



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

ELC PETITION NO. E006 OF 2021

KERIO VIEW INVESTMENT CO. LTD.....PETITIONER

-VERSUS-

THE CHIEF LANDS REGISTRAR.....1ST RESPONDENT

COUNTY LANDS REGISTRAR KERIO VALLEY MARAKWET COUNTY.....2ND RESPONDENT

THE COUNTY LANDS SURVEYOR KERIO VALLEY MARAKWET COUNTY.....3RD RESPONDENT

MR. DAVID DUNYA OMOLO.....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

AND

LORNAH KIPLAGAT.....1ST INTERESTED PARTY

COUNTY GOVERNMENT OF KERIO VALLY.....2ND INTERESTED PARTY

RULING:

Introduction:

1. This is a ruling in respect of two applications which are interrelated. The first application is dated 18th June, 2021. It is brought by the Petitioner/Applicant and it seeks the following orders:-

1. Spent
2. That the Honourable Court do intervention to open the paragliding path by removal of the illegal fence to enable the only paragliding path in East and Central Africa.
3. That in the Interim the Honourable Court be pleased to issue conservatory order restraining the 1st, 2nd, 3rd, 4th & 1st Interested Party from shutting down the Petitioner's paragliding path and Hellipad on Land Registration IRONG/ITEN/2742 approximately measuring 0.44 Ha pending further orders of Court.
4. That the Honourable Court do issue compelling orders to the County Lands Registrar and Surveyor to remove and sustain the status quo prevailing prior to the erection of *the* new fencing line obstructing the paragliding path on land registration IRONG/ITEN/2742 approximately measuring 0.44 Ha pending further orders of Court.
5. That a mareva injunction do issue compelling the 1st to 4th Respondents and the 1st Interested Party to reopen and keep the Petitioner's paragliding path and Hellipad operation pending hearing and determination of the Application and consequently the Petition herein.
6. That the County Police Commissioner to supervise the Court orders issued herein accordingly.

7. Costs for the application be provided for.

2. The second application is dated 30th September, 2021. It is also brought by the Applicant and it seeks the following orders:-

1. Spent

2. That the Honourable Court do issue directions under Rule 5 of the Constitution Protection of Rights and Fundamental Freedoms Practice and Procedure Rules 2013 to enable the court fast track the determination of the petition herein.

3. That the Honourable Court be pleased to issue a Conservatory Order compelling the 1st to 4th Respondents and 1st Interested Party through the OCPD Elgeyo Marakwet County to remove the illegally installed fence, and keep the Petitioner's paragliding paths viable for use.

4. That the Honourable Court do mandate the Deputy Registrar to visit the disputed site and prepare a status report detailing and outlining the nature of the paragliding paths and place of the barbed wire there at IRONG/ITEN/2742 approximately measuring 0.44 Ha pending further orders of court.

5. Costs for the application be provided for.

6. Costs of this application be borne by the Respondents and 1st Interested party jointly and severally.

7. That the Honourable Court be pleased to issue any other order and/or direction it deems fit and expedient.

Background:

3. The genesis of these two applications can be traced from Eldoret ELC case No 636 of 2012 Kerio Valley Investments -Vs- Lornah Kiplagat & another. This case had initially been filed in the High Court as HCCC No. 112 of 2010. It was moved to the Environment and Land Court after the 2010 Constitution which created the Environment and Land Court.

4. The Applicant owns LR Irong/ Iten/2742 on which it has erected a four star hotel which among other activities provides Paragliding activities to local and international tourists. The 1st Interested party through her Company owns an adjacent land being LR Irong/ Iten/2743.

5. There arose a boundary dispute between the Applicant and the 1st Interested party which culminated into the Applicant filing Eldoret ELC 636 of 2012. On 23rd May, 2016, the two neighbours entered into a consent in which it was agreed that the Elgeyo Marakwet County Surveyor was to determine the boundary between the two parcels and file a report in Court within 30 days.

6. From the materials placed before this Court, it appears that there were earlier reports made and subsequently the land Registrar fixed the boundary. The Applicant did not prosecute the suit in ELC 636 of 2012 leading to its dismissal for want of prosecution. The Applicant filed an application seeking to reinstate the suit but this application was dismissed. The Applicant preferred an appeal against the ruling declining to reinstate the suit.

