



**M'ngondu & another v Deputy County Commissioner & 3 others; M'atheru (Interested Party)
(Environment & Land Petition E006 of 2023) [2024] KEELC 5132 (KLR) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5132 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND PETITION E006 OF 2023**

**CK YANO, J
JULY 11, 2024**

BETWEEN

**CHARLES KIPCHANGI M'NGONDU 1ST PETITIONER
JOSHUA KAMENCU M'NGONDU 2ND PETITIONER**

AND

**THE DEPUTY COUNTY COMMISSIONER 1ST RESPONDENT
THE LAND ADJUDICATION OFFICER NAATHU/NAATHU ADJUDICATION
SECTION 2ND RESPONDENT
THE LAND REGISTRAR MERU NORTH 3RD RESPONDENT
HON. ATTORNEY GENERAL 4TH RESPONDENT**

AND

JOSEPH KARUTI M'ATHERU INTERESTED PARTY

RULING

1. By a notice of motion application dated 16th November, 2023, the petitioners/applicants are seeking conservatory orders against the respondents against all dealings in relation to land Parcel No. Naathu/Naathu/101 pending the hearing and determination of the application and pending the hearing and determination of the petition herein and/or further orders of the court.
2. The application is premised on the grounds thereon and supported by the affidavits of Charles Kipchangi M'ngondu and Joshua Kamencu M'ngondu, the applicants herein sworn on 16th November, 2023 and the annexures thereto.
3. The applicants aver that their father was the rightful recorded owner of land Parcel No. Naathu/naathu/101 Adjudication Section now land parcel No. Naathu/naathu/101 (hereinafter referred to as



“the suit property”) having personally gathered the same in the 1970s. That the petitioners have been in occupation of the suit land wherein they are carrying out farming activities. The applicants state that the 2nd respondent without jurisdiction is now threatening to visit the land and implement an illegal decision of the 1st respondent.

4. The applicants aver that the respondents have concluded and determined adjudication proceedings illegally when the registration regime of adjudication system had long changed in 2014. That the respondents have furthered their illegal acts by restricting the applicants’ father’s land. That the interested party has threatened to evict the applicants from the land. The applicants aver that unless the application is allowed, they stand to lose their father’s land. They further contend that they have established a prima facie case with high chances of success.
5. The applicants aver that the interested party lodged a claim over the suit land but the same was dismissed by the committee. That being dissatisfied with the outcome of the objection proceedings, the interested party preferred an appeal to the minister being appeal to the minister land case no. 66 of 2008 and 179 of 2010 (P/No 101). Relying on advice, the applicants believe appeal No. 179 of 2010 was filed out of time.
6. The applicants further aver that their deceased father was issued with a title deed in respect of the suit land on 28th November, 2014. That after the title deed was issued, the 1st and 2nd respondents had no jurisdiction to deal with any dispute touching on the land as the matter fell in the hands of the 3rd respondent and the court. That the 1st respondent without jurisdiction to deal with registered land under the Land Registration Act No. 3 of 2012 went ahead and illegally heard the appeal and delivered a ruling/decision on 12th September, 2017.
7. The applicants have in their supporting affidavit annexed copies of a confirmed grant in Meru CMC succession cause no. 100 of 2020, search and ruling delivered by the 1st respondent in respect to the appeal to the minister land case no. 66 of 2008 and 179 of 2010.
8. The interested party in response to the application filed his replying affidavit sworn on 5th December, 2023. He too avers that the suit land belonged to his late father who had gathered the land. The interested party states that the said land was transferred to him by his late father, but while the transfer was pending, the documents mysteriously vanished from the lands office.
9. It is the interested party’s contention that the applicants have failed to demonstrate to the court how their rights have been specifically infringed. That there are no breach of rights in the petition and neither has it been demonstrated that any rights have been infringed.
10. The interested party avers that the matter having been litigated in court and the interested party having won all those cases, it is in order that the application be dismissed and the interested party be allowed to peacefully occupy his land, the dispute over the same having been fully determined. That after the appeal to the minister was determined and a judgment delivered, the applicants filed Maua CMC ELC case No. 120 of 2018 which was dismissed by that court for the reason that it had no jurisdiction over the matter. That the deceased again opted to file Judicial review misc. application No. E008 of 2023 at Meru ELC. It is the interested Party’s contention that the applicants failed to disclose these facts to this court and have abused the court process.
11. The application was canvassed by way of written submissions which were duly filed by the advocates for the applicants and for the interested party. I have perused and considered the said submissions and I need not reproduce the same in this ruling.



