



REPUBLIC OF KENYA



Kinama v Sub County Land & Settlement Officer Kibwezi & 4 others (Constitutional Petition E007 of 2021) [2022] KEELC 15273 (KLR) (7 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15273 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
CONSTITUTIONAL PETITION E007 OF 2021
TW MURIGI, J
DECEMBER 7, 2022**

BETWEEN

LYDIA MBULI KINAMA PETITIONER

AND

**SUB COUNTY LAND & SETTLEMENT OFFICER KIBWEZI ... 1ST
RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

PAUL NZIOKA NDUNDA 3RD RESPONDENT

BETH NDUNDA 4TH RESPONDENT

FLORENCE MUTHONI MUHIA 5TH RESPONDENT

RULING

1. By a Notice of Motion dated 3rd of December, 2021 brought pursuant to the provisions of Section 1A, 1B, 3, 3A, 63 (C) of the *Civil Procedure Act*, Order 40 Rules 1, 2, 4 and 6 of the Civil Procedure Rules and all other enabling provisions of the law, the Applicant seeks the following orders:-
 1. Spent.
 2. That pending the hearing and determination of this application, injunction orders do issue restraining the Respondents or any other person acting under their authority from interfering, disposing, selling, allocation, constructing, transferring, charging and/or in any way dealing with all that plot of land known as plot number 613 at Mbweetwani Settlement Scheme in Mrito Andei Location.
 3. That pending the hearing and determination of this Petition, injunction orders do issue restraining the Respondents or any other person acting under their authority from interfering,



disposing, selling, allocation, constructing, transferring, charging and/or in any way dealing with all that plot of land known as plot number 613 at Mbweetani Settlement Scheme in Mtito Andei Location.

4. That the costs of this application be paid by the Respondents.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of the Applicant sworn on the even date.

The Applicant's Case

3. It is the Applicant's case that on 15th of August, 1992 she purchased the suit property from the Committee of Ilikoni Village. That the suit property was vested on the Applicant as a gift for some funds that she had raised to construct a school in the said village. She averred that she developed the suit property and constructed permanent and semi-permanent buildings. That shortly after she purchased the suit property, she fell ill and sought for treatment for a period of 6 years. That when she returned to the suit property, she found that the 3rd, 4th and 5th Respondents had trespassed on the suit property denying her access to the same. She further averred she established that the 1st Respondent had illegally and unlawfully transferred the suit property to the 3rd Respondent who thereafter transferred ownership of the same to the 4th and 5th Respondents.
4. The Applicant averred that the 1st Respondent issued a letter dated 5th of February, 2020 which indicated that the current ownership of the suit property was vested on the 4th and 5th Respondent whilst the 3rd Respondent had been the original owner during demarcation recorded in 2001.
5. The Applicant went on to state that vide a letter dated 25th of September, 2019 she lodged a complaint to the 1st Respondent who in turn summoned the 3rd and 4th Respondents to resolve the complaint but they failed to honour the summons.
6. That after failing to honour several summons, a ground visit and a report was prepared on 6th of May, 2021 which confirmed that she is the bonafide proprietor of the suit property. That based on the report the 1st Respondent cancelled the Respondents names from the register and the suit property reverted back to her name. She further averred that under unclear circumstances, the 1st Respondent cancelled her name from the records without involving her or giving her reasons for the alteration and recorded the names of the 4th and 5th Respondents.
7. She went on to state that the 4th and 5th Respondents have began construction on the suit property and unless restrained they will continue with the acts of trespass which will result in the depreciation and degradation of the suit property. The Applicant further averred that the Respondents have continued to deny her access to the suit property thereby violating her right to property. It was argued that the Applicant continues to suffer irreparably from the unlawful actions by the Respondents as she has been deprived of the use of the suit property and is at risk of being completely deprived of the property due to the cancellation of her name from the register.

The 3rd, 4th and 5th Respondents Case

8. Opposing the application, the 3rd, 4th and 5th Respondents vide the replying affidavit sworn by the 4th Respondent on her own behalf and on behalf of the 3rd and 5th Respondent on 3rd of January, 2022 averred that there was no structure on the suit property during the period when the 3rd Respondent was using the suit property. That moreover, the period of 6 years of absence was not convincing to explain the disappearance of the Applicant.



