Fondo & 45 others v Mwahadzi & 8 others (Petition E016 of 2023) [2024] KEELC 5178 (KLR) (4 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5178 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

PETITION E016 OF 2023

EK MAKORI, J

JULY 4, 2024

IN THE MATTER OF: ARTICLE 22, ARTICLE 23, ARTICLE 27, ARTICLE 40, ARTICLE 47, AND ARTICLE 165(3) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOM UNDER ARTICLE 40, ARTICLE 47, AND ARTICLE 27 OF THE CONSTITUTION REGARDING THE PROPERTY RIGHT, RIGHT TO FAIR ADMINISTRATIVE ACTION, RIGHT TO EQUALITY, AND FREEDOM FROM DISCRIMINATION, ALL RELATING TO PLOT NO. 161 SECTION/ III/MN CR NO. 5636, WHICH LAND HAS BEEN ILLEGALLY ALIENATED, SUBDIVIDED, OR CURVED INTO PLOT NUMBERS 1665/III/MN CR 25460, CR 5550 PLOT NO. 10468 SECTION/III CR 65550, 10469 SECTION/III/MN

AND

IN THE MATTER OF: ARTICLE 17 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948)

AND

IN THE MATTER OF: THE PRINCIPLE OF LEGITIMATE EXPECTATION

AND

IN THE MATTER OF: ARTICLES 14 AND 22 OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS, 1981

AND

IN THE MATTER OF: SECTION 6, 27 AND 28 OF THE REGISTRATION OF TITLES ACT (CAP 281) OF THE LAWS OF KENYA

AND

IN THE MATTER OF: SECTIONS 20 AND 21 OF THE LANDS TITLE ACT (CAP 282) OF THE LAWS OF KENYA

AND

IN THE MATTER OF: REGULATION 30 AND SECTION 30 OF THE SURVEY ACT (CAP 299 OF THE LAWS OF KENYA

AND IN THE MATTER OF: THE APPLICATION OF INTERNATIONAL LAW

BETWEEN

KALAMA FONDO & 45 OTHERS ..... PETITIONER

AND

MWALIM KHAMIS MWAHADZI & 8 OTHERS ..... RESPONDENT

RULING

1. By an application dated 20th April 2023, the Applicant seeks, among other reliefs, a conservatory order restraining the respondents, whether by themselves or their servants or any other person acting on their behalf, from evicting, demolishing the petitioners'/Applicants' homesteads or otherwise interfering with the Applicants' stay on the suit property is known as Title No. 161/Section III/MN CR No. 5636, now subdivisions Nos.1665/III/MN CR 25460, CR 65550, Plot No. 10468 Section III/MN and 10469 Section /III/MN, until the current petition is heard and determined.

2. An affidavit deposed on 20th April 2023 by one Kalama Fondo Nyamawi (representing the other petitioners/applicants) gave a long history on the status and the acquisition of the suit properties - Title No. 161/Section III/MN CR No. 5636, subdivision Nos.1665/III/MN CR 25460, CR 65550, Plot No. 10468 Section III/MN and 10469 Section /III/MN. The applicants aver that they have settled on the parcel of land since immemorial and that the land is ancestral and ought to have been adjudicated in their favor pursuant to the repeal of the Mazrui *Land Trust Act* on 1st December 1989.

3. The applicants state that instead of the land being ascertained and adjudicated in their favor, the 1st to 5th respondents hatched a fraudulent scheme with the aid of government officials at the land adjudication and settlement office to have the land subdivided and titles issued to them to the detriment of the applicants when appropriate adjudication ought to have been undertaken.

4. The applicants aver that if adjudication is correctly done, it will reckon that they were on the ground and still reside on the suit property to date; hence, they filed the current petition to question why the adjudication process was never conducted after the repeal of the Mazrui *Land Trust Act*, which they believe infringed their rights to property ownership under Article 40 of the *Constitution*.

5. The petitioners stress that goons have invaded the land with the assistance of the local administration and are determined to evict them by pulling down their homesteads. This urgent situation necessitates the institution of the current application, whose aim is to restrain the respondents from effecting the imminent eviction directed at them.

6. The respondents were served the current application and the petition by advertisement. I see no response from the respondents. I am not sure whether the Attorney General, who would have been a crucial party in providing this Court with the most significant material regarding whether the land we are dealing with, was ever adjudicated or can be adjudicated after the alleged repeal of the Mazrui *Land*

Trust Act, and the declaration by the Court that the repeal was unconstitutional – as will be discussed below was properly served.

7. I directed the applicant's counsel, Mr. Mangaro, to submit written submissions. When writing this ruling, I saw none on the physical file, the Court email address for receiving submissions, or the online portal.

8. The Court will decide on the application based on the supporting affidavit and the averment in the petition as provided.

9. I frame the issue for this Court's determination as whether, at this point, a conservatory order should be issued restraining the respondents from evicting or demolishing the structures placed on the suit property.

