



**Oichoe v Land Registrar & another (Environment and Land Petition
10 of 2021) [2022] KEELC 3499 (KLR) (14 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3499 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT AND LAND PETITION 10 OF 2021

JM ONYANGO, J

JULY 14, 2022

**IN THE MATTER OF THE CONSTITUTIONAL RIGHTS UNDER
ARTICLES, 2 (1)10 (2) (B) (C), 22 (1), 23 (1), 23(1) (3) (F), 27, 28, 35, 40,
47(1), 48, 50 (1), 165 AND 258 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION AND VIOLATION
ARTICLES 35, 40 (1) 47 (1) & (2) AND 50(1) OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS
PARTICULARLY ARTICLES 27 (1), (2) & (4), 35 (1) 40 (3) 47 (1)
& (2) AND 50 (1) OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE CONSTITUTIONAL VALIDITY OF THE DECISION
BY THE 1ST RESPONDENT TO ARBITRARILY REVOKE THE PETITIONER'S
TITLE DEED WITHOUT A JUST CAUSE IN VIOLATION OF ARTICLES
40 (3) 47 (1) & (2) AND 50 (1) OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS NO. 4 OF 2015

AND

IN THE MATTER OF THE LAND REGISTRATION ACT LAWS OF KENYA

BETWEEN

JOHN MAGARA OICHOE PETITIONER

AND

LAND REGISTRAR 1ST RESPONDENT



RULING

Introduction

1. By a Notice of Motion dated August 5, 2021, the Petitioner/Applicant sought the following orders against the Respondents;
 - a) Spent
 - b) Pending the hearing and determination of this application, this Honourable Court be pleased to issue a temporary injunction restraining the 1st Respondent and/or any one acting under his instruction from altering details of that land known as LR No. Wanjare Bokeire/4548 (hereinafter referred to as the suit property).
 - c) Pending the hearing and determination of the Petition, this Honourable Court be pleased to issue a temporary injunction restraining the 1st Respondent and/or any one acting under his instructions from altering details of the suit property.
 - d) The 1st Respondent be directed to issue the Petitioner with the current green card for the suit property.
 - e) The Respondents bear the costs of this application.
2. The application is anchored on the Supporting Affidavit of John Maraga Oichoe, the Petitioner herein sworn on August 5, 2021. In the Supporting Affidavit, the Petitioner/Applicant averred that he was the registered owner of the suit property having acquired the same through transmission vide a Certificate of Confirmation of Grant dated December 5, 2014 issued in Kisii High Court Succession Cause No. 309 of 2012.
3. The Petitioner/Applicant further averred that on 5th May, 2021 he had a dispute with third parties concerning ownership of the suit property and was forced to visit the 1st Respondent's office to seek an updated green card. When he went to the Land's office, he was directed to produce an original title deed to facilitate issuance of the said green card and he complied with the expectation that he would be issued with the green card. A few minutes later, he was informed that the title deed that had been issued to him had a problem and thus the same was revoked. He immediately instructed his advocates to write a letter to the 1st Respondent seeking reasons for the said revocation and demand for the title deed to be issued back to him but he never received any response from the 1st Respondent.
4. It was his averment that at the time his title was revoked he was engaged in construction activities whereby he had started erecting a fence and digging a foundation to put up a building. He deponed that following the turn of events, he was forced to stop the construction since he no longer had title to the property.
5. He lamented that the revocation of his title had caused him substantial loss given that he had already entered into a fixed contract with contractors who had no obligation to refund monies already disbursed to them, citing frustration of the contract. He further deponed that the arbitrary revocation of the title to his property without any just cause was a violation of his fundamental rights to own property.



