



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND PETITION NO. 8 OF 2014

**IN THE MATTER OF ARTICLES 20 (2), 21 (1), 22(1) & (2), 23(1), 40 (2) & 165 OF THE
CONSTITUTION, 2010**

AND

**IN THE MATTER OF VIOLATION AND/OR INFRINGEMENT ON THE PROPERTY RIGHTS
OF THE PETITIONER**

AND

IN THE MATTER OF THE LAND REGISTRATION ACT, NO. 3 OF 2012

AND

IN THE MATTER OF LR NO. WEST KASIPUL/KODERA KARABACH/34

AND

IN THE MATTER OF OYUGIS PMCC MISC. APPLICATION NO. 1 OF 2005

AND

IN THE MATTER OF OYUGIS PMCC NO. 3 OF 2008

AND

IN THE MATTER OF KISII HCCA (E&L) NO. 71 OF 2008

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOM) PRACTICE AND PROCEDRUE RULES, 2013**

BETWEEN

WILSON DINDA OLILO PETITIONER

AND

THE PRINCIPAL MAGISTRATE'S COURT, OYUGIS LAW COURTS 1ST RESPONDENT

THE DISTRICT LAND REGISTRAR, RACHUONYO DISTRICT 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 3RD RESPONDENT

DALMAS AKECH NGIELA 4TH RESPONDENT

RULING

1. What I have before me is the petitioner's application for conservatory and/or interim orders brought under rules 19, 23, 24 and 26 of the Constitution of Kenya (Protection of rights and fundamental freedoms) Practice and Procedure Rules, 2013. In the application the petitioner has sought among others the following orders;-
 - i. **The honourable court be pleased to grant an order of stay of execution, enforcement and/or implementation of the eviction orders issued against the petitioner in Oyugis PMCC No. 3 of 2008 and subsequently confirmed in Kisii HCCA No. 71 of 2008 touching and/or concerning ownership over and in respect of LR No. West Kasipul/Kodera Karabach/34 pending the hearing and determination of this petition.**
 - ii. **The honourable court be pleased to grant an inhibition over and in respect of LR No. West Kasipul/Kodera/Karabach/34 (hereinafter referred to only as "the suit property") and in particular to maintain the current registration status thereof, to last pending the hearing and determination of this petition.**
 - iii. **The honourable court be pleased to grant conservatory order to protect, preserve and/or conserve the status of the suit property, and in particular, the occupation and thereof by the petitioner pending the hearing and determination of this petition**
 - iv. **An order of a temporary injunction to restrain the 4th respondent from taking possession of or interfering with the suit property in any other manner.**
2. The petitioner's application was brought on the grounds that were set out in the body thereof and on the affidavit of the petitioner sworn on 20th March 2014. The facts giving rise to this petition and the application under consideration are as follows. The petitioner was at all material times registered as the proprietor of the suit property on a first registration. Sometimes in the year 2005, the 4th respondent lodged a claim against the petitioner at Kasipul Division Land Disputes Tribunal (hereinafter referred to as "the tribunal") over the suit property. The 4th respondent contended before the tribunal that the suit property was irregularly registered in the name of the petitioner. The 4th respondent sought the cancellation of the petitioner's title over the suit property and the registration of the 4th respondent as the owner of the suit property. The tribunal heard the 4th respondent's complaint and made an award in favour of the 4th respondent in which it ordered the revocation of the petitioner's title over the suit property and the registration of the property in the name of the 4th respondent. The tribunal's decision was lodged with the 1st respondent sometimes in January, 2005 in Oyugis PMCC Misc. Application No. 1 of 2005 (hereinafter referred to as "the adoption suit") and the same was adopted as a judgment of the court on 7th June 2005.
3. Upon the adoption of the tribunal's award as aforesaid, the 1st respondent issued a decree for the revocation of the petitioner's title over the suit property and the registration of the 4th respondent as the proprietor of the suit property. The decree by the 1st respondent was duly executed. The petitioner's title was cancelled and the suit property registered in the name of the 4th respondent on 21st September 2007. Upon obtaining a title over the suit property, the 4th respondent filed a suit against the petitioner for his eviction from the suit property. This was in Oyugis PMCC No. 3 of 2008 (hereinafter referred to as "the eviction suit"). The eviction suit was heard and determined in favour of the 4th respondent on 6th May 2008 by Hon. Yalwala RM who ordered the petitioner to vacate and hand over possession of the suit property to the 4th respondent. He also issued permanent injunction restraining the petitioner from interfering with the suit property. The

- petitioner lodged an appeal to this court against the decision in the eviction suit which appeal was dismissed by this court on 7th February 2014 in Kisii HCCA No. 71 of 2008. This court upheld the decision of Hon. Yalwala RM in the eviction suit.
4. The petitioner has now brought the present application to challenge the decision of the tribunal and the 1st respondent in the adoption suit which formed the basis of the 4th respondent's case in the eviction suit. The petitioner has contended that the tribunal had no jurisdiction to determine the 4th respondent's claim against the petitioner over the suit property which concerned title to land. The petitioner has contended further that the 1st respondent had no jurisdiction to adopt the tribunal's decision as a judgment of the court which decision had been arrived at without jurisdiction as aforesaid. The petitioner has contended that the decree that was issued in the adoption suit was fraudulent null and void. In the petition the petitioner has sought the following prayers;
 - a. **Declaration be issued to the effect that the petitioner is entitled to protection under the constitution.**
 - b. **Declaration that the complaint, proceedings and the attendant award of the land disputes tribunal, Kasipul division, which was subsequently adopted and ratified by the 1st respondent vide Oyugis PMCC Misc. Application No. 1 of 2005 and the resultant decree, was illegal, null and void for want of jurisdiction.**
 - c. **Declaration that the process of enforcement, execution and implementation of the decree arising from Oyugis PMCC Misc. Application No. 1 of 2005, culminating into the revocation of the petitioner's title over the suit property, was void.**
 - d. **Declaration that the transfer and registration of the title in respect of LR No. West Kasipul/Kodera Karabach/34, in favour of the 4th respondent, was anchored on an illegal and void process and hence same ought to be nullified.**
 - e. **An order for cancellation of the title in favour of the 4th respondent and rectification of the register in respect of LR No. West Kasipul/Kodera Karabach/34, to read the name of the petitioner, as the bonafide and legitimate owner thereof.**
 - f. **An order of permanent injunction restraining the 4th respondent either by himself, agents, servants and/or anyone claiming under the said 4th respondent from entering upon, trespassing onto, taking possession, building on, building structures on and/or in any other way, whatsoever, interfering with the petitioner's rights and/or interests over the suit property, that is LR No. West Kasipul/Kodera Karabach/34.**
 - g. **Payment of damages, arising from the illegal and void actions by and/or at the instance of the respondents**
 - h. **Costs of the petition be borne by the respondents jointly and/or severally.**
 - i. **The honourable court be pleased to issue such orders and/or writs as the court may deem fit and/or expedient.**
 5. The petitioner has contended that following the dismissal of his appeal to this court against the decision that was made against him in the eviction suit, he may be evicted at any time which eviction would render him destitute. The petitioner has contended that his eviction from the suit property would infringe on his constitutional rights which rights should be protected by this court. The petitioner has contended that unless the conservatory and/or interim orders sought are granted, the petitioner would suffer irreparable loss and prejudice. The petitioner has contended that this is a fit and proper case to grant the orders sought.
 6. The petitioner's application was opposed by the 4th respondent. The 4th respondent contended that he is the registered proprietor of the suit property and that the same had been fraudulently registered in the name of the petitioner. The 4th respondent contended that both the tribunal and this court in their decisions referred to above confirmed that the suit property is owned by the 4th respondent. The 4th respondent contended that the petitioner owns LR No. Kodera/ Karabach/83 and as such, it is not true that he would be rendered destitute if he is evicted from the suit property. When the petitioner's application came up for hearing on 18th June 2014, Mr. Oguttu advocate appeared for the petitioner while the 4th respondent appeared in person. The other

respondents did not appear although they were served with a hearing notice. In his submission in support of the application, Mr. Oguttu reiterated the contents of the petitioner's affidavit in support of the application. Mr. Oguttu submitted that the tribunal had no jurisdiction to cancel the petitioner's title and as such its decision was null and void. Mr. Oguttu submitted further that the 1st respondent had no jurisdiction to adopt as its judgment a decision of the tribunal that was null and void. Counsel submitted that the petition herein raises several issues of law and fact which the court should interrogate at the trial.

