



Johnson Nduya Muthama Holdings Limited v Musomba & 5 others; National Environment and Management Authority (Interested Party) (Environment & Land Petition E012 of 2021) [2022] KEELC 2647 (KLR) (18 May 2022) (Ruling)

Neutral citation: [2022] KEELC 2647 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND PETITION E012 OF 2021

A NYUKURI, J

MAY 18, 2022

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2, 3, 10, 22, 23, 27(1) (2), 40, 42, 48, 69, 70 AND 258 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF RULES 4, 10, 11, 13, 19, 20, 23, 24 (1) OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013

AND

IN THE MATTER OF THE VIOLATION OF THE PETITIONER'S ENVIRONMENTAL RIGHTS AND QUIET & PEACEFUL ENJOYMENT OF PROPERTY

BETWEEN

JOHNSON NDUYA MUTHAMA HOLDINGS LIMITED PETITIONER

AND

FRANCIS MULWA KAVOI MUSOMBA 1ST RESPONDENT

JOSEPH NZYOKA MUSOMBA 2ND RESPONDENT

MUTHOKA MATAKA SOO 3RD RESPONDENT

ALBANUS MUASA KAVOI 4TH RESPONDENT

MBITHI NGULUKYO 5TH RESPONDENT

DANIEL MUTISO MATAKA 6TH RESPONDENT

AND



RULING

Introduction

1. Vide an application dated July 29, 2021, the Petitioner/Applicant sought for the following orders;
 - a. Spent.
 - b. Spent.
 - c. That pending the hearing and determination of this petition, the Honourable court be and is hereby please to issue a conservatory order temporarily restraining the Respondents and/or their agents, employees, servants or people acting under their instructions or servants from continued and/or further dumping of human waste, as well as any other form of interference and/or damage, round the petitioner/Applicant's properties known as Matungulu/Kyaume/2744 (measuring approximately 0.091 ha); Matungulu/Kyaume/2742 (measuring approximately 1.324ha);Matungulu/Kyaume/2743 (measuring approximately 0.783 ha); all located within Machakos County.
 - d. That costs be provided for.
 - e. Any other order that this court will deem fit and just to issue in the circumstances.
2. The application is premised on the supporting affidavit of Wilson Mwaniki Ngumbi, the General Manager of the Petitioner/Applicant. The Applicant avers that he is the registered proprietor of Matungulu/Kyaume/2744 (measuring approximately 0.091 ha), Matungulu/Kyaume/2742 (measuring approximately 1.324ha) and Matungulu/Kyaume/2743 (measuring approximately 0.783 ha) (herein after referred to as the suit properties); that on 5th October 2016, the Respondents trespassed on the suit properties and had attempted to cut down trees thereon, which prompted the Petitioner to obtain an injunction against them in Machakos ELC NO. 39 of 2020; that to unscrupulously circumvent the orders of injunction mentioned above, the Respondents brought an exhauster upon the Applicant's property and dumped raw human excrement around the said property, thereby endangering the environment as well as public health and safety; that the Petitioner's workers and neighbours have endured months of stench and noxious gases from the human waste; that the raw waste is interfering with the petitioner's quiet enjoyment of his property and destroying the Petitioner's fence and that conservatory orders are necessary to protect the health of those on and near the suit property and the environment.
3. Francis Mulwa Kavoi, the 1st Respondent, filed a replying affidavit sworn on 27th September 2021, on his own behalf and on behalf of his co-Respondents, in opposition of the application. He averred that the Respondents have never trespassed on the suit property; that the petition has been filed out of malice and mischief as the 2nd Respondent is deceased; that there is no evidence presented by the applicant to show that trees on the suit properties have been cut down or that raw waste was placed on the suit properties, and that the photographs presented do not prove the allegations of the Petitioner; that the orders sought are similar to those granted in Machakos ELC NO. 39 of 2020; that the suit properties were obtained unscrupulously; that the Petitioner does not deserve equitable orders sought for coming to court with unclean hands; that the Applicant has lodged case No. ELC 35 of 2020 at Kangundo Law Courts, ELC 39 of 2020 at Machakos Law Courts, Criminal cases 1244 of 2019 and



269 of 2020 and that the said cases are malicious and meant to frustrate the Respondents and that the application is an abuse of the court process.

4. The application was canvassed by way of written submissions. On record are the Applicant's submissions filed on 1st November 2021 and the 1st, 3rd to the 6th Respondents' submissions filed on 2nd March 2022.

Applicants' Submissions

5. Counsel for the Applicant relied on the case of *E.W. A & 2 Others v Director of Immigration and Registration of Persons & Another* [2018] eKLR, to argue that Article 23 of *the Constitution* empowers the court to grant appropriate relief including conservatory orders for purposes of enforcing fundamental rights and freedoms. Counsel argued that the decision in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR, set out the test for grant of conservatory orders; and argued that where the suit is arguable and it is in the public interest to grant such orders, then the court may grant the same.
6. Counsel further submitted that for an applicant to be granted conservatory orders, they must demonstrate a prima facie case and show that there is real danger if violation of the right happens. To buttress this argument, counsel referred to the cases of *Centre for Rights Education and Awareness (CREAW) v Attorney General* [2011] eKLR and *George Mike Wanjohi v Stephen Kariuki* [2014] eKLR.
7. It was further argued for the Applicant that the petition herein is arguable with high probability of success and that an arguable petition is one which elicits cognizable constitutional controversies, just like in this matter. Counsel observed that the cognizable constitutional controversy generated from the petition herein are the facts that the Respondents have dumped raw human excrement around the petitioner's property, which has exposed the people staying on the property and near the property to become sickly, which may lead to death.
8. Counsel urged the court to interpret *the Constitution* in a manner that favours the enjoyment of the right and freedoms to the fullest measure and placed reliance on the case of *Jacqueline Okuta & Another v Attorney General & 2 Others* [2017] eKLR. In conclusion counsel emphasized the fact that the Respondents' acts led to the pollution of the environment.

Respondents' submissions

9. Counsel for the Respondent relied on sections 107, 108 and 109 of the *Evidence Act*, and submitted that there was no proof that the Respondents had trespassed on the Applicant's property and placed human excrement thereon. Counsel pointed out that the applicant's annexure 3, which are photographs, do not show any trace of any human waste as alleged by the applicant, and therefore his contentions are baseless.
10. It was further argued for the Respondents that some of the Respondents moved to Masinga in the 1970s and that the 2nd Respondent is deceased; hence the suit and the application are filed out of malice. Further, counsel contended that the orders sought herein are similar to those in ELC NO. 39 of 2020 and ought not be granted as the Applicant has failed to make full and frank disclosure. Counsel referred the court to the decisions in *Republic v Kenya Power & Lighting Co. Limited Exparte Corner Electrical Contractors Limited & 3 Others* [2015] eKLR, *Lopesia Group Ranch v Kamanga Holdings Limited & 43 Others* [2022] eKLR and *Joseph Kimata Wachira & Another v Wilson Waitbaka Gitau & Another* [2021] eKLR, for the proposition that filing the petition herein while ELC 39 of 2020 was pending,



amounts to an abuse of the court process. Counsel stated that a multiplicity of suits is a waste of judicial time and may embarrass the courts for issuing conflicting decisions.

11. While relying on the decisions in the cases of *Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others* [2015] eKLR, *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 Others* [2014] eKLR, and *Centre For Rights Education and Awareness (CREAW) v Attorney General* [2011] eKLR counsel contended that for conservatory orders to be granted, the applicant must show that they have an arguable prima facie case with a likelihood of success and that they will suffer prejudice if conservatory orders are not granted.
12. Counsel also submitted that the Petitioner had not demonstrated that they had an arguable case in regard to the question of ownership of the suit properties as the same were owned by the Respondents, who hold the original titles. Counsel concluded that the application ought to be dismissed for being frivolous, lacking merit, being sub judice and that the Applicant has not met the threshold for grant of conservatory orders.

Analysis and Determination

13. I have considered the application, the affidavit in support, the replying affidavit as well as submissions and authorities relied upon by the parties. The issue that arise for determination is whether the applicant has met the threshold for grant of conservatory orders.
14. Article 42 of *the Constitution* protects every person's right to a clean and healthy environment. As regards enforcement of environmental rights, Article 70 of *the Constitution* provides as follows;
 1. If a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.
 2. On application under clause (1), the court may make any order, or give any directions, it considers appropriate—
 - a. To prevent, stop or discontinue any act or omission that is harmful to the environment;
 - b. To compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or
 - c. To provide compensation for any victim of a violation of the right to a clean and healthy environment.
 3. For purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.
15. Rule 23 (1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013;
 1. Despite any provision to the contrary, a judge before whom a petition under Rule 4 is presented shall hear and determine an application for conservatory or interim orders.
16. It is therefore clear that where a person's right to a healthy environment is denied, violated, infringed or threatened, this court has the power to issue interim or conservatory orders so as to prevent, stop or discontinue any act or omission that is harmful to the environment. For purposes of enforcing environmental rights, the applicant need not demonstrate any actual loss or injury.



17. The Applicant's case is that although they are the registered proprietor of the suit properties, the Respondents dumped raw human excrement on the fence of their property which has led to a horrid stench and harmful gases, which has for several months detrimentally affected the environment and the health of persons resident on those properties as well as their neighbours. In response, the Respondents have countered that argument by stating that the issue of ownership of the suit property is a matter pending determination as the Respondents are holding the original titles to the suit properties as the Applicant's registration thereof was unlawful.
18. I must point out at this stage that as the Plaintiff's claim is for violation of the right to a clean and healthy environment, and therefore the question as to whether the suit properties are in the Applicant's name is immaterial. As stated in Article 70 of *the Constitution*, an Applicant need not prove loss or injury to enforce the right to a clean and healthy environment. Even if the issue of ownership of the suit properties is still unresolved, or in the event the resolution is in favour of the Respondents, that does not militate against the applicant's right to a clean and healthy environment in the context of the suit properties and their environs. The Applicant need not prove that they own the suit property to have their environmental rights protected by judicial intervention. It is enough that they have environmental rights to a clean and safe environment wherever they are within the Republic of Kenya, whether on their land or otherwise.
19. For a court to grant conservatory orders in a constitutional petition, the applicant must demonstrate a prima facie petition with a probability of success. As conservatory orders are equitable orders, the applicant ought to also demonstrate that their hands are clean.
20. In the case of *Peter Gatirau Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR, the Supreme Court held as follows;

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.
21. Similarly, in the case of *Centre for Rights Education and Awareness (CREAW) & 7 Others v Attorney General* [2021] eKLR, the court held as follows;

At this stage, a party seeking a conservatory order only requires to 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*.
22. In the instant application, the applicant argued that the Respondents dumped raw human excrement on their property which has led to a stench and noxious gases, detrimentally affecting the environment, their fence, their land and the health of persons resident on those properties as well as their neighbours for several months. I note that the Applicant has not stated when the dumping was done. They only stated that the stench has been there for months. The Applicant attached seven photographs in demonstrating that raw human excrement was dumped on their land. From the certificate by Wilson Mwaniki Ngumbi, prepared under section 106 of the *Evidence Act*, the photographs are said to have been taken on 24th July 2021. They are photographs of barbed wire and live fences. I have looked at the said photographs and the same do not show any the human excrement as alleged by the Applicant.



23. The Respondents have denied ever trespassing on the Applicant's land. They have also denied dumping human excrement thereon. They contend that there is no truth in the applicant's application as the 2nd Respondent passed away while the 3rd and 6th Respondents reside in Masinga and not in Tala. These averments that the second Respondent is dead and therefore could not have trespassed or dumped human excrement on the applicant's land have not been controverted.
24. While at this stage, not all the facts of the case are brought forward, it is incumbent upon the Applicant to demonstrate that they have an arguable petition with high chances of success. In this matter, there is no evidence that there was dumping of raw human excrement on the applicant's property, and I am not persuaded that the Respondents dumped raw human excrement on the applicant's property. In the premises, the applicant has failed to demonstrate the existence of a prima facie case with a probability of success.
25. I therefore find and hold that the application dated 29th July 2021 lacks merit and the same is dismissed with costs to the 1st, 3rd, 4th, 5th and 6th Respondents.
26. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 18TH DAY OF MAY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Ms. Masaki holding brief for Mr. Omari and Mr. Wambui for the Petitioner/Applicant

Mr. Were for the 1st, 3rd, 4th, 5th and 6th Respondents

Kevin Kimari – Court Assistant

