



**Rado Development Company Limited v County Government of Kisumu & another (Environment & Land Petition E003 of 2020) [2022] KEELC 15469 (KLR) (19 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15469 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND PETITION E003 OF 2020  
SO OKONG'O, J  
DECEMBER 19, 2022**

**BETWEEN**

**RADO DEVELOPMENT COMPANY LIMITED ..... PETITIONER**

**AND**

**THE COUNTY GOVERNMENT OF KISUMU ..... 1<sup>ST</sup> RESPONDENT**

**ABALA WANGA, KISUMU CITY MANAGER ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This suit was brought by the petitioner by way of a petition dated December 16, 2020. In the petition, the petitioner sought the following reliefs;
  1. Conservatory orders directed at the respondents restraining them from entering upon or attempting to demolish all that property known as title No Kisumu/Municipality Block 9/111(hereinafter referred to as “the suit property”) in pursuance of the impugned notice or otherwise interfering with the petitioner’s quiet possession and enjoyment of the property.
  2. Prohibitory orders directed at the respondents restraining them from claiming, entering upon or attempting to demolish the suit property in pursuance of the impugned notice or otherwise howsoever interfering with the petitioner’s possession and quiet enjoyment of the property.
  3. A declaration that the purported “Public Notice” dated December 9, 2020 is null and void and of no legal consequences to the extent that it relates to the suit property.
  4. A declaration that the respondents’ police have threatened, infringed upon and violated the petitioner’s fundamental rights to privacy, property and fair administrative action.
  5. A declaration that by their actions, the respondents have acted capriciously, arbitrarily and have abused and exceeded their lawful powers.



6. A declaration that as a result of the respondents' actions aforesaid, the petitioner has suffered damage and loss and is entitled to exemplary damages.
  7. An order for compensation to be assessed and quantified by the court.
  8. General damages.
  9. Costs of the petition.
2. In their petition, the petitioner has averred that it is the duly registered leasehold proprietor of all that parcel of land known as Title No. Kisumu Municipality/Block 9/111 ("the suit property"). The petitioner has averred that it purchased the suit property in 2012 from the County Council of Kisumu (hereinafter referred to only as "the Council") at a consideration of Kshs 31,000,000/- after all the necessary approvals were obtained by the Council to sell the property by tender to defray its debts. The petitioner has averred that it participated in the tender and emerged the winner after which it entered into a formal agreement for sale with the Council on June 14, 2012. The petitioner has averred that after it fulfilled its part of the agreement for sale, the suit property was transferred to it on 3<sup>rd</sup> September 2012 and it was issued with a certificate of lease. The petitioner has averred that its leasehold interest in the suit property is for a term of 69 years with effect from April 1, 1985 and that the same is still subsisting.
  3. The petitioner has averred that it has enjoyed quiet possession of the suit property since 2012 with the full knowledge of the respondents to which it has paid land rates over the years and received approvals for the developments that it has carried out on the property. The petitioner has averred that on December 14, 2020, the respondents caused a notice dated January 9, 2020 to be affixed on the main gate of the suit property. The petitioner has averred that the said notice required the petitioner and its tenants on the suit property numbering 74 to vacate the suit property in less than 48 hours in default of which the 1<sup>st</sup> respondent would forcibly evict them and raze the suit property to the ground.
  4. The petitioner has averred that through its advocates on record, it wrote to the respondents explaining and demonstrating that it was the lawful owner of the suit property and as such was lawfully in occupation thereof. The petitioner has averred that despite receipt of the letter, the respondents refused to withdraw the said notice. The petitioner has averred that the respondents are hell-bent on carrying out arbitrary, illegal, and unconstitutional eviction of the petitioner from the suit property and demolition of its structures thereon. The petitioner has averred that the current value of the suit property inclusive of the developments thereon is Kshs 155,000,000/-. The petitioner has averred that the petitioner and its tenants stand to suffer colossal loss and irreparable damage should the court not intervene and halt the respondents' illegal acts complained of.
  5. Together with the petition, the petitioner filed a notice of motion application dated December 16, 2020 seeking conservatory orders in the nature of a temporary injunction restraining the respondents from entering upon the suit property to effect the impugned notice or from otherwise howsoever interfering with the petitioner's business, quiet possession, and enjoyment of the suit property.
  6. In response to the petition and the said application for a conservatory order, the respondents filed grounds of opposition dated January 20, 2021 in which the respondents have raised several issues. The respondents have termed the petition and the application as unmerited the same having been based on irrelevant and inadmissible evidence. The respondents have averred that the suit property which was public land was acquired by the petitioner unlawfully. The respondents have averred that the petitioners have not produced any evidence showing that they acquired the said parcel of land lawfully. The respondents have contended that the title to the suit property having been acquired by the



petitioner illegally, the same does not enjoy the protection of the law. The respondents have urged the court to dismiss the petition and the application with costs and to proceed to make a declaration that the suit property was acquired by the petitioner irregularly and order the cancellation of the petitioner's title to the same.

7. In addition to the grounds of opposition, the respondents filed an answer to the petition and a cross-petition. In their answer to the petition and cross-petition, the respondents have reiterated that the suit property is public land and that the same was acquired by the petitioner corruptly, irregularly, illegally and fraudulently. The respondents have denied that the petitioner acquired the suit property through an open competitive tender as claimed in the petition. The respondents have urged the court to dismiss the petition with costs.
8. In their cross-petition, the respondents have contended that the petitioner fraudulently and illegally acquired the suit property that was reserved for public use and has since denied the public access and use thereof. The respondents have sought the following reliefs against the petitioner in the cross-petition;
  1. A declaration that the 1<sup>st</sup> respondent is the rightful owner of the suit property.
  2. A declaration that the purported acquisition of the suit property by the petitioner is illegal, null and void.
  3. Rectification of the register for the suit property by the cancellation of the registration of the petitioner as the owner thereof and the registration of the 1<sup>st</sup> respondent as the owner of the property.
  4. A declaration that the occupation of the suit property by the petitioner is illegal and an order for its eviction from the property.
  5. A permanent injunction to restrain the petitioner from interfering with the respondents' use and occupation of the suit property and from transferring, selling and encumbering the said property.
9. The petitioner's application for a conservatory order was heard by Ombwayo, J who in a ruling delivered on September 23, 2021 allowed the same with costs to be in the cause. In the ruling, Ombwayo, J stated as follows in part:

“I find that the respondents reply has no sufficient evidence as they have not clearly demonstrated to this honourable court how the petitioner acquired the title illegally yet they are the ones who sold the suit property to the petitioner and from the letter dated May 31, 2012, the respondents wrote to the petitioner confirming that they won the tender.
10. The preliminary objection, the respondents have urged the court to dismiss the petitioner's petition without a hearing on the following grounds;
  1. That the petition discloses no constitutional issue and is merely an attempt to constitutionalize a matter that relates to land allocation and adjudication.
  2. The petition offends the doctrine of constitutional avoidance by seeking the application of the Constitution on matters fully addressed by statute.
  3. The petition offends the doctrine of exhaustion in so far as the complaints raised in the petition relate to actions of the 2<sup>nd</sup> respondent who by dint of sections 12, 28 and 29 of the Urban Areas and Cities Act implements the decisions and the functions of the Kisumu County Public Service Board and therefore the court does not have jurisdiction to determine the matter in



light of the provisions of articles 234(2)(i), section 77 of the [County Governments Act](#) and sections 85, 86 and 87 of the [Public Service Commission Act](#).

4. The petition is incompetent, misconceived, vexatious and an abuse of the process of the court.
11. The notice of preliminary objection was heard by way of written submissions. The respondents filed their submissions on October 25, 2022 while the petitioner had not filed its submissions as of the time of drafting this ruling. In their submissions, the respondents submitted that; the petition discloses no constitutional issue and offends the doctrine of constitutional avoidance and the doctrine of exhaustion. The respondents cited several statutes and case law in support of their submissions.