7. Mr. Oguttu submitted that the right to own property is a constitutional right of which the petitioner can only be deprived of through the due process. In support of this submission, Mr. Oguttu cited the provisions of Article 40 of the Constitution of Kenya and sections 70 to 83 of the repealed Constitution of Kenya. Counsel submitted that the petition herein raises serious issues and as such the conservatory and/or interim orders sought should be issued to maintain the status quo pending the hearing of the petition. Counsel submitted that the petitioner stands to suffer great loss and inconvenience if the orders sought are not granted. Mr. Oguttu submitted that the petition would be rendered nugatory if the orders sought are not granted.
8. In response to the submissions by Mr. Oguttu, the 4th respondent relied entirely on his affidavit in reply to the application and urged the court to dismiss the application. I have considered the petitioner's application together with the 4th respondent's affidavit in opposition thereto. I have also considered the submissions by the petitioner's advocate and the 4th respondent. In the case of, **Mecha Magaga alias Joseph Magaga –vs- Jackson Obiero Magaga, Kisii High Court Constitutional Petition No. 22 of 2013** (unreported), this court stated as follows on the threshold to be met on an application for conservatory order and/or interim relief;

“an applicant for a conservatory order or interim relief pending the hearing and determination of a petition must demonstrate that he has a prima facie arguable case against the respondent. He must also show that unless the order is granted he will suffer harm.”

Applying the same test to this application what I need to determine is whether the petitioner has demonstrated that he has a prima facie case against the respondents and that he will suffer harm if the orders sought are not granted. It is clear from the petition filed herein that what the petitioner has sought to challenge in these proceedings are the decision of the tribunal made sometimes in January, 2005 and the adoption of that decision by the 1st respondent as a judgment of the court on 7th June 2005.

9. The petitioner has not challenged the judgment of the 1st respondent in the eviction suit that was made on 6th May 2008 in which orders were issued for the eviction of the petitioner from the suit property and a permanent injunction restraining the petitioner from interfering with the 4th respondent's ownership of the suit property. The petitioner has also not challenged the decision of this court made on 7th February 2014 in which this court upheld the 1st respondent's decision aforesaid. The petitioner having not challenged the decision of the 1st respondent that was upheld by this court on as aforesaid, the said decision still stands and remains binding upon the petitioner. The said decision having not been stayed or set aside, the decree issued there from is executable. In the application before me, the petitioner has sought orders for stay of execution of the 1st respondent's orders made in the eviction suit aforesaid and for a conservatory order to maintain the status quo in respect of the suit property more particularly the petitioner's occupation and use thereof. The petitioner has also sought an order of injunction to restrain the 4th respondent from taking possession of the suit property.
10. As I have stated above, the petitioner is not seeking any relief in relation to the eviction suit in this petition, I am of the view that the orders sought by the petitioner herein have no basis in the petition. I do not see how the court can be called upon to stay the execution of a decision which has not been challenged before it. The principal prayers in the present application are all intended to stay the execution of the orders made in the eviction suit. The petitioner had a duty to lay a basis for these orders. This court cannot stay the execution of a valid court order which has been upheld on appeal without a proper basis. Apart from stay of execution and conservatory order

sought, the petitioner has also sought an order of a temporary injunction and inhibition. The order for injunction sought if granted would be in direct conflict with the order that was made by the 1st respondent in the eviction suit which not only directed the petitioner to vacate the suit property but also restrained the petitioner from interfering with the suit property. This court would be able to make such order only if the orders made by the 1st respondent in the eviction suit are brought to question before this court. That not being the case, the order of injunction sought cannot issue. I am of the view that the orders sought in the application herein have been sought in vacuum as they have no basis in the petition. The petitioner's application would fail on this ground alone.