6. He contended that the 1st Respondent did not have powers to revoke his title unless there was a court order requiring him to do so. Hence he believed that the action of the 1st Respondent was ultra vires, illegal, null and void.
7. He contended that the revocation of his title without any reasons being given to him or being afforded a fair hearing, amounted to a gross violation of his rights enshrined in the Bill of Rights, which called for urgent intervention by the court.
8. The Applicant expressed concern that the impugned revocation might have been made in favor of third parties who would dispose of the suit property or deal with it in a way that was adverse to his interests unless the court issued the orders sought.
9. The application was opposed by the Respondents vide a Replying Affidavit sworn by Mr. Steve Mokaya the Land Registrar Kisii County, on October 27, 2021. In his Affidavit Mr. Mokaya deponed that the suit property was originally known as LR. No. Wanjare/Bokeire/427, and that it was registered in the names of Magara Makori, Obigwa Makori and Nyamatura Makori on 2nd August, 1976 with each of them owning 1/3 share. He further averred that on 2nd December, 2009 the title of parcel LR. No. Wanjare/Bokeire/427 was closed upon subdivision and new numbers, LR. No. Wanjare/Bokeire and LR. No. Wanjare/Bokeire 4548 were created.
10. He stated that it was later discovered that the mutation form was only signed by one party yet there were three proprietors. He further deponed that his office discovered that two of the proprietors had died and their beneficiaries needed to apply for succession before dealing with the said properties. He contended that entry number 2 which generated parcels 4547 and 4548 was subsequently cancelled as it had been entered erroneously.
11. Mr. Mokaya deponed that the land was later transferred to one Pius Nyakwanga Nyamatura who acquired it through transmission vide a Certificate of Confirmation of Grant dated 16th, March 2012 issued in Kisii High Court Succession Cause No. 437 of 2010. The said Pius Nyakwanga Nyamatura later on subdivided the land (parcel 427) into new numbers being 5255 to 5267 now owned by third parties who are not parties to the Petition.
12. Mr. Mokaya contended that the application was frivolous, vexatious and a waste of the court's time and thus it should be dismissed.
13. On October 28, 2021 the court directed that the application be canvassed by way of written submissions and both parties filed their submissions which I have considered.

Applicant's Submissions

14. Learned counsel for the Applicant submitted on two issues, namely:
 - a) Whether the Petitioner has met the necessary requirements for grant of injunctive orders.
 - b) Whether the 1st Respondent is justified in refusing to issue the Petitioner with a current green card for the suit property.
15. On the issue of whether the Petitioner has met the necessary requirements for grant of injunctive orders, counsel submitted that the Applicant had met conditions for injunction set out in the case of *Giella vs Cassman Brown Co. Ltd* (1973) EA 358.



16. He submitted that the Applicant had established a prima facie case with probability of success as he had demonstrated that he acquired the suit property pursuant to succession proceedings in Kisii High Court Succession Cause No. 309 of 2012.
17. He refuted the 1st Respondent's contention that the mutation form that generated the suit property was revoked on the grounds that it was only signed by one of the three proprietors as the mother title had already been transferred from the original proprietors to Annah Nyaboke Asiago vide a court order in *KISII CMCC No. 18 of 1990*.
18. Counsel further submitted that the Applicant's deceased daughter was a diligent and innocent purchaser for value who confirmed that the seller (Annah Nyaboke Asiago) had a valid title and that the parcel had no encumbrances before she bought it.
19. He contended that it is settled law that under Section 26(1) of the [Land Registration Act](#) a person who is registered as the proprietor of land acquires an indefeasible title to land, which could only be challenged on grounds of fraud, and misrepresentation to which he was proved to be a party. He submitted that a title deed could only be challenged through judicial proceedings and not a unilateral decision by a Land Registrar.
20. He relied on the case of [Republic v Registrar of Titles Mombasa & 4 others Ex-Parte A.K. Abdulgani Limited](#) [2018] eKLR where Edward M. Muriithi J opined as follows;

“What was the right procedure to follow in asserting the respondent's and interested parties' interest in the suit land? Surely not by the ultra vires action of revocation of title but by suitable judicial proceedings in that behalf.”
21. He also relied on the case of [Franns Investments Limited Vs the Registrar of Titles, Mombasa & 2 Others](#) (2012) eKLR where the Court ruled on the issue of the Land Registrar revoking titles as follows:

“It is now settled that the Registrar of Tiles or the Land Registrar as the case may be does not have power to revoke title to land. In the case of *Republic v. Land Registrar Taita Taveta District & another* [2015] eKLR, I made this observation and gave the way forward in the event that the Government through its agencies wished to challenge the title to land considered to have been unlawfully obtained, as follows:

“The Court must therefore uphold the Rule of Law with regard to the applicant's rights, as a registered proprietor, under sections 27 and 28 of the Registered [Land Act](#) as then applicable to the suit property (now section 25 of the [Land Registration Act](#), 2012), until fraud shall have been established in accordance with section 26 (1) of the [Land Registration Act](#) 2012...”

