Mwaiwa & 3 others (Suing on behalf of the 1700 members of Ene Nthi Kinyoo Farmers Society) v South Eastern Kenya University & 4 others; County Governemnt of Makueni (Interested Party) (Environment & Land Petition 14 of 2020) [2022] KEELC 15003 (KLR) (25 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15003 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ENVIRONMENT & LAND PETITION 14 OF 2020

CG MBOGO, J

NOVEMBER 25, 2022

BETWEEN

ALOIS MWAIWA ..... 1ST PETITIONER

JULIUS S. KASUNI ..... 2ND PETITIONER

JIMMY MAKUMBI MAINGA ..... 3RD PETITIONER

PETER KALAA ..... 4TH PETITIONER

SUING ON BEHALF OF THE 1700 MEMBERS OF ENE NTHI KINYOO FARMERS SOCIETY

AND

SOUTH EASTERN KENYA UNIVERSITY ..... 1ST RESPONDENT

NATIONAL LAND COMMISSION ..... 2ND RESPONDENT

CHIEF LAND REGISTRAR ..... 3RD RESPONDENT

MAKUENI LAND REGISTRAR ..... 4TH RESPONDENT

ATTORNEY GENERAL ..... 5TH RESPONDENT

AND

COUNTY GOVERNEMNT OF MAKUENI ..... INTERESTED PARTY

RULING

1. Vide the Notice of Motion dated August 31, 2020 filed by the Petitioners under the provisions of Rules 4, 5, 13 and 23 of the *Constitution* of *Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*, the Applicants seek the following Orders: -

   i) spent

   ii) spent

   iii) That this Honourable Court be pleased to grant a temporary injunction restraining the 1st and 2nd Respondents by themselves, their servants and/or agents or anybody authorized by them from entering or remaining upon the Applicants' parcel of land or using the same for any purpose whatsoever which is inconsistent with the Petitioners' constitutional and property rights whether by their employees, servants or agents or their visitors or others claiming, constructing, evicting, selling, transferring, carrying out destruction and/or any further dealing on the land interfering with the Applicants' quiet use and occupation of Emali parcel of land, Land Reference No 12970 (IR No 4109) pending hearing and determination of this petition.

   iv) That this Honourable Court be pleased to grant an Order prohibiting the 1st Respondent herein precluding it, its officers, servants and/or its agents from awarding Tender No SEKU/PROC/008/2020/2020 to any person or entity in reference to Emali parcel of land, Land Reference No 12970 (IR No 4109) pending hearing and determination of this application inter partes.

   v) That this Honourable Court be pleased to grant an Order prohibiting the 1st Respondent herein precluding it, its officers, servants and/or its agents from awarding Tender No SEKU/PROC/008/2020/2020 to any person or entity in reference to Emali parcel of land, Land Reference No 12970 (IR No 4109) pending hearing and determination of this petition.

   vi) Costs of this application.

2. The application is supported by the affidavit of Julius S Kasuni sworn on August 31, 2020. It is premised upon these salient grounds. Firstly, that the Petitioners are members of Ene Nthi Kinyoo Farmers Society which is duly registered under the *Societies Act* Cap 108 Laws of Kenya. That the Petitioners are land owners in the suit property known as LR No 12970 measuring 4,500 acres and the primary objective of the Society is to agitate for the rights of its members. That the Petitioners are the bona fide owners of the suit property which is ancestral land bequeathed to them by their forefathers who initially inhabited the land since precolonial times.

3. It was further averred that the suit property was not available for acquisition by the Commissioner pursuant to the Crown Lands Ordinance, 1902 which the British Government used to alienate Kamba land to European settlers. That the graves of the Applicants' forefathers can even be traced on the land. That after independence, in 1985, the defunct Masaku County Council illegally, fraudulently and through a corrupt scheme allocated the suit land to Ukambani Agricultural Institute (UKAI) without any consultation with the Petitioner. That members of the Petitioner have been living in the suit property as a community for decades practicing their culture and sustaining their livelihoods.

4. The Applicants further averred that in 1995 when the District Commissioner realized that UKAI failed in its mission, and that the directors were hell-bent on converting the land into individual use, he authorized the local community to use the land for farming pending the issuance of title deeds. That in 2011, in a meeting with the 1st Respondent at Emali after the realization that UKAI had wound up and illegally handed ownership of the suit property to the 1st Respondent, the Applicants challenged the said handing over with the support of then Councilor Mr Alois Mwaiwa and Prof Kivutha Kibwana, then Presidential Advisor.

5. The Applicants averred that in the said 2011 meeting, it was resolved that the local farmers would cede 200 acres of the suit property for the construction of Makueni University and not SEUCO. That sometimes in June 2020, the 1st Respondent issued a public notice directing the Applicants to bring down all their structures in the suit property, which were alleged to be illegal. The Applicants were also directed to stop their farming activities with the 1st Respondent intending to enter and develop the suit property upon expiry of the notice. The said notice also expressed threat of demolition and destruction to structures that would not have been in compliance.

6. It was averred that in response, the Applicants wrote a letter dated June 9, 2020 to the 1st Respondent requesting the withdrawal of the earlier notice because a petition on ownership was already pending determination with the 2nd Respondent. That on August 18, 2020, the 1st Respondent published a tender notice being Tender No SEKU/PROC/OO8/2020/2021 for the construction of security houses and for the fencing of the suit property.

7. The Applicants averred that if the threat of eviction by the 1st Respondent is accomplished, then the Applicants will be rendered homeless in addition to other violations of their constitutional rights. That the 1st Respondent is acting without due regard to the rule of law and procedure and with impunity. Lastly, it was contended that should the orders sought be disallowed, the 1st Respondent will continue to infringe on the Applicants' constitutional rights.

8. In a replying affidavit sworn by Prof Geoffrey M Muluvi on September 11, 2020, it was deposed that the 1st Respondent is the successor to South Eastern University College which also succeeded Ukamba Agricultural Institute. That among the assets inherited by the 1st Respondent was the suit property herein LR No 12970 situate in Emali, Makueni County. That the said land was donated to the 1st Respondent for education purposes by the former Masaku County Council and issued in the name of then trustees of UKAI for a term of 99 years from February 1, 1985.

9. It was further averred that Petitioners had not produced any legal documents to support their claim over the suit property and neither had they satisfactorily proved the prerequisites of what amounts to community land as per the provisions of the *Constitution* and the *Community Land Act* No 27 of 2016. That the Petitioners cannot claim infringement of their proprietary rights in the suit property when they never had those rights. Again, the 1st Respondent contended that the public notice dated June 8, 2020 was issued to three individuals who had encroached into the suit property and not to the Applicants who have not settled there.

10. The 1st Respondent further averred that Applicants cannot invoke the doctrine of adverse possession over the suit property which is public land. That the 1st Respondent does not have any statutory or constitutional mandate to compulsorily acquire land more so the suit property as such powers are vested in the 2nd Respondent. That for close to four decades, no objection to the 1st Respondent's Grant was raised with the Masaku County Council until the year 2016 when the first petition over the suit property was brought by the Petitioners before the 2nd Respondent. That the suit herein is

incompetent on the score that a similar petition over the suit property involving the same parties is before the National Land Commission, and the same is yet to be determined.

11. That the Petition is also incompetent on account of the fact the claims of historical land injustices remain within the mandate of the 2nd Respondent. Further, the 1st Respondent averred that the Applicants have not produced evidence of the authority to institute these proceedings and to swear the supporting affidavit dated August 31, 2020 on behalf of Ene Nthi Kinyoo Farmers Society. That the cancellation of Tender No SEKU/PROC/008/2020/2021 would greatly prejudice the 1st Respondent because the procurement process is in its final stages ultimately violating the procurement laws and hence cause unnecessary legal proceedings against the 1st Respondent.

12. Lastly, the 1st Respondent argued that the Applicants had failed to satisfy the grounds for granting temporary injunctions as they have not established a prima facie case. It was argued that the proceedings are an abuse of the process of this Court

13. On September 22, 2020, the 3rd, 4th and 5th Respondents filed Grounds of opposition on the basis of the following inter alia: -

    i) That the application is frivolous, vexatious and an abuse of court process.

    ii) That the Applicants have not demonstrated any grounds for the grant of the orders of injunction.

    iii) That the Applicants are not lawful proprietors of the suit land and any will halt the 1st Respondent from putting its land to lawful use.

14. Vide a replying affidavit sworn by Alex Nthiwa, the Chief Officer of the Interested Party on October 13, 2020, it was deposed that the Interested Party was aware that the 2nd Respondent had not rendered a determination on the Petitioner's claim over the suit property based on a claim of historical injustice. That ever since 2013, in the course of various engagements with various stakeholders, it was agreed that the Interested party would allocate alternative land to the 1st Respondent for purposes of establishing a university campus within Makueni County. That it was therefore his belief that the Petition herein is merited.

15. The Petitioner filed a further affidavit sworn by Julius S Kasuni on November 12, 2020. It was deponed that Ukambani Agricultural Institute (UKAI) acted in breach of the special conditions attached to the Grant issued on February 1, 1985 and therefore the suit property ought to have reverted to the defunct Masaku County Council. That it has come to the Petitioner's knowledge that UKAI has been issuing membership cards to private individuals for the purchase of shares with a view of selling and/or disposing the suit property. Further, it was conceded that the Petitioner did lodge a claim with the 2nd Respondent which is pending determination but that the claim does not oust the jurisdiction of this Court to hear and determine the instant Petition.