11. Assuming that I am wrong on the conclusion that I have arrived at above, I am of the opinion that the petitioner's application would not succeed even if considered on merit. I have not had sight of the proceedings of the tribunal or a copy of its decision. The same are not on the record before me. It is not clear therefore if the petitioner participated in the proceedings before the tribunal. The decision of the tribunal seems however to have been made in the month of December 2004 or January, 2005 because it was filed in court on or about 3rd January 2005. From the record of the adoption suit, it is manifest that the petitioner was notified of and was aware of the tribunal's decision even if he had not participated in the proceedings of the tribunal. From the record, the petitioner had engaged an advocate to act for him in the adoption proceedings and he was present in person when the decision of the tribunal was read and adopted by the 1st respondent as a judgment of the court. The petitioner had a right to appeal to the Provincial Land Appeals committee against the said decision of the tribunal. He also had a right of a second appeal to the High Court from the decision of the Provincial Land Appeals Committee on points of law.
12. The petitioner also had a right to apply to the High Court for the quashing of the said decision of the tribunal by way of judicial review. The petitioner neither appealed the decision of the tribunal to the Provincial Appeals Committee nor challenged the same in the High Court through judicial review. The decision of the tribunal was therefore adopted as a judgment of the court, a decree issued and executed more than nine (9) years ago. The 4th respondent in whose favour the decision of the tribunal was made had the petitioner's title cancelled and the suit property registered in his name. He thereafter filed a suit for the petitioner's eviction from the suit property and a permanent injunction to restrain the petitioner from interfering with the suit property. The 4th respondent succeeded in his suit for the eviction of the petitioner from the suit property. He also secured an order of a permanent injunction to restrain the petitioner from interfering with the suit property. The petitioner's appeal against the 1st respondent's order for his eviction was dismissed by the court on 7th February 2014. The petitioner has not appealed against this court's decision.
13. The petitioner has now brought the present petition claiming that the decision of the tribunal that was made more than 9 years ago and the adoption thereof as a judgment of the court by the 1st respondent on 7th June 2005 have violated his constitutional rights. I am not persuaded that the petitioner's petition has good chances of success. The tribunal was lawfully established and constituted when it entertained and determined the 4th respondent's claim against the petitioner. Whereas I am in agreement with the contention by the petitioner that the tribunal had no power or jurisdiction to entertain and determine the claim, I am unable to accept the petitioner's contention that the mere fact that the tribunal made an *ultra vires* decision amounted to a violation of the petitioner's constitutional right. The same applies to the decision of the 1st respondent. The 1st respondent had power under section 7 of the Land Disputes Act. No. 18 of 1990 (now repealed) to adopt the decision of the tribunal as a judgment of the court.
14. The 1st respondent cannot therefore be said to have violated the petitioner's constitutional right merely because it adopted as a judgment of the court an *ultra vires* decision of the tribunal. Both the tribunal and the 1st respondent made wrong decisions. The petitioner had the opportunity and the right to challenge the said decisions. The petitioner failed to do so. I am of the view that a court of law cannot be accused of violating a litigant's constitutional right merely because the court made a wrong decision. On the other hand, the 4th respondent was merely a litigant who had approached both the tribunal and the 1st respondent for redress of a legal claim that he had against the petitioner. He had a constitutional right to seek redress from the tribunal and the 1st

respondent. See, Article 50 (1) of the Constitution of Kenya, 2010. The 4th respondent did not make the decisions complained of. I do not think that the 4th respondent's act of lodging a claim against the petitioner with the tribunal and having the tribunal's decision filed with the 1st respondent for adoption as a judgment of the court infringed on the petitioner's constitutional right to property.

15. Due to the foregoing, I am not satisfied that the petitioner has established a prima facie case against the respondents that would justify the issuance of the conservatory or interim orders sought. I therefore find no merit in the application dated 20th March 2014. The same is accordingly dismissed with costs to the 4th respondent. In exercise of the powers conferred upon this court under section 13(7) of the Environment and Land Court Act, 2011 and rules 2(3), (4) and (5) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, I hereby grant to the petitioner a stay of execution and/or enforcement of the eviction orders that were issued in Oyugis PMCC No. 3 of 2008 for a period of sixty (60) days from the date hereof within which period the petitioner shall vacate and handover possession of LR No. West Kasipul/ Koderia Karabach/34 to the 4th respondent herein.

Delivered, signed and dated at KISII this 31ST of October, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Oguttu-Mboya for the applicant

N/A for the 1st, 2nd and 3rd respondents

N/A for the 4th respondent

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE