



REPUBLIC OF KENYA



KENYA LAW
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Ragen (Suing in the public interest) v Safqa Limited & 6 others (Environment & Land Petition E008 of 2023) [2024] KEELC 496 (KLR) (7 February 2024) (Ruling)

Neutral citation: [2024] KEELC 496 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION E008 OF 2023
SM KIBUNJA, J
FEBRUARY 7, 2024**

BETWEEN

AINEA RAGEN (SUING IN THE PUBLIC INTEREST) PETITIONER

AND

SAFQA LIMITED 1ST RESPONDENT

CHIEF LAND REGISTRAR MOMBASA 2ND RESPONDENT

NATIONAL LAND COMMISSION 3RD RESPONDENT

AND SETTLEMENT OFFICER 4TH RESPONDENT

COUNTY GOVERNMENT OF MOMBASA 5TH RESPONDENT

URBAN PLANNING MOMBASA COUNTY 6TH RESPONDENT

ATTORNEY GENERAL OF THE REPUBLIC OF KENYA 7TH RESPONDENT

RULING

1. The petitioner filed the notice of motion dated the 14th September 2023 seeking for inter alia, “conservatory orders prohibiting the respondents either by themselves or by their agents or their staff or any private individual not mentioned in this suit from subdividing, transferring, developing and selling of the suit plot No. 1580 Mwembelegeza Scheme in Mombasa County.” The application is premised on the eleven (11) grounds on its face, and supported by the affidavit of Ainea Ragen, the petitioner, sworn on the 14th September 2023, in which he inter alia deposed that plot No. 1580, the suit property, was reserved as bus park; that the records in the lands office have shown the plot that was under Mwembelegeza Settlement Fund Trustee was in a mysterious and mischievous way transferred to Anthony Charo Karisa on 11th April 2014 and then to the 1st defendant on the 23rd September 2015; that there has been established on the said plot a shopping mall with numerous shops rented out to individuals, and it is not benefitting the public; the transaction over the suit property



- has been denounced by the 3rd respondent; that there is no bus park at Mwembelegeza Sheme and the residents there, including those living with disabilities are disenfranchised and having difficulties accessing public transport.
2. The application is opposed by the 5th and 6th respondents through the grounds of opposition dated the 30th October 2023. They among others contend that the suit should have been filed through a plaint and not petition; that the petitioner has not exhausted the other available methods before coming to court; and that the petition is frivolous, vexatious, an abuse of court and should be struck out with costs. The 5th and 6th respondents also filed the replying affidavit of John Wambua Francis, a planner with 5th respondent, sworn on the 20th November 2023 in which he among others deposed that the 5th respondent was not involved in issuing of title over the suit property, that had been identified as a public park; that the title was issued by the Registrar of Titles acting on information provided by the National Survey office and the 5th respondent used the said title only for rating purposes.
 3. The 1st respondent opposed the application through the replying affidavit of Abdulaziz Suleiman, director, sworn on the 1st November 2023 in which he among others deposed that the 1st defendant is the registered owner of Mombasa/Mwembelegeza/1580. That the said land was not public land as it acquired it from Anthony Charo Karisa on 9th September 2015. That the said vendor had obtained registration with the land on 11th April 2014. That the application is meant to vex the 1st respondent and should be dismissed with costs.
 4. The 2nd, 4th, and 7th respondents responded to the application through the replying affidavit of Benjo Kibet Daniel, County Land Adjudication and Settlement officer Mombasa, sworn on the 7th December 2023 in which he deposed that plot No. 1580 is within Mwembelegeza Settlement Scheme, Mombasa and their records indicates it was one of the plots reserved for public utilities as a Bus Park.
 5. The court gave directions on filing and exchanging submissions on the 2nd October 2023. During the subsequent mention on the 13th December 2023, the petitioner indicated that he has filed and served his submissions dated the 14th November 2024, which the court has considered. On record are the submissions by the learned counsel for the 5th & 6th respondents dated the 20th November 2023 and 1st respondent dated the 5th December 2023 which the court has also considered. The learned counsel for the 3rd respondent informed the court that they do not oppose the application. The court has checked the record and CTS and not traced any submissions from the Attorney General.
 6. The issues for the determinations by the court are as follows:
 - a. Whether the petitioner has made a reasonable case with a probability of success for the conservatory order sought to issue at this interlocutory stage.
 - b. Who pays the costs in the application?
 7. The court has carefully considered the grounds on the application, affidavit evidence, grounds of opposition, submissions filed, and come to the following findings:
 - a. That from the replying affidavit of Benjo Kibet Daniel, filed by through the Attorney General for the 2nd, 4th, and 7th respondents, the suit property was reserved as one of the public utility plots as a bus park. That even though the affidavit has not specifically stated so, I take the deposition thereon to confirm their support for petitioner's application for conservatory order to issue pending the hearing and determination of the petition.
 - b. The learned counsel for the 3rd respondent expressed their support for the application from the bar on the 13th December 2023.



- c. That though the 5th and 6th respondents initially appeared to oppose the application through their grounds of opposition dated the 30th October 2023, they appear to have somewhat changed that position through the replying affidavit sworn by John Wambua Francis on the 20th November 2023 and their submissions dated 20th November 2023 where the learned counsel inter alia submitted that “It is trite law that conservatory orders are issued in cases where the interests of the public are at stake hence the need to preserve status quo…… it is on this basis and the replying affidavit filed on behalf of the 5th and 6th respondents- we submit that we are in agreement that there is need for the court to grant conservatory orders pending hearing and determination of the petition.” The court therefore takes the 5th and 6th respondents to be in support of the petitioner’s application for conservatory orders to issue pending hearing and determination of the petition.
- d. The 1st respondent has however expressed its opposition to the application through the replying affidavit by Abdulaziz Suleiman sworn on the 1st November 2023 and their learned counsel’s submissions dated the 5th December 2023. The 1st respondent contends that it acquired the suit property lawfully and the petitioner has not satisfied the principles precedent to the issuance of conservatory orders. That the petitioner’s application is without merit and should be dismissed with costs. That even without appearing to make final determinations on the question of whether or not the suit property is public or private land and whether the 1st respondent’s title to the said land was lawfully, legally and procedurally obtained, the totality of the affidavit evidence by the petitioner, 2nd, 4th, & 7th respondents and the 5th & 6th respondents confirms that the suit property was at the time of the adjudication of the Mwembelegeza Settlement Scheme, reserved as a public utility for use as a bus park. That shows at that stage it was part of the public land as defined under Article 62 of the Constitution of Kenya.
- e. That flowing from the finding in (d) above, it is only fair and just to conserve the status of the suit property pending the hearing and determination of the petition as sought by the petitioner and tacitly supported by all the respondents, except the 1st respondent.
- f. That the issue of costs should abide the outcome of the petition.
8. That in view of the foregoing determinations, the court finds and orders as follows:
- a. That the petitioner’s notice of motion dated the 14th September 2023 has merit and is allowed in terms of prayer (2).
- b. The costs to abide the outcome of the petition.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED ON THIS 7TH DAY OF FEBRUARY 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Petitioner : Present.

Respondents : Mr. Mugambi for Kiptoo for 1st Respondent and M/s Lenjo for 2nd, 4th and 7th respondents.

Wilson – Court Assistant.

S. M. KIBUNJA, J.



ELC MOMBASA.