7. The Interested party moved back to Court and filed an application in ELC 636 of 2012 seeking enforcement orders but the application was dismissed as the 1st Interested party could not base the application on a dismissed suit in which she had not filed a counter claim. When the 1st interested party's application was dismissed, she went and mobilized Police officers from Iten Police station who accompanied her to the disputed portion where she erected a barbed wire fence which effectively closed the paragliding path and Helipad of the Applicant's hotel.

8. It is the 1st Interested party's action of fencing off about ½ an acre of the Applicant's land which prompted the Applicant to file this petition in which it seeks the following reliefs:-

a) A Conservatory order restraining the County Lands Registrar and County Lands Surveyor from appropriating the Petitioner's Parcel IRONG/ITEN/2742 approximately measuring 0.44 Ha.

b) A declaration order that the proprietary interest in land parcel IRONG/ITEN/2742 approximately measuring 0.44 Ha vests in the Petitioner absolutely and cannot be appropriated by the Interested Party without due process of the law being followed.

c) An order of Certiorari to call into court the County Lands Registrar's unilateral boundary fix and determination dated 18th day of August, 2010 breached rules of fair Administrative Action, Article 47 the Constitution of Kenya 2010.

d) An order of declaration that the County Lands Registrar breached the rules of natural justice by presiding over a complaint he is the subject of and a fraud, which he perpetuated.

e) An order of declaration to the effect that the dismissal order in Eldoret Environment and Land Court Case No. 636 of 2012 Kerio View Investments Company Limited vs Lornah Kiplagat & Another breached the hearing as envisaged by Article 50 of the Constitution of Kenya 2010.

f) A declaration that the process of terminating the complaint prematurely amounts to unfair administration of justice contrary to

Article 47 of the New Constitution of Kenya 2010.

- g) An order of mandamus to compel the County Lands Registrar to Commission a lawful survey and have a neutral surveyor involving both parties in delineating the common boundary.
- h) Costs of the Petition from the time of instituting the Award and Petition Proceeding in court to the date of judgment.
- i) Any other order the court may deem fit to grant.

The Applicant's Contention:

9. The Applicant contends that the fixing of the boundary was done in the absence of its officials and that there was no notice given notifying the Applicant of the fixing of the boundary. The Applicant argues that as a result of this, the 1st Interested party annexed about ½ an acre of its land and the fencing which was carried out in 2021 blocked its paragliding path and helipad.

10. The Applicant had intended to be incorporated into the International Paragliding Association Calendar so that it could jumpstart its paragliding activities which had been grounded for two years due to Covid 19 Pandemic. This is not possible as the 1st Interested party has cut off the paragliding path and helipad.

11. The Applicant contends that the boundary was fixed using fraudulent survey plans which were obtained through Collusion between the 1st to 4th Respondents. The Applicant accused the 4th Respondent of being a judge and executioner in his own cause. The Applicant argues that it commissioned an independent surveyor who found out that the survey and the fixing of the boundary were not done properly.

12. On the issue of ELC 636 of 2012, the Applicant contends that the case was dismissed without notice to it and that it was not possible for one of its directors to see the notice for dismissal which had been displayed on the Court's noticeboard as one of its directors is based out of the Country.

13. The Applicant argues that when its application dated 18th June, 2021 came up before the Court on 26th July, 2021, Conservatory orders were given but that when its officials went for assistance at Iten Police station with a view to implementing the orders, the Iten Police station officers declined to assist arguing that there was no order directed at them to implement the orders. This explains why the application dated 30th September, 2021 was filed. The Applicant argues that it spent over 600,000,000/= to put up the four-star hotel and that if its paragliding path and helipad are not opened, it will incur huge losses.

Opposition by the 1st, 2nd, 3rd and 5th Respondents:

14. The Attorney General on behalf of the 1st, 2nd, 3rd and 5th Respondents opposed the Applicant's two applications based on grounds of opposition filed on 16th November, 2021. The Attorney General contends that the Applicant's application is incompetent, fatally defective, frivolous and is an abuse of the process of Court. The Attorney General further argues that the Applicant has made an omnibus application which renders the application defective.

15. The Attorney General further argues that what the Applicant is seeking amounts to an appeal against ELC 636 of 2012 and is actually seeking to reopen the case in which it has already filed a notice of appeal challenging the order of the Court declining to reinstate the dismissed suit and that in any case, the Applicant has not demonstrated sufficient grounds to warrant grant of the orders sought.