16. In further response, the 1st Respondent filed a further replying Affidavit sworn by Prof Geoffrey M Muluvi on November 23, 2020. It reiterated that the 1st Respondent has never lost its ownership rights over the suit property and that the Petitioner cannot claim ownership over public land. Lastly, the 1st Respondent reiterated that given that a similar petition was lodged before the 2nd Respondent by the Petitioner, if allowed to proceed, this suit would be sub judice.

17. On January 7, 2021, the 1st Respondent filed its submissions to the application. The counsel for the 1st Respondent submitted that the Petitioner has not produced any evidence of written authority from the said Society authorizing its representatives to file this suit. That the said omission is contrary to the

requirements of Sections 41 (1) and (2) of the *Societies Act* Cap 108 Laws of Kenya. That in the absence of evidence of such authority from the Petitioner, the outlined representatives of the Petitioner have no locus standi to institute these proceedings which are therefore a nullity.

18. It was further submitted that the 1st Respondent's Title to the suit property is indefeasible under the provisions of Section 26 (1) of the *Land Registration Act*, 2012. That the Petitioner had not substantiated its claim to the suit property.

19. Moreover, the 1st Respondent submitted that due to the pending petition before the 2nd Respondent by the Petitioner herein over the same subject matter, this Court is precluded from hearing these proceedings as to do so would be sub-judice and against the clear provisions of Section 6 of the *Civil Procedure Act*. Lastly, the 1st Respondent submitted that the Petitioner has not established a prima facie case with the likelihood of success and neither had they demonstrated how they would be prejudiced if the orders sought are denied.

20. The 1st Respondent further placed reliance on the list and bundle of authorities filed in Court on January 7, 2021 to buttress their submissions.

21. Vide the submissions dated January 27, 2021, the Interested Party argued that the Petitioner had satisfied the criteria for grant of conservatory orders. That the proportionality of the competing interests favours issuance of conservatory orders because the Petitioner would suffer irreparably if evicted from their homes while the 1st Respondent would suffer no harm because it does not utilize the suit property.

22. None of the authorities cited by the Interested Party were annexed to the submissions and as such, they have been disregarded.

23. The Petitioner's submissions were filed in Court on April 21, 2021. The counsel for the Petitioner argued that the Petitioner had demonstrated the requirements for the grant of injunctive reliefs. That a prima facie case with high chances of success was established by virtue of their ancestral claim to the suit property. That no university in Kenya owns such vast tracts of land in this particular instance, 4,500 acres.

24. It is further submitted that in the event that the application is disallowed, the 1st Respondent will enforce the eviction notices causing irreparable loss to the Petitioner. Lastly, it was submitted that the balance of convenience shifts in favour of the status quo being maintained. That the 1st Respondent only moved to take possession of the suit property in June 2020 when the public notice was issued directing the Petitioner to demolish all its structures in the suit property.

25. Again, none of the authorities that were cited by the Petitioner were annexed thus, they are disregarded.

26. On April 27, 2021, the 3rd, 4th and 5th Respondents filed their submissions. The State Counsel contended that the Petitioner had not met the threshold for grant of the injunctive orders sought as enunciated in the case of Giella v Cassman Brown & Co Ltd [1973] EA 358. It was argued that the Petitioner did not produce evidence of ancestral ownership of the suit property. That evidence of irreparable loss was also not substantiated. That the balance of convenience tilts against issuing the injunctive reliefs because it is the 1st Respondent who would suffer for stalled developments and the advancement of education in the country.

27. Lastly, it was argued that the jurisdiction of this Court does not extend to halting a tendering process either under the *Constitution* or vide the *Environment and Land Court Act*, 2011. No authorities were annexed to the 3rd, 4th and 5th Respondents' submissions.

28. The primary issue for determination is whether the Applicants have demonstrated a prima facie case to warrant issuance of the orders sought.

29. The test for granting the conservatory orders must align with the decision of the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR*. The following excerpt of the learned Judges' findings is especially succinct: -

> ' (86) 'Conservatory orders' bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as 'the prospects of irreparable harm' occurring during the pendency of a case; or 'high probability of success' in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.'

30. In *Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another [2016] eKLR* Justice GV Odunga held as follows: -

> ' 68. What then are the circumstances under which the Court grants conservatory orders? It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success. Accordingly in determining this application, the Court is not required-indeed it is forbidden- from making definite and conclusive findings on either fact or law. I will therefore refrain from making any determinations whose effect would be to prejudice the hearing of the main Petition. However, apart from establishing a prima facie case, the applicant must further demonstrate that unless the conservatory order is granted there is real danger which may be prejudicial to him or her. See Centre for Rights, Education and Awareness (CREAW) & 7 others vs The Hon Attorney General, Nairobi HC Pet No 16/2011, Muslims for Human Rights (MUHURI) & 2 others vs The Attorney General & Judicial Service Commission, Mombasa HC Pet No 7 of 2011 and V/D Berg Roses Kenya Limited & Another vs Attorney General & 2 Others [2012] eKLR.'

31. Justice GV Odunga goes on to endorse the following observations made by other learned members of the Bench: -

> ' 70. The aforesaid principles were adopted by the High Court of the Republic of Trinidad and Tobago in the case of Steve Furgoson & Another vs The AG & Another Claim No CV 2008 – 00639 – Trinidad & Tobago. The Honourable Justice V Kokaram in adopting the reasoning in the case of Bansraj above stated:
>
> > 'I have considered the principles of East Coast Drilling –V- Petroleum Company of Trinidad And Tobago Limited (2000) 58

> WIR 351 and I adopt the reasoning of BansraJ and consider it appropriate in this case to grant a Conservatory Order against the extradition of the claimants pending the determination of this motion. The Constitutional challenge to the Act made in this case is on its face a serious one. The Defendant has not submitted that the Constitutional claim is unarguable. The Claimants contends that the Act is in breach of our fundamental law and the international obligations undertaken were inconsistent with supreme law. It would be wrong in my view to extradite the claimants while this issue is pending in effect and which will render the matter of the Constitutionality of the legislation academic.'

71. Back home, Musinga, J (as he then was) in *Petition No 16 of 2011, Nairobi – Centre For Rights Education and Awareness (CREAW) & 7 Others* stated that:

> '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*.'

72. In *The Centre for Human Rights and Democracy & Others vs The Judges and Magistrates Vetting Board & Others Eldoret Petition No 11 of 2012*, it was held by a majority as follows:

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

73. Similarly, in *Judicial Service Commission vs Speaker of the National Assembly & Another [2013] eKLR* this Court expressed itself as follows in regard to Conservatory orders:

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

opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.'

32. In the above respect, the 1st Respondent is inarguably the registered proprietor of the suit property as evidenced by the title deed annexed to the replying affidavit.

33. Section 26(1) of the *Land Registration Act*, 2012 perfectly sums up the fate of this application. The said provision of statute outlines as follows: -

> The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
>
> (a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or
>
> (b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

34. I have grappled with the basis upon which the Petitioner founded its claim against the 1st Respondent without any proof of that they had ancestral rights to the suit property in the first place. I have also pondered as to why the Petitioner's rights were never registered as either special conditions to the Grant in 1985 or why no objections were raised to the issuance of the Grant in the first place.

35. In any event, I would take relief in the fact that the Petitioner has raised its claim with the 2nd Respondent to address the underlying historical land injustice which may have resulted in the issuance of the 1st Respondent's title deed. All the parties herein have conceded that there is a pending claim by the Petitioner before the National Land Commission in the basis that there was a historical land injustice which occasioned the loss of the Petitioner's land. No doubt that the 2nd Respondent has the technical competence and expertise to investigate and resolve the Petitioner's claim in accordance with Section 15 of the *National Land Commission Act*, 2012.

36. Since the 2nd Respondent would as well be in a position to recommend the appropriate redress in the event of a finding that there was a historical land injustice, I am minded to sustain the 1st Respondent's argument that proceeding with the instant application and the Petition would be sub judice and contrary to Section 6 of the *Civil Procedure Act*. For now, this Court's hands are tied by virtue of Section 26(1) of the *Land Registration Act*, 2012.

37. I have adopted the view that was taken by the Court of Appeal in *Joseph NK Arap Ng'ok v Moijo Ole Keiwua & 4 others [1997] eKLR* where it was held as follows: -

> ' Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such sanctity of

title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.'

38. I would also sustain the argument by the State Counsel for the 3rd, 4th and 5th Respondents that this Court is divested of jurisdiction to intervene on matters of public procurement as sought under prayers 4 and 5 of the instant application. The jurisdiction of this Court is delineated at Section 13 of the *Environment and Land Court Act*. I would therefore endorse the finding of Justice JG Kemei in *Benmark Murikwa Nganga v Attorney General & 4 others [2019] eKLR* where the Court held as follows: -

> ' 44. The Applicant's issue in respect to the award of the tender and the contract are with respect not within the jurisdiction of this Court and this can best be pursued using the dispute resolution mechanism provided under the Public Procurement and Disposal Act. The jurisdiction of this Court is as set out in Art 162(2)(b) of the *Constitution* read together with section 13 of the Environment and Land Act.'

39. I therefore find the instant application devoid of merit. It is hereby dismissed with costs.

SIGNED, DATED AND DELIVERED AT NAROK VIA EMAIL ON 25TH NOVEMBER, 2022.

MBOGO C.G.

JUDGE

25/11/2022

In the presence of:

Court Assistant: Chuma