



REPUBLIC OF KENYA



KENYA LAW
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**Henry & another v M'Anampiu & another (Petition
E001 of 2022) [2022] KEELC 2595 (KLR) (18 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2595 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
PETITION E001 OF 2022
CK NZILI, J
MAY 18, 2022
IN THE MATTER OF ARTICLE 22 (1) OF THE CONSTITUTION OF
KENYA
AND
IN THE MATTER OF ALELGED CONTRAVENTION OF RIGHTS OF
FUNDAMENTAL FREEDOMS UNDER ARTICLES 40 AND 50 OF THE
CONSTITUTION OF KENYA**

BETWEEN

LOISE GACEKE HENRY 1ST PETITIONER

MICHAEL RIMBERIA 2ND PETITIONER

AND

SAMWEL KIRERIA M'ANAMPIU 1ST RESPONDENT

**LAND ADJUDICATION AND SETTLEMENT OFFICER, RUIRI/RWARERA
ADJUDICATION SECTION 2ND RESPONDENT**

RULING

A. The Application

1. By an application dated 8.2.2022 the court is requested to grant interim orders of stay of the implementation of the decision made by the 2nd respondent in objection no. 520 pending the hearing and determination of the petition. The application is based on the grounds on the face of it and the supporting affidavit sworn on 27.1.2022 by Michael Rimberia. The reasons given are that the suit property was recorded in the name of the applicant's deceased father Girishon Rimberia Mugaine alias Gelishon M'Rimberia who has been in exclusive possession of the same and after his demise the



petitioners continued with the occupation. That if the decision was implemented there was likelihood of the petitioner losing the land and hence suffering immense loss.

B. Grounds of Opposition

2. The application was opposed by the 1st respondent through a replying affidavit sworn on 23.2.2022, based on the grounds set out in the replying affidavit to the petition.
3. It was averred that the 1st respondent bought 15 acres from the deceased in 1982 for Kshs.13,500/=, took vacant possession as per the sale agreement and acknowledgment receipts attached with effect from 14.7.1983 and has all along been in occupation of the land now known as L.R Ruiru/Rwarera/529 where he has also installed water form Gaitenga water project. The annexures were marked SKM 1-3 (a) and (b) respectively.
4. It was averred in 2003 the 1st respondent applied for the transfer of 15 acres for L.R NO. Ruiru Rwarera/529 and filed an objection because the deceased passed on 1996 before transferring the land to him.
5. Further it was averred that the 1st respondent had built a semi-permanent house and allowed his relatives to utilize 3 acres from his portion while the deceased, his family had been utilizing their portion without interruptions and that during the lifetime of the deceased there had been no conflict as to the said arrangement.
6. It was averred the family of the deceased was fully represented during the objection and tendered evidence whereof it was established that there was a valid sale agreement with effect from 18.10.1982 following the award of the land, pending the issuance of a title deed.
7. The 1st respondent averred upon the determination of the objection the deceased family was informed about the right of appeal but has been filed and given the orders sought there was need for a scene visit to establish the status quo since it was not true the deceased was in exclusive control of the land. On the contrary it was averred that the fifteen acres were clearly marked on the ground.
8. It was averred the applicants who were his relatives had not suffered any loss or damage and their intention was to enter into and evict him from his portion before the matter was heard and determined hence urged the court to find the threshold of a grant of conservatory order had not been met.
9. The 1st respondent averred the applicants had failed to follow the law, and that he had demonstrated anything to warrant him the issuance of conservatory orders or a prima facie stopping the implementation of the decision.

C. Written Submissions

10. By written submissions dated 24.3.2022 the petitioners urge the court to grant conservatory orders to arrest the implementation of the decision in which the 1st respondent was trying to enforce a contract entered into with the deceased, enforced without a legal representative.
11. The petitioners submitted the claim by the 1st respondent was not one of the ascertainment of interest as envisaged by the Land Adjudication and urged to find that this was a unique case where the 1st respondent failed to lay his claim the *Land Adjudication Act* under Section 3 thereof when the area was declared an adjudication section 5 so that his claim could be handled by the established organs.
12. The petitioners submitted that the 1st respondent had been silent on when the subject area was declared an adjudication section, if he lodged any claim, the outcome of the same, if the adjudication register



was completed so that the alleged objection could be lodged and or whether the objection was preceded by the publication of the adjudication register.

D. The Petition

13. The basis of this application is the petition dated 27.1.2022 in which the petitioners describing themselves as legal representatives of the estate of the deceased bring the same on their behalf and for the benefit of the estate thereof regarding the suit property recorded in the name of the deceased said to have passed on 19.10.1986 before the completion of the adjudication process in Ruiru Rwarera adjudication section.
14. The bone of contention is the objection no. 520 brought by the 1st respondent before the 2nd respondent and which the record indicates that the estate of the deceased was represented during the hearing by Douglas Kirimi Rimberia and Obadiah Thurunira as sons of the deceased, now alleged to have had no authority to deal with the issue of ownership of the deceased property, since the family had not settled on a legal representative then and whose participation without authority is alleged disadvantaged the estate.
15. It was averred that the 2nd respondent before hearing objection ought to have ascertained the status of the persons purporting to represent the deceased and by proceeding to do without that, the estate of the deceased was disadvantaged and risked losing a huge chunk of the land.
16. The court is urged to quash the decision and direct the 2nd respondent to hear the objection afresh. The petition is supported by an affidavit of the 1st petitioner attaching a copy of the limited grant of letters of administration ad litem issued in Meru CMCC Misc. Succession No. 177 of 2021 on 24.1.2022 and copy of the proceedings of 1.7.2020 and the decisions thereof annexed as MR “1” and “II” respectively.
17. The petition alongside the notice of motion dated 27.1.2022 were served upon the respondents on 16.2.2022. The 1st respondent filed a response on 2.3.2022 acknowledging that the deceased was his first cousin and a close relative.
18. It was averred that in 1982 the deceased’s ancestral land of Chunga area was being sold through a public auction by Agricultural Finance Corporation (AFC) and as a family a solution was found out to stop the auction hence the basis of the agreement for sale which was made after a meeting between M’Thuranira Rukunga, the deceased and one Julius Kiunga.
19. The 2nd respondent has not filed any response to both the petition and the application herein.

E. Issues for Determination

20. The issue commending themselves for determination are: if the petitioners are entitled to stay orders or conservatory orders.
21. The petitioners urged the court to grant a stay of the implementation of the decision made by the 2nd respondent pending the hearing and determination of the petition.
22. Reliance was placed on *Rep vs Land adjudication office Tigania East and another exparte Lydia Mukuba Ntika* (2018) eKLR and Meru ELC JR II of 2018. *Rep vs Tigania East DLASO exparte joseph Kubai Tarichia; Peter Mukondo (interested party)*.
23. In the two cited cases the court was dealing with an application brought under Order 53 *Civil Procedure Rules* and Section 8 and 9 *Law Reform Act* where leave had already been sought and obtained.



24. In this application the court has been approached through a constitutional petition brought under Articles 22 (1), 40 and 50 the Constitution of Kenya 2010.
25. Further the court has been moved under Rule 24 of the Constitution of Kenya Protection of Rights and Fundamental Freedoms (Practice and Procedure Rules, 2013) hereinafter Mutunga Rules for interim orders pending the hearing and determination of petition.
26. Rule 23 of the Mutunga Rules provides that a court before which a petition under Rule 4 is presented shall hear and determine an application for conservatory or interim orders under Rule 22.
27. Even though the application has invoked the wrong rule under Rule 3, the court is mandated to administer justice without undue regard to procedural technicalities and to do substantive justice guided by Sections 1A, 1B of the Civil Procedure Act and Article 159 of the Constitution as held in Abok James Odera t/a AJ Odera and Associates vs John Patrick Machira t/a Machira & co advocates (2013) eKLR.
28. Coming to the issue as to whether the petitioners are entitled to stay a of the implementation of the impugned decision, or not whereas the proceedings leading to the decision were done on 1.7.2020 as per annexure marked MR II and confirmed by the 1st respondent in the replying affidavit to the notice of motion as annexure marked SKM “6”, the date when the decision was made is not indicated at the end of the proceedings.
29. None of the parties herein have also specifically indicated the said date. That notwithstanding the stamp by the District Land Adjudication and Settlement Officer Meru central and the signature thereto is dated 21.12.2020. It is therefore not clear if the decision made by the land adjudication officer sued herein as the 2nd respondent was ever signed by the officers and or was left to be signed by the District Land and Settlement Officer.
30. Besides this and what is of importance at this stage is the date of the decision given there was indication that the aggrieved party, the petitioners were granted sixty days as per the record to lodge an appeal with the minister.
31. Going by the annexed summons dated 13.3.2020 as SKM”5” to the replying affidavit by the 1st respondent it is apparent that this was an A/R objection under the Land Adjudication Act Cap 284 Laws of Kenya.

F. The Threshold of a Conservatory Order

32. A party seeking conservatory orders must show to the satisfaction of the court that his or her rights are under threat of violation and that such violation or threat is likely to continue unless a conservatory order is granted. The purpose of conservatory order is simply to prevent the violation of rights and freedoms pending the hearing of the petition.
33. In CREAW and 7 others AG (2011) eKLR Musinga J as he then was now a Judge of Appeal held a party at this stage has only to demonstrate that the has a prima facie case with a likelihood of success and that unless conservatory orders issue there is real danger that he will suffer prejudice as a result of the violation.
34. In Center for Human rights and Democracy and another vs The Judges and Magistrates Vetting Board and 2 others (2013) eKLR the court held where a legal wrong or legal injury was caused to a person by reason of violation of a constitutional right or legal right, the court has power to grant on appropriate relief 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 hence an interim protection would be in order not to expose that person to preventable perils or risks by in action or omission.
35. In *Judicial Service Commission vs Speaker of the National Assembly and another* (2013) the court held conservatory orders are not ordinary civil law remedies but remedies under *the Constitution*, not between individuals but are meant to keep the subject matter of the dispute in situ. The court said such remedies are in rem on not in persona.
 36. In *Gatirau Peter Munya vs Dickson Mwenda Kibitnji & 2 others* (2014) eKLR the Supreme Court of Kenya held conservatory orders bear a public law connotation aimed at facilitating ordered functioning within public agencies as well as in upholding adjudicatory authority of the court in the public interest.
 37. The court held conservatory orders should be granted on the inherent merits of the case bearing in mind the public interest, the constitutional values, the proportionate magnitude and the priorities attributable to the relevant causes.
 38. Applying the above principles to the instant case it is not in dispute that there was A/R objection was decided in favour of the 1st respondent.
 39. The applicants herein averred that it came to their knowledge there was such a dispute and the persons who allegedly represented them were not authorized by the family to undertake it and that the 2nd respondent should have ascertained the capacity of the said representatives to represent the interests of the estate of the deceased.
 40. The petitioners based their claims given on limited grant issued on 24.1.2022. The petitioners had the duty and obligation to explain the delay in coming to court to stay a decision which was certified by the 2nd respondent on 21.12.2020. The petitioners have not disclosed when they came to know of the existence of the decision and for that matter when and how they were able to obtain MR (II) annexed to the petition.
 41. Further and given the purpose of conservatory orders in *Gatirau Peter Munya decision* (supra), the court has to be mindful of the public interest and the proper functioning of adjudicating bodies.
 42. It was expected of the petitioners to have brought before this court information on the current status of the adjudication process. There is nothing brought before this court to show that the deceased was the recorded owner of the suit land by way of adjudication records and maps.
 43. Further and given the respondents to objection no. 520 were granted 60 days to lodge an appeal to the Minister, the petitioners herein should have done more to demonstrate to the court that there is a real danger of threat to their constitutional rights, if the decision made over two years ago is not stayed.
 44. The suit land was governed by the *Land Adjudication Act*. A/R objection are determined and records forwarded to the Director of Land Adjudication and Settlement Officer for onward transmission to the Chief Lands Officer for the titling process.
 45. In this application all this information is missing. There is nothing to show that the petitioners have been notified that there would be implementation of the decision on the ground.
 46. The question this court has to answer is what would be achieved by the order of stay at this stage given the inordinate delay in seeking for the orders and the missing information on the status of the adjudication process? Secondly is whether there will be any prejudice to the petitioners if the orders of stay are not granted. The 1st respondent in response to this application has stated the step reached so far in the adjudication stage is the titling by the Chief Land Registrar



47. On the other hand the petitioners have not given this court any information on the imminent danger, threat or prejudice at the moment.
48. In my view even if the title deeds were to be issued in favour of the 1st respondent, the petitioners still retain the constitutional right to question the legality and the appropriateness of the same if the petition herein was to be found with merit.
49. Therefore I am unable to see how the petitioners would benefit from a conservatory order of stay of the implementation of the decision given the sixty days of appeal with effect from 21.12.2020 are long overdue and the titling entities under the Land Registration Act 2012 have not been joined to this petition, who would in essence be the parties to be bound by conservatory orders if the court were to find petitioners deserving the orders. See Board of Management of Uburu Secondary School vs City county director Education and 2 others (2005) eKLR and the Law Society of Kenya Vs Officer the AG & another, Judicial Service commission (interested party) 2020 eKLR.
50. In the circumstances I disallow the application with no orders as to costs. The petition shall be listed for hearing on priority basis.
51. Meantime the status quo subsisting on the suit land to remain with each party remaining on their respective portion of land.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 18TH DAY OF MAY, 2022

In presence of:

Ringera for applicant

Mukaburu for 1st defendant

Kieti for 2nd defendant

HON. C.K. NZILI

ELC JUDGE