#### **Analysis and determination:**

12. I have considered the respondents' notice of preliminary objection and the submissions in support thereof. The following is my view on the matter: In [Hassan Ali Jobo & another v Suleiman Said Shabbal & 2 others](#) [2014] eKLR, the Supreme Court stated as follows on preliminary objections;

To restate the relevant principle from the precedent setting case, *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors* (1969) EA 696.

‘a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ..... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is exercise of judicial discretion.’

13. In [Oraro v Mbaja](#) [2005] 1 KLR 141, the court stated that;

A preliminary objection correctly understood is a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not as a matter of legal principle, a true preliminary objection which the court should allow to proceed. The court's discretion is never exercised just on the basis of propositions of law; there must be a factual situation of which the court takes cognizance, and in relation to which its equitable conscience is exercised.”

14. In [CNM v WMG](#) [2018] eKLR, the court stated as follows on what constitutes a constitutional issue:

21. The question of what constitutes a constitutional question was ably illuminated in the South African case of *Fredericks & others v MEC for Education and Training, Eastern Cape & others* (2002) 23 ILJ 81(CC) in which Justice O'Regan recalling the Constitutional Court's observations in *S v Boesak* (2001)(1)SA 912(CC) notes that:-

“The [Constitution](#) provides no definition of “constitutional matter.” What is a constitutional matter must be gleaned from a reading of the [Constitution](#) itself: If regard is had to the provisions of .....the [Constitution](#), constitutional matters must include disputes as to whether any law or conduct is inconsistent with the



Constitution, as well as issues concerning the status, powers and functions of an organ of State....., the interpretation, application and upholding of the Constitution are also constitutional matters. So too,....., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.”

15. 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. Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Ketrtridge 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 US 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.”

16. 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 v SK Dutambala Cr Appeal No 37 of 1991* (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.”

17. 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.”

18. The respondents’ notice of preliminary objection falls for consideration on the foregoing principles. I am of the view that the petitioner’s complaint in the petition relates to the respondents’ alleged acts of trespass on the suit property and unlawful threat to evict it from the property forcefully unless it voluntarily vacates the same. I am in agreement with the respondents that these are issues that have a civil law remedy. It was not necessary in my view to invoke the constitutional jurisdiction of this court to redress the said complaint. The petitioner should have simply filed a civil suit for injunction rather than moving the court through a constitutional petition. In a dispute of the nature before the court that concerns alleged acts of trespass and a notice of eviction, issues of ownership of land are bound to arise. Constitutional petitions and judicial review are not appropriate procedures for determining such issues. In the present case, the court will be called upon to determine under what circumstances the suit property that was reserved for public use was sold by the Council to the petitioner and whether the sale process was conducted lawfully. These are issues that should be determined in a normal civil suit.
19. The foregoing notwithstanding, my hands are tied in this matter and as such, I am unable to grant the orders sought by the respondents. As I have mentioned earlier in the ruling, the court while considering an application for a conservatory order herein made a finding that the petitioner had established a prima facie case against the respondents. That prima facie case is a prima facie constitutional case. In [\*Kevin K Mwiti & others v Kenya School of Law & others\*](#) [2015]eKLR the court stated as follows:
  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. (Emphasis added). 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.”
20. The court had made a finding that the petition raises prima facie constitutional issues. This court which is not an appellate court cannot without hearing the main petition make another finding that the petition raises no constitutional issues or that the petitioner should have gone to another forum for redress. The finding of a prima facie case made at the hearing of an application for a conservatory order can only be rebutted on an appeal or at the hearing of the petition. A preliminary objection falls short of that.
21. The upshot of the foregoing is that I find no merit in the respondents’ notice of preliminary objection dated July 6, 2022. The objection is dismissed with costs to be in the cause.

**DELIVERED, DATED AND SIGNED AT KISUMU ON THIS 19<sup>TH</sup> DAY OF DECEMBER 2022**

**S OKONG’O**

**JUDGE**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

N/A for the petitioner.

Mr Mongeri for the respondents.

Ms J Omondi-Court Assistant.