1st Interested party's opposition:

16. The 1st Interested party opposed the Applicant's application based on a replying affidavit sworn on 29th September, 2021 and grounds of preliminary objection dated 30th September, 2021. The 1st Interested party contends that the Applicant's petition as well as application do not raise any Constitutional issues; that she has been wrongly sued as it is her company which owns the adjacent land; that the petition is res judicata; that the delineation should have been challenged through judicial review and not Constitutional petition; that there is misjoinder of 4th Respondent which is meant to scare public officials from performing their work and that the Applicant thought that it had purchased land with a paragliding path whereas the terminal end of the gliding path belonged to another party.

Analysis:

17. The parties herein were directed to dispose of the two applications by way of written submissions. The Applicant filed its submissions on 15th October, 2021. The 1st, 2nd, 3rd and 5th Respondents filed their submissions on 16th November, 2021. The 1st Interested party filed her submissions dated 20th November, 2021.

18. I have considered the Applicant's application as well as the opposition to the same by 1st, 2nd, 3rd, 5th and the 1st interested party. I have also considered the submissions by the parties. The issues which emerge for determination are firstly whether the petition herein is res judicata and secondly whether the Applicant has made out a case for grant of a conservatory order or mandatory injunction as sought.

19. On the first issue, the 1st, 2nd, 3rd and 5th Respondents as well as the 1st Interested party contend that the issues being raised, in this petition were dealt with in ELC 636 of 2012 as well as by the Land Registrar and that by the Applicant raising the same issues herein, then it is contravening the principle of res judicata.

20. The principle of res judicata is predicted on section 7 of the Civil Procedure Act which states as follows:-

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. (1) -The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.(2) -For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3) -The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation.(4) -Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. **Explanation. (5)**—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)-Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

21. In Elc 636 of 2012, this suit was dismissed for want of prosecution. It was never heard on merits. This Constitutional Petition cannot therefore be res judicata. Equally, the determination of the boundary dispute by the Land Registrar cannot render this petition res judicata. In the instant case, the Petitioner is seeking to quash the determination of the boundary on the ground that it was not invited to attend the determination and that the determination of the boundary was based on fraudulent survey plans.

22. In the case of *Kenya Commercial Bank –Vs- Benjoh Amalgamated Limited (2017) eKLR* the Court of Appeal stated as follows on the issue of res judicata:-

“The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit; (a) The suit or issue was directly and substantially in issue in the former suit. (b) That former suit was between the same parties or parties under whom they or any of them claim. (c) Those parties were litigating under the same title. (d) The issue was heard and finally determined in the former suit. (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

23. As regards the second issue, Courts have set out principles to be considered in determining whether or not to grant conservatory orders in constitutional petitions. In the case of *Martin Nyaga Wambora -Vs- Speaker of the County Assembly of Embu & 3 others* petition No. 7 of 2014 the Court stated as follows:-

“(59) In determining whether or not to grant conservancy orders, several principles have been established by the Courts. The first is that: “... [an applicant] must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution”

(60) To those erudite words I would only highlight the importance of demonstration of "real danger". The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the Court. Thus an allegedly threatened violation that is remote and unlikely will not attract the Court's attention.

(61) The second principle, which naturally follows the first, is whether if a conservancy order is not granted, the matter will be rendered nugatory.”

24. In the case of *Gatirau Peter Munya -Vs- Dickosn Mwenda Kithinji & 2 others (2014) eKLR*, a two judge bench of the Supreme Court Judges stated as follows as regards conservatory orders:-

" (86) 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."

25. It is in light of the principles set out in the Kenya Commercial Bank and Gatirau Peter Munya cases (supra) that I will determine whether the Applicant has made out a case for grant of a conservatory order. A look at the prayers in the petition shows that the Applicant is seeking a

conservatory order restraining the County Land Registrar and Surveyor from appropriating approximately 0.44 ha of its land. Already the Land Registrar has determined the boundary and the 1st interested party has fenced her land based on the said determination. Whether or not the said fencing was based on fraudulent survey plans will be determined in the main petition. Even if conservatory orders are not granted, that will not render the Applicant's petition nugatory.

