



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

PETITION 19 OF 2021

IN THE MATTER OF:

ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF

THE INDIVIDUAL UNDER ARTICLES 40, 47, 47 & 50 OF

THE CONSTITUTION OF KENYA

IN THE MATTER OF:

ADJUDICATION COMMITTEE AND ARBITRATION BOARD AND OBJECTION IN

THE LAND COMMITTEE CASE NO. 2348, 234, ARBITRATION

CASE NO. AND OBJECTION NO. 26 AND 27

IN THE MATTER OF:

THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION & PROTECTION OF

FUNDAMENTAL RIGHTS & FREEDOMS OF THE INDIVIDUAL)

HIGH COURT PRACTICE RULES, 2013.

IN THE MATTER OF:

PLOT NOS. 2097 AND 2028 MWANDA/MBALAMBWENI ADJUDICATION SECTION

IN THE MATTER OF:

ARTICLES 20, 21, 22 & 23 OF THE CONSTITUTION OF KENYA, THE

ENVIRONMENT & LAND COURT ACT NO. 19 OF 2011, SECTIONS

13, 19, 20, 21, 22, 26, 27, 28 AND 29 OF THE LAND ADJUDICATION

ACT CAP. 284 LAWS OF KENYA, THE LAND ACT NO. 6 OF 2012

AND THE LAND REGISTRATION ACT, No. 3 of 2012

BETWEEN

PASCAL MWARINGA MAEPETITIONER

- VERSUS -

1. JACKSON KASISA MUSANGO
2. ALI BAKARI MWAMUNDA
3. JUMA MVONDI
4. AMBALE GAYA
5. JULIUS FISI KITHI
6. NZARO KARISA NZARO
7. SAFARI KARISA
8. EMILY EDITH MBEYU
9. NATHAN OHILELE MULEKYA
10. LAND ADJUDICATION OFFICE, KILIFI COUNTY
11. THE LAND REGISTRAR, KILIFI COUNTY
12. THE ATTORNEY GENERAL.....RESPONDENTS

RULING

I. Introduction

1. Before the Honorable Court for its determination is the Notice of Motion application dated 7th May 2021 filed by the Petitioner's/Applicant. It is brought under the provision of Article 23 (3) (a), (b), and (c) of the Constitution of Kenya, Order 40 Rule 1, 4 (1) of the Civil Procedure Rules, 2010 and Section 13 (7) of the Environment and Land Court Act, No. 19 of 2011.

II. The Petitioner/Applicant's case

2. The Petitioner/Applicant seeks for the following orders:-

a) Spent.

b) That pending the hearing and determination of this application "*inter parties*" a Conservatory order be issued staying the implementation of the decision and orders of the 9th Respondent (Adjudication Committee) of 22nd August 2014 allowing Case No. 220 and Objection No. 26 and 27 ordering that the Petitioner's name be deleted and replaced with that of the 1st Respondent in respect of Plot No. 2097 in case No. 220 that new numbers be issued to 2nd and 9th Respondents on objection numbers 26 and 27 and staying the issuance of title deeds to the 1st and 9th Respondents are owners of the plots.

c) That at the hearing of this application and in the event that the 1st to 9th Respondents have already been registered then in the alternative to prayer No. 2 above, a prohibitory order be issued prohibiting registration of any dealings on plots registered in the names of the 1st to 9th Respondents pending hearing and determination of this application and ultimately pending the hearing and determination of this Petition.

d) That the conservatory and prohibitory issued herein be registered at the lands registry against plots registered in the names of the 1st to 9th Respondents.

e) That at the hearing and determination of this application "*inter parties*" a conservatory order be issued staying the implementation of the decision and orders of the 9th Respondent (Adjudication Committee) of 22nd August 2014 allowing Case No. 220 and Objection No. 26 and 27 ordering that the Petitioner's name be deleted and replaced with that of the 1st Respondent in respect of Plot No. 2097 in case No. 220 that new numbers be issued to 2nd and 9th Respondents on objection numbers 26 and 27 and staying the issuance of title deeds to the 1st and 9th Respondents are owners of the plots.

f) That the costs of this application be provided for.

3. The said application is premised on the facts, testimony, grounds and the averments of 31 Paragraphed Supporting Affidavit of PASCAL MWARINGA MAE, the Petitioner herein sworn and dated on 7th May 2021 and eight (8) annexures marked as "PMM – 1 to 8". He stated that pursuant to the provision of Section 30 (1) of the Land Adjudication Act, Cap. 287 (hereinafter referred to as "The Act") in order to institute this civil proceedings, on 9th March, 2021 he applied and obtained Consent from the Land Adjudication Officer (DLAO)

Mwanda Mbalamweni Adjudication Section annexed hereto as “PMM – 1”. He stated that he the 1st Respondent and him had a land dispute over all that parcel of land known as Plot No. 2097 Mwanda/Mbalamweni Adjudication Section (Hereinafter referred to as “The Suit Land”). He deposed that the land dispute was heard by the Land Committee in Land Case No. 220, and the Committee reached a decision that the Petitioner’s name be deleted and replaced with that of the 1st Respondent. Being dissatisfied by the said Committee’s decision, the Petitioner lodged a complaint to the Executive Officer of the Committee vide a letter dated 3rd July 2015 and a follow up to it on 24th June 2016.

4. He deposed that pursuant to this, the 1st Respondent lodged an objection No. 26 and 27 against his own family members namely; Kahindi Karisa, Jackson Karisa, Jackson Musango and Karisa Musango, but failed to include the Petitioner in the said objection being the sole Defendant and since Plot No. 2097 and 3009 belonged to his family which he represented during the adjudication process and in the cases. The intention by the 1st Respondent of lodging the objection against his own family was not to let the Petitioner know of the objection. He stated that the 10th Respondent never informed him of the objection and which proceeded on without his participation. He deposed that the decision emanating from the objection in February 2019, led to parcel numbers Plot No. 3009 being sub - divided and given to the 2nd and 7th Respondents, while the 1st Respondent and his brothers retained the parcel numbers Plot No. 2097 jointly. The Petitioner only came to know of these anomalies by the 1st Respondent and the 10th Respondent when he obtained copies of the proceedings in the month of February, 2021.

5. Besides, the 10th Respondent wrote him letters dated 20th September, 2018 and 22nd May, 2019 concerning the parcel of land known as Plot 2097 and 3601 respectively. He stated that the Plot No. 3601 was recorded in the name of the 8th Respondent who had no right over it as it was curved out of the parcel number Plot No. 2019. He stated that in the year 1993 there has been land case between his father Kahindi Saro and the Respondent’s father called Karisa Mwangi and the elders decided stating the boundary between the 1st Respondent’s father and his father.

6. The Petitioner claimed that the 2nd to 9th Respondents bought parcels of land which belonged to the Petitioner’s from the 1st Respondent who acquired title illegally, despite the Petitioner and his family objecting to the sale of the same. That the 1st to 9th Respondents are utilizing the suit land while awaiting the issuance of title deeds by the 10th Respondent. The Petitioner argued that he is being prejudiced by the actions of the 10th Respondent who has failed and/or refused to comply with the process of adjudication and resolve the dispute, but is set to register and issue the 1st to 9th Respondents with title deeds. That the implementation of the decision and order of the land committee without hearing the case before the Arbitration Board is imminent as the 1st to 9th respondents may dispose of the suit land once they are registered as the owners. Such actions the petitioner argued would occasion him irreparable loss and injustice which cannot be adequately compensated by way of monetary damages and may compel further litigation.

III. The 1st, 2nd, 4th, 6th, 7th & 9th Respondents case.

7. On 17th August 2021, the 1st, 2nd, 4th, 6th, 7th, and 9th Respondents jointly and severally filed a twenty two (22) Paragraphed Replying Affidavit in response to the application. It was sworn by JACKSON KARISA MUSANGO dated 17th August, 2021. He stated that he had the authority of all these Respondents to swear this affidavit. They held that the Petition was misconceived, frivolous, vexatious and otherwise an abuse of the due process of the law and court process.

8. He relied on the advise by his Advocates on record that the Land Adjudication Act had a very elaborate and laid down procedure to deal with claim once an area was declared an adjudication area. He stated that when the Mwanda/Mbalamweni area was declared an adjudication section the parcel of land known as Plot Number 2097 measuring 18 acres or thereabout was adjudicated in the name of the Petitioner. However, he lodged a challenge of this before the Adjudication Committee in cause number 220 of 2014 and he was successful. Being dissatisfied, the Petitioner preferred an appeal at the Arbitration Board then appeal before the Minister and whose decision was final unless the applicant was seeking for prerogative writs of a Judicial review emanating from these proceedings and not the merit of the Adjudication process. Unfortunately, he never pursued his appeal up to date. Instead of that, he decided to institute a Civil Suit at Malindi High Court No. 351 of 2016 and sought the same orders as the ones in this Petition. Once again he never pursued it and on 21st May, 2018 the said suit was dismissed a clear case of abuse of the due process.

9. Through an application dated 27th July, 2018 he sought for the reinstatement of the suit but on 2nd October, 2018 the application was dismissed for non attendance. He stated that currently he never owned any of the parcels of land being adjudicated by the Petitioner in this Petition taking that the original parcel issued as result of the adjudication process being parcel number 2097 was eventually sub – divided into the following parcels numbers 3600, 3601, 3602, 3603 and 3526 respectively and transferred to other third parties, the 2nd, 3rd, 4th, 5th, 6th and 7th Respondents herein. Indeed, he stated they were in actual use and had already taken possession. They had built dwelling houses, kept poultry and cultivated on it. He held that the Petitioner had never been in occupation of the land and did not know what he was claiming. It was clear that the Petitioner had avoided the right laid down procedure and now pursuing the wrong course altogether. He was in a fishing expedition by filing different causes in High Court without pursuing them at all. The Petition was misconceived and the same should be dismissed.

VI. The 6th Respondents case.

10. On 17th August 2021, the 7th Respondent filed an eleven (11) Paragraphed Replying Affidavit in response to the application. It was sworn by NZARO KARISA NZARO dated 17th August, 2021. He resided at Kibao Kiche Kawala Location in Mbalamweni Division. He stated that on or about 17th January, 2019 he bought two parcels of land 3603 and 2097 being derived from 2097 from the 1st Respondent. The land Adjudication process has been closed. When purchasing the parcel the 1st Respondent showed him the proceedings that took place before the Land Adjudication Committee whereby he had been granted the entire parcels of land known as Plot Number 2097 against the Petitioner.

11. He held that the Petitioner had never been in occupation of the land and did not know what he was claiming. He had never had any case with him instead they had a dispute with the 1st Respondent before the adjudication committee and before the High Court Malindi whereby he lost. Indeed, he had never obtained any Consent to institute a Civil Suit against the 6th Respondent making his suit to be misconceived and the same should be dismissed.

V. The 7th Respondents case.

12. On 17th August 2021, the 7th Respondent filed a nine (9) Paragraphed Replying Affidavit in response to the application. It was sworn by SAFARI CHARO NDURRYA alias SAFARI KARISA dated 17th August, 2021. He resided at Kibao Kiche Kayafungo. He stated being the owner of all that parcel of land known as No. 3009 at Mwanda/Mbalamweni. He bought it from Jackson Karisa Musango, the 1st Respondent on 7th July, 2015 and the number was transferred to him. He had built a dwelling house, kept poultry and cultivated on it. He held that the Petitioner had never been in occupation of the land and did not know what he was claiming. He had never had any case with him instead they had a dispute with the 1st Respondent before the adjudication committee and before the High Court Malindi whereby he lost. Indeed, he had never obtained any Consent to institute a Civil Suit against the 7th Respondent making his suit to be misconceived and the same should be dismissed.

VI. The 9th Respondents case.

13. On 17th August 2021, the 9th Respondent filed an eight (8) Paragraphed Replying Affidavit in response to the application. It was sworn by EMILYA EDITH MBEYU and dated 17th August, 2019. She stated being the owner of all that parcel of land known as No. 3526 at Mwanda/Mbalamweni which was a consolidation from No. 3009 and 2097. She bought the suit land, which had been adjudicated upon but had no title deed, from the 1st Respondent and his brothers on 9th February 2020. She claimed that the Petitioner lost the suit land to the 1st Respondent before the adjudication committee and before the High Court Malindi. That the Petitioner later appealed to the arbitration board but never pursued the appeal and snubbed the entire adjudication process.

VII. The 12th Respondent's grounds of Opposition

14. On 2nd July 2021, the 12th Respondent filed a Seven (7) points Grounds of opposition in opposition to the said application. The grounds of opposition held that the Petition was misconceived, frivolous, vexatious and an abuse of the court process. It held that the Petitioner had neither sought for any stay before the Adjudication Committee on the decision and orders made on 22nd August 2020 nor had he lodged an appeal before the Arbitration Board in regard to the parcels known as Plots No. 2097 and 2018 Mwanda/Mbalamweni Adjudication Section. That the 10th Respondent was carrying out their mandate under the provision of Section 15 of the Land Registration Act to draw a Cadastral Maps during the surveying upon the request by the 1st to 9th Respondents and issue them with title deeds under Section 26 of the Land Registration Act and thus should not be condemned for carrying out their mandate.

15. The Petitioner had failed to demonstrate in his Petition how the Adjudication Committee erred in both law and fact in regard to the determination of the issue of ownership of Parcel land No. 2097 and 2028 as the matter had not as yet been heard and determined upon the appeal after various objections were made. He had failed to prove how his Constitution rights had been infringed and/or violated.

VIII. Submissions

16. On 6th October, 2021 while in the presence of all the parties herein, the Honorable Court directed all parties to canvass the said application dated 7th May 2021 by way of filing written submissions. Thereafter, all the parties obliged and a ruling date was reserved accordingly.

A. The Petitioner's Written Submission

17. On 13th October 2021, the Learned Counsel for the Petitioner, the Law firm of Messrs. Odhiambo S. E & Company Advocates filed their written submissions dated even date in support of the application. Mr. Odhiambo Advocate urged court to allow the application to conserve all the parcels of land known as Plots No. 2097, 3009, 3526, 3600, 3601 and 3602 Mwanda/Mbalemwani Adjudication Section pending the hearing and determination of the Petition. The Learned Counsel submitted that the acts of the 10th Respondents issuing title to the 1st to 9th Respondent is a reason enough to grant conservatory orders, less the Petition be rendered nugatory. The Learned Counsel further questioned why despite the 6th, 7th and 9th Respondents stating they bought their suit premises from the 1st Respondent who hived them from Plot No. 2097; the 1st Respondent has not responded to the application. The Learned Counsel further argued that the land adjudication exercise was not done in accordance with the law as the 1st Respondent sold off the suit premises despite the 10th Respondent addressing the Petitioner and the 1st Respondent to maintain the status quo of not having any land transaction on Plot No. 2097.

B. The 1st, 2nd, 4th, 6th, 7th and 9th Respondents' Written

Submissions

18. On 2nd November 2021, the Learned Counsels for the 1st, 2nd, 4th, 6th, 7th and 9th Respondents the Law firm of Messrs. B. W. Kenzi & Company Advocates filed their written submissions dated 28th October, 2021 to oppose the application. Mr. Kenzi Advocate submitted that the Petitioner was adjudicated Plot No. 2097 and the 1st Respondent challenged the decision of the committee vide committee case No. 220 of 2014 and the land was awarded to him. That the Petitioner filed a complaint with the Arbitration Board on 6th July 2015 but he never

pursued the arbitration and a decision was made in favour of the 1st Respondent, who had since sold the suit premises to the 2nd to 9th Respondents.

19. Instead of the Petitioner pursuing his complaint at Arbitration Board he filed Malindi ELC No. 315 of 2016 which was dismissed for want of prosecution as well as the Petitioner's application to reinstate the suit. That the 1st Respondent appeared before the committee at objection state on Objection 26 & 27 of 2019, where the Parcel No. 2097 was subdivided into parcels of land known as Plots 2097, 3600, 3601, 3602, 3603, 3526 which were later sold to the 2nd to 9th Respondents who are currently in occupation. The Learned Counsel argued that the Petitioner has never challenged the Respondents ownership to land before the adjudication officer therefore has no rights whatsoever to the suit premises.

20. The Counsel argued that the Petitioner had not exhausted all the laid down procedure founded in the Land Adjudication Act. He had also failed to adhere to the statute with regards to filing Appeals. The Counsel argued that where there is a clear procedure for the redress of any particular grievance in law, that procedure should be strictly followed. That the register has been closed and title deeds are being processed, so the Petitioner has not proved a prima facie case. That it's the Respondents who stand to suffer irreparable loss and the balance of convenience tilts to them since they are in occupation of the suit premises. He urged court to dismiss the application for the conservatory orders on the ground that the Petitioner has no prima facie case with probability of success.

IX. Analysis and determination

21. I have reused all the filed pleadings in this case, the written submissions, the cited authorities thereof and the relevant provisions of law hereof. In order to arrive at an informed, fair and just decision, the only main issue before court for determination is whether the court can grant conservatory orders and who meets the costs of the said application.

22. In the case of **Michael Osundwa Sakwa – Versus - Chief Justice and President of the Supreme Court of Kenya & another [2016] eKLR, Odunga J**, discussed the circumstances under which the court grants conservatory orders:-

“What then are the circumstances under which the Court grants conservatory orders? It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success. Accordingly in determining this application, the Court is not required- indeed it is forbidden- from making definite and conclusive findings on either fact or law. I will therefore refrain from making any determinations whose effect would be to prejudice the hearing of the main Petition. However, apart from establishing a prima facie case, the applicant must further demonstrate that unless the conservatory order is granted there is real danger which may be prejudicial to him or her.”

