



**PKA (Suing on her behalf and as next friend of her Minor Children)  
v NCBA Bank Kenya PLC & 3 others (Environment & Land Petition  
17 of 2020) [2022] KEELC 3271 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3271 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION 17 OF 2020  
SO OKONG'O, J  
JULY 28, 2022**

**BETWEEN**

**PKA (SUING ON HER BEHALF AND AS NEXT FRIEND OF HER MINOR  
CHILDREN) ..... PETITIONER**

**AND**

**NCBA BANK KENYA PLC ..... 1<sup>ST</sup> RESPONDENT**

**MICHAEL ANGAYA ARUNGA ..... 2<sup>ND</sup> RESPONDENT**

**ATHINYA MUTHURI HARON ..... 3<sup>RD</sup> RESPONDENT**

**PURPLE ROYAL AUCTIONEERS ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. By a petition dated March 3, 2020, the Petitioner sought the following reliefs against the Respondents;
  - i. A declaration that Article 27 of the Constitution is under threat of violation by the Respondents.
  - ii. A declaration that the rights of the Petitioner and her children guaranteed under Articles 40 and 53 of the Constitution are under threat of violation by the Respondents.
  - iii. Interpretation of the letter of offer dated February 12, 2014 issued by the 1<sup>st</sup> Respondent and executed by the Petitioner and the 2<sup>nd</sup> Respondent.
  - iv. An injunction stopping the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents either by themselves, their agents, workers and/or anyone claiming through them from concluding a sale and/or transferring the property known as L R No Kiambaa/Kihara/2861(hereinafter referred to as “the suit property”) to the 3<sup>rd</sup> Respondent or any other person.



v. A declaration that any sale in respect of the suit property was in contravention of the rights of the Petitioner and her children and as such null and void.

vi. An order prohibiting the Respondents from continued infringement of the rights of the Petitioner by discriminating and interfering with her quiet possession and enjoyment of her home on the suit property.

vii. An order directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to open a mortgage account, reconcile accounts in respect to the mortgage and forward all communication in respect to the said account with bank statements to the Petitioner.

viii. Costs of the petition.

ix. Any other relief that the court may deem fit and just to grant.

2. The Petitioner amended her Petition on April 7 2020. The reliefs sought were not changed in any material respect save that in place of an injunction, the Petitioner sought a conservatory order. What I now have before me are two applications by the Petitioner. The first application was brought together with the original petition by way of Notice of Motion dated March 3, 2020. In the application, the Petitioner sought the following orders;

1. That the court do issue conservatory orders granting a stay of the intended sale purported to emanate from the unlawful and/or unprocedural auction that took place on February 20, 2020, the payment of the balance of the purchase price, transfer and/or any other dealings with the suit property and any further infringement of the rights of the Petitioner and her children by the Respondents, their agents and/or servants pending hearing and determination of this petition.

2. That the costs of the application be provided for.

3. The application that was supported by the affidavit of the Petitioner sworn on March 3, 2020 was brought on several grounds. The Petitioner averred that together with the 2<sup>nd</sup> Respondent, they took a loan from the 1<sup>st</sup> Respondent that was secured by a mortgage over the suit property that was registered in their joint names. The Petitioner averred that since the 1<sup>st</sup> Respondent failed to open a joint mortgage account in her name and that of the 1<sup>st</sup> Respondent, she was kept in the dark with regard to the repayment of the loan and the balances in respect thereof. The Petitioner averred that the 1<sup>st</sup> Respondent instructed the 4<sup>th</sup> Respondent to sell the suit property through public auction. The Petitioner averred that the 4<sup>th</sup> Respondent advertised the suit property for sale by public auction on February 20, 2020 but ended up selling the property to the 3<sup>rd</sup> Respondent by private treaty at a paltry sum of Kshs 22,400,000/-. The Petitioner averred that the suit property had been valued in April 2019 at Kshs 87,500,000/- being the open market value and Kshs 65,625,000/- as the forced sale value. The Petitioner averred that the purported sale of the suit property was a sham and as such null and void. The Petitioner averred that she was apprehensive that the 1<sup>st</sup> Respondent would proceed and transfer the suit property to the 3<sup>rd</sup> Respondent on the basis of the said stage managed purported auction at the detriment of the Petitioner unless stopped by the court.

4. The Petitioner averred that her right to information and ownership of the suit property had been infringed by the Respondents. The Petitioner averred that she had been treated with contempt by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in that they refused to supply her with the statements of the loan account. The Petitioner averred that the 2<sup>nd</sup> Respondent was less bothered with the 1<sup>st</sup> Respondent's said acts of aggression and had even threatened to divorce the Petitioner. The Petitioner averred that if the orders sought were not granted, the petition would be rendered nugatory.



5. The 1<sup>st</sup> and 4<sup>th</sup> Respondents opposed the application through a replying affidavit sworn by Dr Jacob O Ogola on March 10, 2020. The 1<sup>st</sup> and 4<sup>th</sup> Respondents termed the Petitioner’s application bad in law and an abuse of the process of the court. The 1<sup>st</sup> and 4<sup>th</sup> Respondents averred that the issues raised in the petition were substantially in issue between the same parties in ELC Suit No 4 of 2018(hereinafter referred to as “the ELC Suit”). The 1<sup>st</sup> and 4<sup>th</sup> Respondent averred that the Petitioner and the 2<sup>nd</sup> Respondent sought orders in the said ELC Suit to stop the sale and transfer of the suit property to the 3<sup>rd</sup> Respondent but the court declined to grant the orders in light of the fact that the suit property had already been sold. The 1<sup>st</sup> and 4<sup>th</sup> Respondents averred that after the sale of the suit property, the Petitioner and the 2<sup>nd</sup> Respondent amended their plaint in the ELC Suit and claimed reliefs similar to those sought in the petition herein.
6. The 1<sup>st</sup> and 4<sup>th</sup> Respondents averred that the issues raised by the Petitioner as grounds in support of the present application were raised in the ELC Suit and considered by the court in a ruling that was delivered on January 24, 2019 and as such the same were *res judicata*. The 1<sup>st</sup> and 4<sup>th</sup> Respondents averred that the Petitioner and the 2<sup>nd</sup> Respondent were given ample time by the 1<sup>st</sup> Respondent to clear the loan arrears but failed to do so. The 1<sup>st</sup> and 4<sup>th</sup> Respondents denied that they sold the suit property at undervalue. The 1<sup>st</sup> and 4<sup>th</sup> Respondents averred that the valuation report that was relied on by the Petitioner in support of that assertion was retracted by the valuer concerned and the Petitioner and the 2<sup>nd</sup> Respondent were duly notified. The 1<sup>st</sup> and 4<sup>th</sup> Respondents denied that the public auction that was conducted by the 4<sup>th</sup> Respondent was a sham. The 1<sup>st</sup> and 4<sup>th</sup> Respondents averred that the Petitioner’s right to property must be weighed against the rights of the 1<sup>st</sup> Respondent as a chargee to exercise its statutory power of sale in the event of default by the Petitioner and the 2<sup>nd</sup> Respondent to pay the outstanding loan. The 1<sup>st</sup> and 4<sup>th</sup> Respondents contended that the exercise of such power could not constitute a violation of the Petitioner’s property rights. The 1<sup>st</sup> and 4<sup>th</sup> Respondents averred that they did not have an obligation to provide the Petitioner and her children with shelter which obligation was upon the state under Article 43 and 53 of the Constitution. The 1<sup>st</sup> and 4<sup>th</sup> Respondents averred that the issue of the legality of the auction sale of the suit property was pending determination in the ELC Suit and as such the same could not be determined in parallel proceedings brought by the Petitioner herein.
7. The Petitioner filed a further affidavit sworn on April 7, 2020 in response to the affidavit filed by the 1<sup>st</sup> and 4<sup>th</sup> Respondents. In the affidavit, the Petitioner to a large extent reiterated the contents of her affidavit in support of the application. The Petitioner contended that she had raised constitutional issues that this court had no jurisdiction to determine in the ELC Suit. The Petitioner denied that the issues raised in this petition had been raised and determined in the ELC Suit.
8. I have not seen on record a response by the other Respondents to the application dated March 3, 2020.
9. The Petitioner’s second application was brought by way of Notice of Motion dated March 14, 2022. In the application, the Petitioner sought the following orders;
  1. That the court does issue an injunction against the 3<sup>rd</sup> Respondents’ agents and servants from continuing to distress for rent against the Petitioner pending the hearing and determination of the application for conservatory orders dated March 3, 2020 scheduled for ruling on July 28, 2022.
  2. That the court does issue such directions as it deems fit for the expeditious hearing and determination of the petition.
  3. That the costs of the application be provided for.