Before any order may be made in terms of Article 40 (6) of the [Constitution](#) of Kenya 2010 and section 26 (1) (a) of the [Land Registration Act](#) 2012 that the title to land was acquired by fraud, misrepresentation and or illegally and it is therefore not protected by the [Constitution](#), the fraud, misrepresentation and illegality in the acquisition of property must be proved to the required standard. The case of fraud and illegality in the acquisition of the suit property herein must, therefore, be proved in proceedings...”
22. Based on the above arguments, counsel concluded that the Applicant had demonstrated that he had a prima facie case with high chances of success.



23. On the 2nd element as to whether the Applicant stands to suffer irreparable loss which cannot be compensated by an award of damages, counsel submitted that the Applicant had under paragraph 9(a) of his Supporting Affidavit averred that having inherited the suit property from his deceased daughter for her beneficiaries' interests, she considered the same to be of immense sentimental value, not just to the petitioner but also to the deceased's younger siblings who look upon the suit property as their deceased sister's legacy.
24. Counsel submitted that the 1st Defendant should be enjoined from altering the ownership details of the suit property which in turn shall expose it to being disposed of or dealt with in a manner that is prejudicial to the Petitioner's interests. He contended that the Petitioner stood to suffer irreparable loss that could not be compensated by monetary damages owing to the sentimental value of the suit property.
25. On the element as to where the balance of convenience tilts, counsel submitted that the Applicant had shown that his deceased daughter was a diligent and innocent purchaser for value of the suit property. He argued that the 1st Respondent has not tendered any evidence to show that if at all there was any fraud and/or misrepresentation, the Petitioner's deceased daughter or the Petitioner were privy to the same.
26. Counsel argued further that the Applicant having demonstrated the irregularity and illegality of the 1st Respondent's actions that form the cause of action herein, and the Applicant having demonstrated that the Respondents do not stand to suffer any prejudice if the interim orders are granted, it would be in the wider interest of justice to find that the balance of convenience tilts in the Petitioner's favour.
27. Turning to the refusal by the 1st Respondent to issue the Petitioner with a current green card for the suit property, counsel argued that the same violates the Applicant's right to access information. He argued that the 1st Respondent has no right to withhold a public document that directly affects the Petitioner.
28. He contended that the 1st Respondent did not voice any opposition to the issuance of the current green card in his Replying Affidavit and therefore that this prayer should be granted.

Respondent's Submissions

29. Learned counsel for the Respondents submitted that the Application should be determined on three issues which are;
 - a) Whether the Applicant has met the requirements for grant of an injunction set out in the celebrated case of *Giella Vs Cassman Brown Ltd* 1930 E.A 358,
 - b) Whether the Applicant is entitled to the orders sought pending the hearing and determination of the Petition.
 - c) Whether the Applicant moved the court through the wrong forum.
30. On the first issue, counsel submitted on the three requirements that this court should consider in granting an order of injunction that were set out in the case of *Giella Vs Cassman Brown Ltd* 1973 E.A 358 which are:
 - a) That the Applicant must establish that he has a prima facie case with probability of success.
 - b) That an Applicant must establish that he will suffer irreparable loss that will not be compensated by way of damages
 - c) That if the court is in doubt, it will decide the Application on balance of convenience



31. On the first element, learned counsel for the Respondent submitted that even though the Applicant alleged that the 1st Respondent revoked his title to the suit property, he presented an incomplete copy of the title deed, an alleged search document dated April 10, 2015 and a Certificate of Confirmation of Grant dated December 5, 2014 which according to him could not be relied upon. Counsel submitted that the copy of the incomplete title deed and the copy of the Search Certificate dated October 10, 2015 provided two different positions in terms of when the Applicant was registered as the owner of the suit property. He also submitted that the certificate of Grant having been issued with regard to an erroneous entry (LR. No. Wanjare/Bokeire 4548) that had been administratively cancelled by the 1st Respondent 5 years earlier in accordance with the provisions of section 79 of the Land Registration Act, the same could not be relied upon by the Applicant to support his case against the Respondents.
32. Counsel concluded therefore that given the contradictions highlighted above, it was safe to hold that the Applicant did not submit any evidence whatsoever to prove his ownership of the suit property. According to him, it followed therefore that the Applicant has not demonstrated that he had a prima facie case with probability of success. To support his argument, counsel relied on the case of Mrao Vs First American Bank Of Kenya Ltd (2003) eKLR 125 where a prima facie case was described as follows:
- “A prima facie case in a civil Application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the court, tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.
- a prima facie case is more than an arguable case, it is not sufficient to raise issues. The evidence must show an infringement of a right, and probability of the Applicant’s case upon trial. That is clearly a standard which is higher than an arguable case”
33. Counsel for the Respondents further submitted that the 1st Respondent on his part had through his Replying Affidavit and documentation demonstrated how the land initially known as LR. No. Wanjare/Bokeire/427 and registered in 1976 in the names of three individuals as per the green card changed ownership to the last subdivisions that were done in 2012 creating 13 titles, all registered under different individuals.
34. Counsel therefore submitted that the Applicant had failed to establish a prima facie case with a probability of success by failing to provide credible documentary evidence to support his application for injunction.
35. Regarding the second element, counsel submitted that the Applicant was a stranger to the 1st Respondent and according to the records held by 1st Respondents, the Applicant had never been registered as the owner of the suit property since the same was non-existent.
36. It was his submission that from the information provided by the 1st Respondent, the mother title known as LR No. Wanjare/Bokeire/427 had been sub-divided way back in 2012 resulting into 13 different titles.
37. He contended that the orders sought by the applicant were tantamount to asking the court to cancel titles issued to 13 innocent persons who were not parties to this case. He argued that the Applicant could not claim that he would suffer irreparable loss at the expense of the Respondents. On the contrary, counsel submitted that it was the Government of Kenya which stood to suffer loss as a result of the titles that had already been issued since the net effect of the orders sought was nullification of the 13 titles legally issued to various persons hence putting the Government at risk of indemnifying



- the 13 title holders. Furthermore, the 13 title holders are not before court despite the fact that they are likely to suffer irreparable loss if the orders sought by the Applicant are granted.
38. Counsel relied on the case of *Nguruman Ltd. Vs. Jan Bonde Nielsen* CA No. 77 of 2012 for the proposition that one must demonstrate irreparable injury in order to qualify for an injunction.
 39. On the third element, counsel submitted that the court ought to consider the pleadings filed by the parties and the affidavits in support of the application together with the exhibits annexed thereto to establish in whose favor the balance of convenience tilted.
 40. He argued that if the court was to perform this intricate exercise without even going to the merits of the Petition, it would establish that the 1st Respondent had systematically demonstrated through unrivaled documents how land parcel LR. No. Wanjare/Bokeire/427 has legally changed ownership from the first registration in the year 1976 to 2012, which information has not been challenged by the Applicant. He concluded by stating that the balance of convenience tilted in favor of the Respondents.
 41. As to whether the Applicant is entitled to the orders sought, counsel for the Respondent submitted that since the Applicant had come to court for equitable relief he ought to have passed the test of good faith.
 42. Counsel contended that the law of equity demands that where the conduct of an Applicant does not meet the approval of equity, the court should deny him the equitable relief in form of injunctive orders regardless of all other matters. It was his submission that the Applicant failed to disclose all the facts regarding the history of the suit property before interim orders were issued to him pending the determination of this application.
 43. He relied on the case of *Appolo Onyango Njago & Another Vs Savings And Loan Kenya Ltd* (2012) eKLR for the proposition that one who seeks an equitable remedy must be candid.
 44. Counsel further submitted that the orders that were being sought by the Applicant were untenable since there was no land known as LR. No. Wanjare/Bokeire/4548 as the same has since been subdivided and the resultant titles had been issued to different people who were not parties to this case.
 45. It was counsel's submission that the Applicant having completely failed to rebut the evidence provided by the 1st Respondent in his Replying Affidavit and the annexures thereto, the Applicant is deemed to have failed to dislodge the affidavit evidence by the 1st Respondent hence he cannot continue to enjoy interim orders issued on 30th September, 2021. Counsel contended that going by the evidence adduced by the 1st Respondent, it was clear that the interim orders were issued in a vacuum and thus the said orders cannot be sustained as against the Respondents.
 46. It was his conclusion that in view of all the affidavit evidence before the court as presented by the 1st Respondent, an order of injunction would be repugnant to public interest hence untenable in the circumstances. This is because the effect would be to interfere with rights of innocent third parties who are not before this court hence it would amount to condemning them without being heard.
 47. Regarding the issue as to whether the Applicant moved the court through a wrong forum, counsel submitted that that the application was bad in law in that the applicant ought to have first complied with the provisions of the *Land Registration Act*. The Act provides (3) three avenues which an aggrieved party ought to follow;
 - a) Firstly, the Applicant ought to have lodged a caution as provided for under section 71 of the *Land Registration Act* to forbid any registration dispositions of Land or pending hearing and determination of the suit.



- b) Secondly, the Applicant ought to have moved under section 76 of the *Land Registration Act* to have the Land Registrar place a restriction on the 13 parcels owned by third parties pending hearing and determination of the suit.
- c) Thirdly, if the Applicant was not satisfied with the above two options, he ought to have moved the court under the provisions of section 68 of the *Land Registration Act* for an order of inhibition.
48. It was counsel's submission that the orders sought in the application were incapable of being granted since the Applicant failed to exhaust the above steps outlined herein above.
49. Counsel for the Respondent further submitted that the interim orders of injunction that were granted to the Applicant were granted in error contrary to the provisions of order 29 of the *Civil Procedure Rules* and section 16 of the *Government Proceedings Act*. He argued that the court failed to interpret the meaning and import of section 16 of the *Government Proceedings Act* vis-a-vis order 29 of the *Civil Procedure Act*. It was his contention that the main issue that the court ought to have addressed itself to was whether an injunction can be issued against the Government in the circumstances. Section 16(2) of the *Government Proceedings Act* provides as follows:
- “The court should not in any Civil Proceedings grant any injunctive or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government”.
50. He relied on case of *Arch Bishop Samson Gaitbo V Joseph Lenaleiyo* [2009 eKLR where the Court stated partly that;
- “Finally I note that the injunction issued was even to apply to the Attorney General. No injunction can issue against the Attorney General and or his officers and this is trite law. In other words, no injunction can issue against the government”
51. He referred this court to case *Job Kibiwot Mutai TIA Ludi Investments & 3 others v Hebatulla Investment Limited & 5 others* [2014] eKLR where Mutungi J stated as follows
- “I have considered the submissions by the 4th , 5th and 6h Defendants and I agree with the submission that the 4th and 6th Defendants as officers of the Government cannot be injected in the manner proposed by the Applicants by reason of section 16(2) of the *Government proceedings Act* any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government”.
52. Counsel urged the court to vacate the interim orders issued on 30th September, 2021 as the said orders were untenable.

Issues for Determination

53. Having considered the application, the response thereto and submissions filed by both parties, the main issues for determination are:
- i. Whether the Applicant has met the requirements for grant of an order of injunction.
 - ii. Whether this court is the appropriate forum to address the issues raised in the application.



- iii. Whether this court can issue an order of injunction against the Respondents.

Analysis and Determination

Whether the Applicant has met the requirements for grant of an order of injunction.

54. The requirements for grant of injunctive relief were set out in the celebrated case of *Giella vs Cassman Brown Ltd* 1973 E.A 358. The said requirements are:
 - a) That the Applicant must establish that he has a prima facie case with a probability of success.
 - b) That an Applicant must establish that he will suffer irreparable loss that will not be compensated by way of damages
 - c) That if the court is in doubt, it will decide the Application on balance of convenience.
55. It will therefore be necessary to determine whether the Applicant has met all the said elements before allowing his application.

a. Whether the Applicant has established that he has a prima facie case with a probability of success.

56. In the case of *Mrao Vs First American Bank of Kenya Ltd* (2003) eKLR 125 a prima facie case was described as:

“A prima facie case in a civil Application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the court, tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

..... a prima facie case is more than an arguable case, it is not sufficient to raise issues. The evidence must show an infringement of a right, and probability of the Applicant’s case upon trial. That is clearly a standard which is higher than an arguable case”

57. In the instant case the Applicant alleges that he is the registered owner of parcel no. Wanjare/Bokeire/4548 which he acquired through transmission vide a Certificate of Confirmation of Grant dated 5th December, 2014 issued in Kisii High Court, in Kisii High Court Succession Cause No. 309 of 2012.
58. However, from the 1st Respondent’s Replying Affidavit the said title was found to have been issued irregularly and the same was canceled after which it reverted to parcel No. Wanjare/Bokeire/427.
59. The said title was later transferred to one Pius Nyakwanga Nyamatura who acquired it through transmission vide a Certificate of Confirmation of Grant dated March 16, 2012 issued in Kisii High Court in Kisii High Court succession cause No. 437 of 2010. The said Pius Nyakwanga Nyamatura subsequently subdivided the land (parcel 427) into new numbers being 5255 to 5267 now registered in the names of third parties who are not parties to this Petition.
60. It is interesting that the Applicant did not challenge the averments by the 1st Respondent regarding cancellation of his title through a Further Affidavit. Instead, the Applicant’s counsel purported to respond to the said averments through his submissions.
61. In his submissions counsel for the Applicant claimed that the cancellation of the mutation form that led to the creation of the suit properties from the mother title was erroneous since the suit property had been transferred to one Annah Nyaboke Asiago vide a court order in *KISII CMCC No. 18 of 1990*.



Anna Nyaboke Asiago later sold to Gladys Lily Magara, the Applicant's late daughter. Counsel also contended that the Applicant's deceased daughter was an innocent purchaser for value who confirmed that the seller (Annah Nyaboke Asiago) had a valid title and that the parcel had no encumbrances prior to purchasing it.

62. It is trite law that submissions are not pleadings and that new averments of such magnitude cannot be introduced by way of submissions. The Applicant ought to have filed a Further Affidavit to introduce such new evidence if he wanted the court to rely on it in determining this application.
63. Even if this court were to consider the above evidence, it would need to have before it the alleged court order issued in *KISII CMCC No. 18 of 1990* that ordered for the transfer of the of the suit property to Annah Nyaboke Asiago, the sale agreement between her and Gladys Lily Magara, the Applicant's late daughter and transfer documents demonstrating when the transfer was effected to Annah Nyaboke Asiago and then to Gladys Lily Magara and eventually to the Applicant.
64. Without the said documents how would this court have determined at this stage that a title deed was issued to Annah Nyaboke Asiago through a court order and later transferred to Gladys Lily Magara through a sale agreement? How would the court have determined the innocence of Gladys Lily Magara in the purchase of the suit property without the said sale agreement? This are questions that cannot be casually answered through arguments of parties in submissions.
65. It has also been pointed out correctly by counsel that there is a clear contradiction in the documents that the Applicant has annexed to his Supporting Affidavit. From the copy of the search Certificate dated March 11, 2015 the title deed was issued on March 11, 2015 while the copy of the title deed indicates that the same was issued on March 10, 2015. This discrepancy has not been explained.
66. The Applicant has also not contested the 1st Respondent's contention that there are third parties holding titles to the suit property whom he has chosen not to bring aboard in this suit and who will definitely be affected by this suit. In fact, the Applicant averred that it was as a result of the said third parties laying a claim to the suit property that he went to the Land Registrar to obtain a green card in respect of the suit property.
67. The issue as to whether the revocation of Applicant's title was done administratively and in accordance with the provisions of section 79 of the *Land Registration Act* cannot be determined at this interlocutory stage. This is so because the main suit is anchored on it and the parties will need to present their evidence before the court during the main hearing in order for the court to determine the said issue.
68. From the above analysis I have established that the Applicant does not have title to the suit property since the Respondent has explained that the same was revoked in 2010 five years before a title was allegedly issued to the Applicant. It is also not in dispute that suit property was divided into 13 parcels and the 13 third parties have titles that rival the one that the Applicant claims to have. It is therefore very clear that the Applicant has not established that he has a prima facie case with probability of success.

b. Whether Applicant has established that he will suffer irreparable loss that will not be compensated by way of damages.

69. The Applicant lamented that at the time his title was revoked he was engaged in construction activities and that following the turn of events he was forced to stop the construction since he no longer had title to the property. He complained that the revocation of his title had caused him substantial loss given that he had already entered into fixed contract with contractors who had no obligation to refund monies already disbursed to them. The Applicant also expressed fears that impugned revocation might



have been made in favor of third parties who would be in a position to dispose of the suit property or deal with in any way that was adverse to his interests unless the court issued the orders prayed for.

70. However, it is a common ground that the Applicant's title deed was revoked by the 1st Respondent. That being the position, it would therefore be impossible for the court to injunct the 1st Respondent from altering changes in an already revoked title. The court does not issue orders in vain.
71. As correctly submitted by counsel for the Respondent, this would be tantamount to reinstating the already revoked title at this interlocutory stage and nullifying titles of third parties who have not been joined to this suit and who have a right to be heard.

c. balance of convenience

72. In light of the foregoing, it is clear that the balance of convenience does not favour the Applicant as the balance of convenience lies in not granting the Applicant order of injunction.

Whether this court is the appropriate forum to address the issues in the application.

73. Learned counsel for the Respondent has argued that the [land Registration Act](#) has clear provisions outlining the avenue that the Applicant should have pursued instead of filing this application. He stated that firstly, the Applicant ought to have lodged a caution as provided for under section 71 of the [Land Registration Act](#) to forbid any registration or dispositions of land pending hearing and determination of the suit. Secondly, the Applicant ought to have moved under section 76 of [Land Registration Act](#) to have the Land Registrar place a restriction on the 13 parcels owned by third parties pending hearing and determination of the suit. Thirdly, if the Applicant was not satisfied with the above two options, he ought to have moved the court under the provisions of section 68 of the [Land Registration Act](#) for an order of inhibition.
74. I agree with the submissions of learned counsel for the Respondents that it was necessary for the Applicant to exhaust the above avenues before approaching the court for an injunction to bar the Respondents from altering the details of the suit property.

Whether this court can award an order of injunction against the Respondents.

75. Section 16(2) of the [Government Proceedings Act](#) provides as follows:

“The court should not in any Civil Proceedings grant any injunctive or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government”.

76. I am also guided by the decision of the court in the case *Arch Bishop Samson Gaitbo V Joseph Lenaleiyo* [2009 eKLR where court stated partly that;

“Finally I note that the injunction issued was even to apply to the Attorney General. No injunction can issue against the Attorney General and or his officers and this is trite law. In other words, no injunction can issue against the government”

77. I am further guided the decision in the case of [Job Kibiwot Mutai TIA Ludi Investments & 3 others v Hebatulla Investment Limited & 5 others](#) [2014] eKLR where Mutungi J stated as follows

“I have considered the submissions by the 4th , 5th and 6h Defendants and I agree with the submission that the 4th and 6th Defendants as officers of the Government cannot



be injected in the manner proposed by the Applicants by reason of section 16(2) of the *Government proceedings Act* any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government".

Conclusion

78. In the final result therefore, it is my finding that the application by the Petitioner is unmerited and the same is dismissed with costs to the Applicant. For the avoidance of doubt, the interim orders issued on September 23, 2021 are hereby discharged.

DATED, SIGNED AND DELIVERED AT KISII THIS 14TH DAY OF JULY, 2022.

J.M ONYANGO

JUDGE