26. The Applicant has deponed in its affidavit that the paragliding path has not been used for the last two years. This is due to covid 19 pandemic. The pandemic is still with us. The paragliding will still be held in abeyance and as such the Applicant will not suffer loss attributable to the actions of the 1st Interested party as non grant of conservatory orders will not render the petition nugatory. If the petitioner succeeds in its petition, the fence which has allegedly blocked the gliding path will be removed.

27. The other orders which the Applicant seeks in both application are mandatory in nature. The conservatory orders which the Applicant seeks to implement through the application dated 30th September, 2021 were expressed to last until the hearing of the application interparties. The principles for grant of mandatory injunctions have been settled in a long line of cases. For instance in the case of Kenya Breweries Limited -Vs- Washington O. Okeyo (2002) eKLR the Court held as follows:-

"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in dear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the Court has to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."

28. The Applicant seems to have been against each of the reports and determinations reached by the surveyors and the Land Registrar. As I said hereinabove, there appears to have been reports made over the boundary dispute as early as 2010. In 2016, there was a consent recorded for the surveyor to go to the ground and file a report in Court within 30 days. There is no evidence whether a report was made as per the consent order as no such report was annexed to either of the applications. In the absence of this, there is no basis upon which this Court can order that the fencing by the 1st Interested party be removed.

29. The Applicant is seeking a Mareva injunction. In our law, a mareva injunction is a freezing order which is based on order 39 Rule 5 and 6 of the Civil Procedure Rules. Our Courts have had occasion to pronounce themselves on this type of injunctions. In the case of *Kanduyi Holdings Limited –Vs- Balm Kenya Foundation & another (2013) eKLR* the Court stated as follows: -

"...Our Order 39 Rules 5 and 6 could be said and is a statutory codification of an interlocutory relief known as Mareva Injunction or freezing order in the UK....Accordingly, Order 39 Rules 5 and 6 of the CPR should operate within known dimensions of law drawing from the above case

[Mareva Compania Naviera SA v International Bulk-carriers SA [1975] 2 Lloyd dis Rep 509] and other judicial precedents on the subject. Order 39 rule 5 and 6 of the CPR is not to be used to: 1) to pressure a defendant; or 2) as a type of asset stripping (forfeiture); or 3) as a conferment of some proprietary rights on the plaintiff upon the assets of the Defendant. The purposes of any order that should be issued under Order 39 Rules 5 and 6 of the CPR is to prevent the Defendants or would be judgment-debtor from dissipating his assets as to have the effect of obstructing or delaying the execution of any decree that may be passed against him "

30. In the case of *Beta Health care International Limited –Vs- Grace Mumbi Githaiga & 2 others (2016) eKLR*, the Court had this to say while declining to grant a Mareva injunction:-

"From the record and affidavits filed by the applicant, there is no concrete evidence that the respondents have absconded or are about to abscond or have disposed of or removed their property from the jurisdiction of the court. For attachment before judgement as contained in Order 39 Rule 5 to apply, cogent evidence must be produced to demonstrate absconding or disposal of property or real possibility of absconding or disposing of property. The property to which has been disposed of or is about to be disposed of or removed from the jurisdiction must also be specified if an order is to issue under the aforesaid legal provisions, something that the Plaintiff has failed to do. What is before the court are mere allegations that are yet to be tested through evidence. I will therefore decline to issue the order for attachment of the Defendants movable or immovable assets as prayed by the Plaintiff in prayer number (b)."

31. The Applicant has not shown through affidavit that the Land held by the 1st Interested party is likely to be sold hence being out of jurisdiction of the Court. A Mareva injunction cannot be allowed without proper basis being given.

Disposition:

32. As the Applicant has failed to demonstrate that it has grounds for grant of conservatory orders or mandatory and freezing orders as sought and cognizant of the fact that the petition was brought majorly as an attack of the dismissal of ELC 636 of 2012 as can be seen from both the supporting affidavits and submissions, I find that both applications lack merit. The same are dismissed with costs to the 1st, 2nd, 3rd, 5th and 1st interested party.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 10TH DAY OF MARCH, 2022.

E. OBAGA

JUDGE

In the virtual presence of;

Ms. Waweru for Mr. Katwa for 1st Interested party.

Court Assistant –Albert

E. OBAGA

JUDGE

10TH MARCH, 2022