10. A conservatory order is a judicial remedy granted by the Court to restrain or debar any action undertaken to preserve the substratum of the suit—in this case, evicting or demolishing the applicants' homesteads. It is an order of status quo to preserve the subject matter, a crucial aspect of this case.

11. In *Damour Florian Emmeric v Director of Immigration Services* [2022] eKLR, Mrima J. describes the nature of conservatory orders as follows.:

> "In Civil Application No. 5 of 2014 Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others (2014) eKLR, the Supreme Court discussed, in paragraph 86, the nature of conservatory orders as follows: -
>
> (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 Applicant's case for orders of stay.
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> 26. The Court in Nairobi Civil Appeal 151 of 2011 Invesco Assurance Co. Ltd vs. MW (Minor suing thro' next friend and mother (HW) [2016] eKLR defined a conservatory order as follows: -
>
> 5. A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.
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> 27. In Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR, the Court had the following to say about the nature of 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.

28. Conservatory orders are, therefore, aimed at preserving the substratum of the matter pending the determination of the main issues in dispute."

12. Mrima J, in the same case, proceeded to state that the issuance of conservatory orders should not delve into the petition itself given the interlocutory nature of the orders and that the orders should be issued based on the already settled principles in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* case where at paragraph 86 the Court stated as follows: -

> "(86) ..... 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 courses."

13. The principles for the issuance of conservatory orders have been well captured in the following decisions: In the *Board of Management of Uhuru Secondary School City County Director of Education & 2 others* [2015] eKLR, the Court articulated the principles for grant of conservatory orders as:

(i) The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.

(ii) The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.

(iii) Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.

(iv) Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.

14. In *Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board* [2016] eKLR, the Court coined three primary principles for consideration on whether to grant 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; and
>
> (c) The public interest must be considered before grant of a conservatory order."

15. The applicants aver that they have lived on the suit land since immemorial. The land was initially registered under the Mazrui *Land Trust Act*, which was later repealed. Adjudication has never been undertaken after that, and the land has been fraudulently transferred to the 1st to 5th defendants. They believe this process was done to their disadvantage since they have been on the suit property since immemorial.

16. The Mazrui *Land Trust Act* was repealed on 1st December 1989 by the Mazrui Lands Trust (Repeal) Act, 1989. The aim was to deal with absentee landlords with vast unutilized land that needed to be allocated to landless locals. Moving the Motion on 2nd November 1989 for the repeal of the Act, Mr. Mbela, The Minister for Lands and Housing and Physical Planning, said in part:

> " Mr. Speaker, Sir, the land is for the exclusive use of the Mazrui tribe or family and the Shak's followers of Salim Bin Khamis, who have all the legal rights of ownership over it. This is not a healthy situation as it contradicts the prevailing official policies in that it discriminates against the citizens of this country. The indigenous people who reside on this land are now treated as squatters and have no legal right over its use or exploitation."

17. The Mazruis went to Court in 1991 to challenge the repeal. Tuiyot J. gave a judgment in their favour on 19 July 2012. Applicants in the case, Abdalla Mohamed, Khamis Mohamed, Omar Abdallah Mohamed Suleiman, and others, had sued the Government on behalf of the Mazrui Land Trust Board on the constitutionality of the repeal of the Act. In his judgment, the judge found that the repeal and seizure of the land from the Mazruis in 1989 was illegal and unconstitutional see *Ahmed Abdalla Mohamed & 3 others v Attorney General* [2012] eKLR, this is what he said:

> " The 1989 Statute did not itself provide for the prompt payment of full compensation of the acquired property nor did it refer the question of prompt payment of full compensation to the provisions of Land Acquisition Act (Cap 295 now repealed). The Land Acquisition Act being the legislative arrangement at that time for the compulsory acquisition of Land for public benefit. The Court is told by the Applicants and it is not contested, that they did not and have not received any compensation at all. To that extent the Statute has enabled or facilitated the breach of Article 75(1)(c) of The Former Constitution and Article 40(3)(b) of The Constitution 2010."

18. In the end, Tuiyott J. declared the repeal of the Act unconstitutional, null, and void.

19. The petition before me seems to have been drafted oblivious to Tuiyott J's decision. The petitioner's quest for an order of this Court to undertake adjudication is not well grounded given the decision by Tuiyott J. aforesaid. The petition seems to be bolstered as a quest to redress a historical injustice claim. Still, its design challenges an Act of Parliament that was long declared to have been repealed unconstitutionally.

20. The foundation of the petition based on the materials before me, in my view, leads to a conclusion that the applicants have not achieved a prima facie case with a probability of success as pronounced by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd& 2 others* [2003] eKLR:

> " So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a 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."

21. Having reached that conclusion, I need not discuss the other principles of the grant of conservatory orders. Application dated 20th April 2023. It is hereby dismissed. Since the respondents never participated, there will be no order as to costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 4TH DAY OF JULY 2024.

E. K. MAKORI

JUDGE

In the Presence of;

Mangaro for the Applicants

Happy: Court Assistant: