioner went and settled on his father's portion. During the adjudication process in Chesoi area of Marakwet, a plot known as Parcel No. 2518 (suit property) was recorded under his name. When the adjudication register was published, the 3rd and 4th Respondents lodged a complaint to the Committee as provided for in law. The Adjudication Committee ruled in favour of the 3rd and 4th Respondents. The Petitioner then filed a complaint to the adjudication officer who affirmed the Committee's decision. The Petitioner filed an appeal to the Minister under appeal No. 540 of 2020. The appeal was dismissed. This is what prompted the Petitioner to file this petition in which he seeks injunctive orders.

6) The Petitioner contends that he has been living on the suit property with his family since 1988 and that if he were to be evicted, he will have nowhere to run to and that it is therefore necessary for an injunction to issue.

7) The Applicant's application is opposed by the 3rd and 4th Respondents based on a replying affidavit sworn on 15th September, 2021 and a further affidavit sworn on 21st October, 2021. The Respondents contend that the Petitioner was accorded a fair hearing at every stage including the appeal to the minister where he lost. The Respondents state that they have been occupying parcel No. 2518 and 2522 from time immemorial and that initially these parcels were known as parcel No. 2972

8) The Respondents contend that in 2015, the Petitioner's father was a Plaintiff in Iten Resident Magistrate's Court in Civil Case No. 46 of 2005. The Respondents were defendants in this case. The Petitioner's father and other Plaintiffs lost this case in which they were laying claim to parcel No. 2972 among other parcels. The Respondents therefore argue that the Petitioner is seeking to have a concluded matter re-opened.

9) The parties were directed to file written submissions in respect of the preliminary objection and the application. The Petitioner filed his submissions on 15th October, 2021. The Respondents filed their submissions on 15th November, 2021. I have considered the petitioner's application as well as the opposition to the same by the Respondents. I have also considered the preliminary objection as well as the grounds of opposition to the same. I have also considered the submissions by the parties.

10) I will deal with the application as well as the preliminary objection together. The only issue for determination in this application is whether an injunction can issue in the manner prayed for. To begin with, the matters herein are based on alleged violation of the Constitutional rights of the Petitioner under Article 40(2) of the Constitution. The law is clear that one cannot seek injunctive relief through an application if the relief is not part of what is sought in the Petition. In matters to do with Constitutional Petitions, what is normally sought are in the nature of conservatory orders. This is because in Constitutional petitions, the Civil Procedure Rules do not apply. Even the threshold required in injunctive orders under the Civil Procedure is not what is required in Constitutional petitions.

11) In *Civil Application No. 5 of 2014 Gatirau Peter Munya -Vs- Dickson Mwenda Kithinji & 2 others (2014) eKLR*, a two bench of the Supreme Court Judges stated as follows on Conservatory orders:-

“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 stay 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 Applicant’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”.

12) In the case of *Centre for Rights Education and Awareness (CREW) & 7 others -vs- Attorney General [2011] eKLR*, Justice *Musinga* (as he then was) stated as follows:-

“At this stage a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with likelihood of success and that unless the court grants the conservatory order there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the constitution”.

13) It is in light of the above decisions that I will seek to determine whether the Petitioner deserves any conservatory orders. The Petitioner was expected to demonstrate that he has a prima facie case with Probability of success. A look at the Petitioner's petition shows

that he is basically seeking judicial review orders seeking to quash the decision of the Committee, adjudication officer as well as the decision of the Minister. A look at the material presented to this Court shows that the Petitioner was heard at every stage of the proceedings. The dispute had even been litigated by the Petitioner's father in Iten Resident Magistrate's Court. In the circumstances, I do not see what prima facie case the Petitioner has to warrant grant of conservatory order. I therefore find that the Petitioner's application lacks merit. The same is hereby dismissed with costs to the 3rd and 4th Respondent's.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 10TH DAY OF MARCH, 2021.

E.O. OBAGA

JUDGE

In the virtual Presence of;

Ms. Koech for Petitioner

Mr. Cheptarus for Mr. Chebii for 3rd and 4th Respondents.

Court Assistant – Albert

E. O. OBAGA

JUDGE

10TH MARCH, 2022