9. She averred that the 3rd Respondent is the legal and registered owner of the suit property the same having been allocated by the 1st Respondent following the completion of the adjudication exercise in 2001. She further averred that the 3rd Respondent sold the suit property to her and the 5th Respondent. She went on to state that on the strength of the transfer request letter by the 3rd Respondent, 1st Respondent confirmed their ownership over the suit property. That following a complaint lodged by the Petitioner, the 1st Respondent summoned her together with the 3rd Respondent for a meeting with the Petitioner on 16th of October 2019 in their offices and upon checking the records they were verbally informed that the suit property is legally registered in her name together with the 5th Respondent.
10. That despite confirmation of ownership of the suit property, the Petitioner has trespassed on the suit property on 7th of June, 2021 which prompted her to make a report at Mtito Andei police station and a complaint with the 1st Defendant offices. That on 8th of June, 2021, the 1st Respondent wrote a letter to the disputing parties herein summoning them to the office at Kibwezi.
11. That despite the advise from the 1st Respondent, the Petitioner went ahead and constructed a semi-permanent kiosk like structure on the suit property on 7th and 9th of June, 2021 which was demolished by unknown persons on 10th of June, 2021. She maintains that they responded to all the summons issued.
12. She argued that the Petitioner was not in occupation of the suit property as the current owner was in occupation and use of the suit property. That as per the government records the suit property does not belong to the petitioner who is employing deceptive tactics to deny the current owner peaceful enjoyment of his property. That the application is an abuse of the court process and if allowed it will set a catastrophic precedence that might lead to more litigation against the authority of the government.

The Response

13. In response, the Petitioner vide her further affidavit sworn on 15th of February 2022 reiterated that after she purchased the suit property she constructed permanent and semi-permanent buildings on the suit property which she intended to house her servants. She argued that she is the legal proprietor of the suit property and that her illness did not give the Respondents the right to trespass on the suit property. She argued that the 4th and 5th Respondents title is not good as it was transferred by a person who did not have a title to transfer. That it had come to her knowledge that the 4th and 5th Respondents have sold the land to David Kyalo for a consideration of Kshs 600,000/- thus intending to dispossess her of the suit property by disposing it off to third parties.
14. The application was canvassed by way of written submissions.

The Applicant's Submissions

15. The Applicant's submissions were filed in Court on 22nd April, 2022. Counsel for the Applicant argued that the main issue for determination is whether the Applicant is entitled to the orders sought. Counsel for the Applicant argued that the law governing interlocutory injunctions is based on Order 40 Rule 1 (a) and (b) of the Civil Procedure Rules, 2010 while the conditions to be met by the Applicant were set out in the case of Giella Vs Cassman Brown [1973] EA 358. With regards to the issue of whether the Applicant has established a prima facie case, Counsel submitted that the Applicant purchased the suit property on 15/8/1992 proceeded to construct permanent and semi buildings. Counsel went on to submit that the Applicant was registered in the Adjudication register as the owner of the suit property before she later came to learn that her name was erased thereof and replaced with the names of the 4th and 5th Respondents. That the 4th and 5th Respondents have since embarked on destroying



the structures built on the suit property by the Applicant. Counsel contended that the suit property is in danger of being wasted away by the Respondents. Counsel thus maintains that the Applicant has established that she has a prima facie case.

16. On irreparable loss, Counsel for the Applicant argued that the Applicant will suffer irreparable loss because the suit property is being utilized by one David Kyalo who purchased the suit property from the 4th and 5th Defendants. That unless the orders sought are granted, the suit property will continue to change hands until there is nothing left to litigate over.
17. Lastly, the Counsel for the Applicant argued that the balance of convenience tilts in favour of the Applicant because none of the Respondents reside on the suit property. Counsel argued that it is in the interest of substantive justice that the orders sought be issued.
18. The Applicant relied on two authorities in support of her submissions namely:-
 1. Mrao Ltd Vs First American Bank of Kenya Ltd & 2 Others [2003] eKLR.
 2. Kenleb Cons Ltd Vs New Gatitu Service Station Ltd & Another [1990] eKLR.

The 3rd – 5th Respondents Submissions

19. The 3rd, 4th and 5th Respondents filed their submissions on 9th May, 2022. Counsel reiterated that the principles governing the grant injunctive reliefs were set out in the case of Giella Vs Cassman Brown [1973] EA 358. It was submitted that the Applicant has not proved a prima facie case because she purchased the suit property from a person who was not the lawful owner and whose records are not at the Lands Registry. Counsel submitted that the photographs supplied by the Applicant showing structures within the suit property are from neighbouring properties. Counsel contended that the Applicant has approached this Court with unclean hands and is therefore not entitled to equitable reliefs as prayed. That the 4th and 5th Respondents' registration as owners of the suit property is valid and unimpeachable.
20. It was further argued that the orders sought by the Applicant cannot be granted at this stage as they would not only lead to eviction of the Respondents but would also amount to a premature determination of the suit without fair hearing. It was further submitted that the Applicant had failed to prove that damages would not be an adequate remedy because the value of the suit property is known and moreover, the Respondents are not impecunious.
21. Lastly, it was submitted that the balance of convenience is in favour of the Respondents because, the suit property is currently in the occupation of David Kyalo to whom the 4th and 5th Respondents lawfully sold the suit property.
22. The 1st and 2nd Respondents did not file submissions in respect of the instant application.

Analysis and Determination

23. The Petitioner has brought this application pursuant to the provisions of Section 1, 1A, 1B, 3A, 63(c) of the *Civil Procedure Act* and Order 40 Rules 1, 2, 4 & 8 and Order 51 Rule 1 of the Civil Procedure Rules. This being a constitutional petition, it was expected that interim relief be sought by way of a conservatory order, pursuant to Rules 23 and 24 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.



24. In the case of James Yator Kisang Vs Land Adjudication Officer Elgeyo Marakwet & 3 Others [2022] eKLR the court held as follows;

“To begin with, the matters herein are based on alleged violation of the Constitutional rights of the Petitioner under Article 40(2) of *the Constitution*. The law is clear that one cannot seek injunctive relief through an application if the relief is not part of what is sought in the Petition. In matters to do with Constitutional Petitions, what is normally sought are in the nature of conservatory orders. This is because in Constitutional petitions, the Civil Procedure Rules do not apply. Even the threshold required in injunctive orders under the Civil Procedure is not what is required in Constitutional petitions.”

25. The Applicant has not cited any single provision from *the Constitution* of Kenya Protection of Rights and Fundamental Freedoms Practice and Procedure Rules 2013. I therefore find that failure to cite the correct provisions of the law cannot by itself defeat the present application. Article 159(d) and (e) of *the Constitution* enjoins Court to administer justice without undue regard to procedural technicalities and to protect and promote the purpose and principles of *the Constitution*.

26. Proof of a prima facie case is pertinent in respect of applications as well as for purposes of conservatory orders.

27. In so finding I am persuaded by the case of Nicholas Hendrick Classen Vs Commissioner of Lands & 4 Others (2016) eKLR where the court held that;

“.....i don't think that an application can be defeated just because it has cited the wrong provisions of the law. The main concern of the court is to do substantive justice as opposed to technical justice. This is why even the Mutunga Rules provide that the courts should give an interpretation of the rules in a manner which furthers the overriding of the court with regard to Article 259(1) of *the Constitution*. I therefore find that there is nothing wrong in the applicant citing the provisions of the Civil Procedure Rules and Act.”

28. Article 23(3) of *the Constitution* empowers a Court to grant appropriate reliefs in any proceedings brought under Article 22 where there has been a violation or threat of a violation of a fundamental right or freedom. The relief may include a conservatory order.

29. The law on the issuance of conservatory orders is well settled. Conservatory orders were defined in the case of Judicial Service Commission Vs Speaker of the National Assembly & Another (2013) eKLR where the Court held that;

“Conservatory orders in my view are not ordinary civil remedies but are remedies provided for under *the Constitution*, the supreme law of the land. They are not remedies between one individuals 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.”

30. The principles in regard to granting of interim conservatory orders were outlined by the Supreme Court in the case of Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 Others (2014) eKLR where the Court Stated as follows:-

“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 applicant’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.”

31. In the case of *Wilson Kaberia Nkunja Vs The Magistrates and Judges Vetting Board and Others Nairobi High Court Constitutional Petition No. 154 of 2016*, the Court summarized the principles in granting conservatory orders as follows: -
 - a. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of *the constitution*.
 - b. Whether if a conservatory order is not granted, the petition alleging violation of or threat of violation of rights will be rendered nugatory.
 - c. The public interest must be considered before grant of a conservatory order.
32. The Court will first determine whether the Petitioner has established a prima facie case that warrants the grant of conservatory orders. It has been held in various decisions that a prima facie case is not a case which must succeed at the hearing of the main case but which discloses arguable issues in a case alleging violation of rights.
33. A prima facie case was defined in the case of *Kevin K Mwitwa & Others Vs Kenya School of Law & Others (2015) eKLR* where the Court stated:-

“.....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 that discloses arguable constitutional issues.”
34. The Petitioner argued that she has established a prima facie to warrant the grant of the orders sought. The Petitioner contends that on 15th of August, 1992 she purchased the suit property from the committee of Ilikoni village and proceeded to build permanent and semi-permanent buildings thereon. In this regard she produced a sale agreement dated 15th of August, 1992 (LMK1A 1B) and photographs (LMK 2A, 2B, & 2C). That thereafter, she fell ill and when she returned to the suit property she found that the 3rd, 4th and 5th Respondents had trespassed on the suit property. That after she established that her name had been erased from the register, she lodged a complaint to the 1st Respondent. That a ground visit and report prepared confirmed that she was the legal owner of the suit property. In this regard she produced the ground report for plot number 613 Mbweetani Settlement Scheme dated 6th of May, 2021 (annexure lmk10) which stated in its findings that she was the original genuine owner of the suit property. That based on the report, the 1st Respondent cancelled the Respondents’ names and the suit property reverted back to her name.
35. The Petitioner went on to state that later, under unclear circumstances the ownership of suit property reverted back to the 4th and 5th Respondents. The Petitioner contends that the Respondents have trespassed on her property and violated her fundamental right to access and own property.
36. On the other hand, the 4th Respondent averred that the 3rd Respondent was the legal owner of the suit property having been allocated the same by the 1st Respondent following the land adjudication exercise conducted in 2001. In this regard she produced the 3rd Respondent’s document of ownership



(BEN1). She further averred that the 3rd Respondent sold to her and the 5th Respondent the suit property and on the strength of a transfer request letter, the 1st Respondent confirmed that they were the registered owners of the suit property. In this regard she produced a letter dated 23rd of July, 2012 (annexure B.E.N2) from the District Land Adjudication and Settlement Officer Kibwezi West which confirmed that the suit property was jointly owned by the 4th and 5th Respondents and a letter dated 5th of February, 2020 by the County Land Adjudication and Settlement Officer (annexure B.E.N5) which confirmed that the 4th and 5th Respondents are the owners of the suit property.

37. Both parties are claiming ownership over the same parcel of land. The Petitioner's proprietary claim is based on the sale agreement dated 12th of August, 1992 and the ground report for Plot No. 613 Mbweetwani Settlement Scheme dated 6th of May, 2021 while the 3rd, 4th and 5th Respondents claim is anchored on the records held by the Ministry of Lands and Physical Planning, land and adjudication and settlement officer Kibwezi west and the county land adjudication and settlement officer.
38. The issue of ownership of the suit property is an issue that need to be canvassed in a full trial by calling evidence and interrogating it through cross examination. At this stage the Court is not required to determine the issues which will be canvassed at the trial.
39. The Court is aware that at the interlocutory stage, it is not required to make any definitive conclusion on the matters that are in controversy.
40. In an application seeking for a conservatory order, it is imperative that the court warns itself that it is required not to make any definitive finding of fact or law. This position was enunciated in the case of Kenya Association of Manufacturers & 2 Others Vs Cbinet Secretary – Ministry of Enviroment and Natural Resources & 3 Others (2017) eKLR where the court stated as follows;

“In an application for a conservatory order, the court is not invited to make any definite or conclusive findings of fact or law on the dispute before it because that duty falls within the jurisdiction of the court which will ultimately hear the substantive dispute.”
41. At this stage, the Applicant is required to establish a prima facie case with a likelihood of success. If the Court were to determine the issues raised, it would amount to determining the Petition at the interlocutory stage.
42. From the pleadings by the parties and the documents presented in Court, it is clearly discernible that the records at the Ministry of Lands and Physical Planning reflect that the suit property was registered in the names of the 4th and 5th Respondents. Prior to their ownership thereof, the suit property was in the name of the 3rd Respondent as per the land records. I find that the Petitioners have not established a prima facie case to warrant the grant of conservatory orders.
43. Before granting conservatory orders, the court is required to evaluate the pleadings and determine whether the denial of conservatory orders will prejudice the applicant. In the case of Centre for Rights Education & Awareness(CREAW)& Another Vs Speaker of the National Assembly & 2 Others (2017) eKLR the Court held that;

“A party who moves the court seeking conservatory orders must show to the satisfaction of the court that his or her rights are under threat of violation, are being violated or will be violated and that such violations, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent the violation of rights and fundamental freedoms and preserve the subject matter pending the hearing and determination of a pending cause or petition.”



44. The Petitioners contend that the Respondents are constructing on the property thereby causing its depreciation and degradation. It is evident from the averments from both parties that on David Kyalo is on occupation of the suit property. From the Petitioners pleadings and annexures it is crystal clear that she is not in occupation of the suit property. Having evaluated the material placed before me, I find that the Applicant will not suffer any prejudice if the conservatory orders are not granted as she is not in occupation of the suit property.
45. On the issue as to whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order, I find that it will served better by preserving the records held by the 1st Respondent until the issue of ownership is heard and determined.
46. The upshot is that the application dated 3rd December, 2021 is devoid of merit.

HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 7TH DAY OF DECEMBER, 2022.

IN THE PRESENCE OF: -

Court Assistant – Mr. Kwemboi

Ms Munyao for the Applicant