23. For court to grant conservatory orders, the Petitioner has to demonstrate that he has a prima facie case with a likelihood of success, and that unless the court grants the orders sought the Petitioner stands to suffer prejudice as a result of the violation or threatened violation of the constitution. In the case of **“The Centre for Human Rights and Democracy & Others – Versus - The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012**, it was held by a majority as follows:-

“In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission.”

24. The application has been brought under Order 40 Rule 1 and 4 of the Civil Procedure Rules, however conservatory orders cannot be sought as the interim temporary injunction is sought in civil cases under Order 40 of the Civil Procedure Rules. **“The Supreme Court in Gatirau Peter Munya – Versus - Dickson Mwenda Kithinji & 2 others [2014] eKLR** held that:-

“Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of “stay orders” is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light.

“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. While in the case of **“Judicial Service Commission – Versus – Speaker of the National Assembly & Another [2013] eKLR** the court expressed itself as follows in regard to Conservatory orders:

“Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words

they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”

26. With reference to the case of “*Michael Osundwa Sakwa (supra)*, I turn to the affidavit in support of the application, to establish whether the Petitioner has established a prima facie case with a likelihood of success and whether he has demonstrated that the conservatory order is granted there is real danger which may be prejudicial to him or her. A prima facie case is that case that discloses arguable issues and in the case of a constitutional Petition, arguable constitutional issues. According to the Petitioner, the Board’s failure to have the case heard and determined by the Arbitration board and the imminent possibility of the registration of the 2nd to 9th Respondents as the registered proprietors of the suit premises, was a violation of his right to access justice, and reasonable and procedural fair hearing and fair administrative action as provided by the provision of Articles 47, 48 and 50 of the Constitution of Kenya. He argued that if the 2nd to 9th Respondents are registered as the proprietors of the suit land his right to property will be infringed and urged court to halt the said exercise. Further the Petitioner maintained that he stands to suffer irreparable loss and injustice which cannot be adequately compensated by way of monetary damages and may led to further litigation to nullify and cancel the title deeds issued to the 2nd to 9th Respondents.

27. It’s crucial to point out that the requirements that the petitioner is required to prove in order to be granted a grant of conservatory order must be weighed on the principle of public interest. As held by the Supreme Court in the case of “*Peter Munya (supra)*, Conservatory orders are not interlocutory injunctions that are linked to private rights. They are granted on the inherent merit of the case, bearing in mind the public interest and constitutional values. There is no aspect of public interest in this case, dispute is on ownership of the suit premises between private persons. Apart from himself, the Petitioner has not pointed out with reasonable exactitude the rights and fundamental freedoms in the Bill of Rights of other persons which he alleges to have been denied, violated or infringed or are threatened in order to justify the grant of conservatory orders. There is no single ground raised on public interest and as such the application fails, the petitioner was better placed seeking interlocutory injunction orders.

28. For a successful invocation of Article 23 of the Constitution of Kenya, the Petitioner ought to have brought himself to the provisions of Article 22 of the Constitution which he failed to do. Odunga J in “*Michael Osundwa Sakwa (supra)*, held that:-

“In my view, an applicant for conservatory order under Article 23 (2)(c) of the Constitution ought to bring himself or herself within the provisions of Article 22 of the Constitution by pleading and establishing on a prima facie basis that his right or fundamental freedom in the Bill of Rights or those of other persons have been denied, violated or infringed, or is threatened.”

29. The mere failure by a public authority such as the 10th Respondent to comply with the law does not necessarily mean violation of fundamental rights and freedoms. There are laid procedures that ought to be followed in the adjudication process and the appeal processes, if any step is omitted, does that mean it’s a human rights violation? I do not think so, there are ordinary ways for seeking judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.

X. Conclusion & Disposition

30. Based on the indepth and detailed analysis done here, the Honourable Court proceeds to make the following orders:-

- a) **THAT the Notice of Motion application dated 7th May 2021 be and is hereby dismissed with costs to the 1st to the 9th Respondents.**
- b) **THAT for expediency sake, the main Petition dated and filed on 7th May, 2021 to be fixed for hearing on 22nd September 2022 and to have been determined within the next Ninety (90) days from the date of this ruling by both adducing of Viva Voce evidence and affidavits.**
- c) **THAT the Costs of this Application to be borne by the**

Petitioner.

31. **IT IS ORDERED ACCORDINGLY.**

DATED, SIGNED AND DELIVERED AT MOMBASA THIS4THDAY OFAPRIL..... 2022.

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIROMNENT AND LAND COURT

MOMBASA

In the presence of:-

M/s. Yumnah, Court Assistant.

No appearance for the Petitioner.

No appearance for the 1st to 9th Respondents.