12. I have considered the application, the response and the submissions by the parties. The only issue for determination is whether the applicants should be granted the conservatory orders sought in the application.
13. The principles of grant of conservatory orders were laid down by the Supreme Court in *Gitaru Peter Munya – Vs Dickson Mwenda Kithinji & 2 others* [2014] eKLR. The judges of the Supreme Court in the said case held that conservatory orders bear a more decided public law connotation: For these are orders to facilitate ordered functioning within 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 the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.
14. In *Regency Systems – vs-County Government of Vihiga & 4 others* [2020] eKLR the court after analyzing the conditions for grant of conservatory orders held that-;

“20 From the above authorities, it is clear that the threshold for the grant of conservatory orders in the nature of mandatory orders are far more stringent and higher than those for the grant of interlocutory injunctions under Order 40 Rule 2 of the Civil Procedure Rules, 2010 since the former is a public law remedy...”
15. In considering whether or not to grant conservatory order, the principle of proportionality ought also to be considered. As was stated by Ojwang, AJ (as he then was) in *Suleiman Vs Amboseli Resort Limited* [2004] 2 KLR 590 the court, in responding to prayers, should also opt for the lower rather than the higher risk of injustice.
16. The principle guiding the decision whether or not to grant conservatory orders were succinctly set out by Onguto J. in *Board of Management of Uburu Secondary School Vs City County Director of Education and 2 others* [2015] eKLR who set out the same as hereunder:
 - (i) The applicant ought to demonstrate an arguable prima facie case with a likelihood of success, and that in the absence of the conservatory orders sought, he is likely to suffer prejudice as a result of the violation or threatened violation of *the constitution*;
 - (ii) Once the applicant has established to the court’s satisfaction a prima facie case with a likelihood of success, the court is then to decide whether a grant or denial of the conservatory relief will enhance the constitutional values and objects of the specific right or freedom of Bill of rights;
 - (iii) Thirdly, flowing from the first two principles is whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is indeed the business of the court to ensure and secure as far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice;
 - (iv) The court must consider conservatory orders also in the face of public interest dogma; and
 - (v) Finally, the court is to exercise its discretion in deciding whether to grant or deny a conservatory order. The court must consequently consider all relevant material facts and avoid immaterial matters. The court will consider the applicant’s credentials, the prima facie correctness of the availed information, whether the grievances are genuine, legitimate, and deserving, and finally, whether the grievances and allegations are grave and serious or merely vague and reckless.”



17. The first issue for determination in matter of this nature, is whether a prima facie case has been established. 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, it has to be shown that a case discloses arguable issues which have been raised and in this case, arguable constitutional issues.
18. The applicants have pleaded that their late father, one M'Ngondu M'Mucheke (deceased) was the recorded owner of the suit land having personally gathered the same in the 1970s and have lived on the land ever since exclusively, which is their only home where they carry out farming activities.
19. The applicants aver that the interested party lodged a claim against their deceased father over the suit land but the same was dismissed by the committee. That being dissatisfied with the outcome of the objection proceedings, the interested party preferred an appeal to the minister land case no. 66 of 2008 and 179 of 2010 in which also a decision was made. It is not in dispute that the suit land has been the subject of various previous litigations, all of which were decided against the applicants.
20. It is therefore my finding that considering the issues raised, and without arriving at definite findings, the petition discloses no prima facie arguable issues for trial.
21. The next question is whether there is real danger that prejudice will be suffered as a result of the violation or threatened violation of *the constitution*. What amounts to real danger was dealt with in *Martin Nyaga Wambora Vs Speaker of the County Assembly of Embu & 3 others* [2014] eKLR, where the court expressed itself as follows-;

“To those erudite words I would only highlight the importance of demonstration of “real danger”. The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court’s attention.”

22. In this case, I am of the opinion that no prejudice will be suffered if the conservatory orders are not granted.
23. The third requirement is whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is the applicants’ submission that if the conservatory orders are not granted, the petition will be rendered nugatory. I am not persuaded so. This is because the land will still be there post the determination of the petition.
24. Applying the principles espoused in the above cited cases and text to the instant application, I am inclined not to grant the conservatory orders sought.
25. In the result the application is dismissed with costs.
26. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 11TH DAY OF JULY, 2024

IN THE PRESENCE OF

Court Assistant – Tupet

Mrs Mutegi for petitioner

Ms Asuma holding brief for Mutembei for interested party

C.K YANO



JUDGE