10. The application dated March 14, 2022 that was supported by the affidavit of the Petitioner of the same date was brought on the grounds that the 3<sup>rd</sup> Respondent had purported to levy distress against the Petitioner while the Petitioner had no tenant and landlord relationship with the 3<sup>rd</sup> Respondent. The Petitioner contended that there was an application for conservatory orders pending ruling on July 28, 2022. The Petitioner averred that the 3<sup>rd</sup> Respondent had not responded to the petition and that save for the preliminary objection to the petition dated March 7, 2020, the 3<sup>rd</sup> Respondent had not filed any other pleading in the matter. The Petitioner averred that it had established a *prima facie* case against the Respondents with a high probability of success.
11. The application was opposed by the 1<sup>st</sup> and 4<sup>th</sup> Respondents and the 3<sup>rd</sup> Respondent by separate grounds of opposition. The 1<sup>st</sup> and 4<sup>th</sup> Respondents filed grounds of opposition dated March 21, 2022. The 1<sup>st</sup> and 4<sup>th</sup> Respondents contended that the Petitioner had no interest in the suit property having lost her right to equity of redemption upon the sale of the suit property. The 1<sup>st</sup> and 4<sup>th</sup> Respondents averred that the 3<sup>rd</sup> Respondent was a bona fide owner of the suit property having purchased the same at a public auction and was protected by law. The 1<sup>st</sup> and 4<sup>th</sup> Respondents contended that the 3<sup>rd</sup> Respondent was entitled to levy distress to recover mesne profits. The 1<sup>st</sup> and 4<sup>th</sup> Respondents termed the application an abuse of the process of the court.
12. The 3<sup>rd</sup> Respondent filed his grounds of opposition dated April 25, 2022. The 3<sup>rd</sup> Respondent contended that the application lacked merit. The 3<sup>rd</sup> Respondent contended that the court was *functus officio* over the issues raised in the application having made a ruling on similar issues. The 3<sup>rd</sup> Respondent averred that as the registered owner of the suit property, he was entitled to rent or mesne profits from the property. The 3<sup>rd</sup> Respondent contended that the reliefs sought were not based on the petition. The 3<sup>rd</sup> Respondent urged the court to declare the Petitioner a vexatious litigant and to dismiss her application.

**The submissions:**

13. The petitioner's application dated March 3, 2020 was heard by way of written submissions. The petitioner filed submissions dated July 16, 2020 while the 1<sup>st</sup> and 4<sup>th</sup> Respondents filed submissions dated January 20, 2021. The 3<sup>rd</sup> Respondent did not file submissions in respect of this application. The applicant submitted that she had established a prima facie case of violation of her constitutional rights that entitled her to the conservatory order sought. On their part, the 1<sup>st</sup> and 4<sup>th</sup> Respondents submitted that a case had not been established for the grant of the conservatory order sought by the Petitioner.
14. The application dated March 14, 2022 was heard through oral submissions on April 28, 2022. In her submissions, the Petitioner reiterated the grounds set out on the face of her application and the supporting affidavit. The Petitioner submitted that the 3<sup>rd</sup> Respondent had employed the law of the jungle in his bid to take possession of the suit property. The Petitioner submitted that she was entitled to the orders sought pending determination of her application for conservatory orders. The advocate for the 3<sup>rd</sup> Respondent also reiterated the contents of the 3<sup>rd</sup> Respondents grounds of opposition and urged the court to dismiss the application. The 3<sup>rd</sup> Respondent submitted that the Petitioner's application had been overtaken by events and that the Petitioner's remedy if any was to seek damages. The 3<sup>rd</sup> Respondent submitted that the distress for rent complained of was not illegal as the 3<sup>rd</sup> Respondent as the owner of the suit property was entitled to enjoy his investment.
15. On their part, the 1<sup>st</sup> and 4<sup>th</sup> Respondent's advocate submitted that the sale of the suit property to the 3<sup>rd</sup> Respondent had not been set aside. The 1<sup>st</sup> and 4<sup>th</sup> Respondent's advocate submitted that the 3<sup>rd</sup> Respondent was entitled to recover mesne profits from the Petitioner who was occupying the suit



property unlawfully. The 1<sup>st</sup> and 4<sup>th</sup> Respondents urged the court to dismiss the application as the Petitioner's remedy was in damages.

**Determination:**

16. I have two applications before me. I will start with the application dated March 3, 2020 which was the first to be filed and on which the second application dated MARCH 14, 2022 was based.

**The Notice of Motion dated March 3 March 2020:**

- 17 I have considered the application together with the affidavits filed in support thereof. I have also considered the responses by the Respondents to the application and the submissions by the parties. Article 22(1) of the Constitution provides as follows:

Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”

Article 23(3) which deals with remedies for violation of or threat to fundamental rights or freedoms provides as follows:

In any proceedings brought under Article 22, a court may grant appropriate relief, including--

- (a) a) a declaration of rights;
- (b) b) an injunction;
- (c) c) a conservatory order;
- (d) d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
- (e) an order for compensation; and
- (f) an order of judicial review.”

18. The Petitioner's contention is that the Respondents have violated her constitution rights and the constitutional rights of her children. The principles applied by the court in applications for conservatory orders are settled. In Nairobi High Court Petition No 16 of 2011, Centre For NRights Education and Awareness (CREAW) & 7 Others v Attorney General, the court stated as follows:

...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. 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}}.”



19. In *Kevin K Mwiti & others v Kenya School of Law & others* [2015]eKLR the court stated as follows on an application for conservatory order:

51. The first issue for determination is whether the Petitioner has established a prima facie case. A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues. 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 Petitions/ Application.”

20. The Petitioner had a duty to establish on a *prima facie* basis that her right or fundamental freedom in the Bill of Rights had been denied, violated or infringed by the Respondents. I am not satisfied that the Petitioner has discharged this burden. In *Uburu Muigai Kenyatta v Nairobi Star Publications Ltd.* [2013] eKLR the court stated as follows:

...I need say no more. Where there is a remedy in Civil Law, a party should pursue that remedy ... My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in *AG vs S K Dutambala* Cr Appeal No 37 of 1991 (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.”

21. This position was further emphasised in *Leonida Aloo Odhiambo v Attorney General & another* [2020] eKLR where the court stated as follows:

Further, it is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be invoked at all. The court will pronounce on the constitutionality of an action only when it is necessary for the decision of the case to do so and that if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”

22. In *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR the Supreme Court stated that:

[256] The appellants in this case are seeking to invoke the “principle of avoidance” also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v Mblungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”



[257] Similarly the U S Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v Tennessee Valley Authority*, 297 U.S. 288, 347 (1936)).

[258] From the foundation of principle well developed in the comparative practice, we hold that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright infringement claim and it was not properly laid before that court as a constitutional issue.”

23. The thread running through all the cited cases is that a court will not determine a dispute brought as constitutional issue where the same can be determined through other processes provided for in law. On the material before me I am unable to see any constitutional issue in the complaints that the Petitioner has put forward against the Respondents. I can only see a commercial dispute between a bank and a customer. It is not disputed that there is a civil suit pending before this court between the parties namely, ELC No 4 of 2018 in which the issues that have been raised herein as constitutional issues have been raised. I am not persuaded that the jurisdiction of this court as a constitutional court has been properly invoked. In my view the proper forum for determination of the dispute between the parties is the pending civil suit.
24. I am also not satisfied that a *prima facie* case of violation or threatened violation of fundamental rights and freedoms has been established by the Petitioner. In *Anarita Karimi Njeru v Republic* [1980] eKLR the court stated that:

We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”
25. In the amended petition the Petitioner has set out several provisions of the constitution which she claims were violated by the Respondents. The Petitioner has also set out what she has referred to as particulars of violation of her rights. In my view, it is not enough to say that a right has been violated. The Petitioner was under a duty to show that the acts set out as violations of her rights are actually contrary to the provisions of the constitution that have been cited. In my view, the alleged violation of constitutional rights if true are mere breaches of the contractual arrangements that the Petitioner and the 2<sup>nd</sup> Respondent had with the 1<sup>st</sup> Respondent and the statutes guiding that relationship which is the subject of the pending civil suit between the parties. Failure by a bank to provide a customer with a statement of a loan account or irregular or illegal sale of a property charged to a bank to secure a loan in my view raises contractual issues rather than constitutional issues.
26. What I have stated is enough to dispose of the application dated March 3, 2020. I wish to add however that even if I had found that a *prima facie* case had been established by the Petitioner, I would still not have granted the conservatory order sought as prayed. The conservatory order is sought to stay the sale of the suit property through the alleged unlawful and/or unprocedural auction that took place on February 20, 2020, payment of the balance of the purchase price, transfer and/or any other dealings with the suit property and any further infringement of the rights of the Petitioner and her children by the Respondents, their agents and/or servants pending hearing and determination of this petition.
27. It is common ground that the sale of the suit property has been completed and the property transferred to the 3<sup>rd</sup> Respondent. The court cannot restrain or stay an act that has taken place. It is also worth



noting that in the pending civil suit between the parties, the court had dismissed an application seeking to stop the sale of the suit property. In the circumstances, I would not have granted a conservatory order to stay the sale or transfer of the suit property.

28. Due to the forgoing, the Petitioner's application dated March 3, 2020 is not for granting.

**The Notice of Motion application dated March 14, 2022:**

29. I have considered this application together with the supporting affidavit. I have also considered the responses filed by the Respondents in opposition to the application. Finally, I have considered the submissions that were made before me by the parties. There are some things that are beyond argument. The Petitioner and the 2<sup>nd</sup> Respondent were at all material times the registered proprietors of the suit property. They charged the suit property to the 1<sup>st</sup> Respondent as a security for a loan that was advanced to them. They failed to pay the loan. The 1<sup>st</sup> Respondent in exercise of its statutory power of sale sold the suit property through the 4<sup>th</sup> Respondent to recover the outstanding loan. The property was sold and transferred to the 3<sup>rd</sup> Respondent. The 3<sup>rd</sup> Respondent is now the Registered owner of the suit property. However, the Petitioner and the 2<sup>nd</sup> Respondent have refused to vacate the suit property arguing that the sale thereof was unlawful.

30. Distress for rent can only be levied against a tenant. Does the refusal by the Petitioner and the 2<sup>nd</sup> Respondent to vacate the suit property make them tenants of the 3<sup>rd</sup> Respondent? The answer is no. It is therefore my finding that the purported distress for rent that was levied against the Petitioner and the 2<sup>nd</sup> Respondent by High Class Auctioneers under the *Distress for Rent Act*, Cap 293 Laws of Kenya to recover alleged rent arrears of kshs 4,800,000/- was illegal. The Petitioner is therefore entitled to an injunction to restrain the 3<sup>rd</sup> Respondent from continuing with an illegal distress against her.

**Conclusion:**

31. In view of the foregoing, I find no merit in the Notice of Motion application dated March 3, 2020. The application is dismissed accordingly. With regard to the Notice of Motion dated March 14, 2022, an injunction is granted restraining the 3<sup>rd</sup> Respondent from levying distress or continuing with the distress for rent that he had commenced against the Petitioner pending the hearing of the petition. Each party shall bear its own costs of the two applications.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF JULY 2022.**

**S OKONG'O**

**JUDGE**

**Judgment read through Microsoft Teams Video Conferencing platform in the presence of;**

**Mrs Pamela Arunga, the Petitioner in person**

**Mr Kabaiku for the 1<sup>st</sup> and 4<sup>th</sup> Respondents**

**Mr Owaga for 2<sup>nd</sup> Respondent**

**Mr Kurauka for the 3<sup>rd</sup> Respondent**

**Ms C Nyokabi-Court Assistant**

