



**Lati v Ngundo & 3 others (Environment & Land Petition
4 of 2022) [2023] KEELC 638 (KLR) (1 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 638 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND PETITION 4 OF 2022
TW MURIGI, J
FEBRUARY 1, 2023**

BETWEEN

CHRISTOPHER MATATA LATI APPLICANT

AND

ALPHONSE NGEI NGUNDO 1ST RESPONDENT

LAND REGISTRAR MAKUENI 2ND RESPONDENT

DIRECTOR OF LAND ADJUDICATION & SETTLEMENT .. 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. Before me for determination is a Notice of Motion application dated 16th of June, 2022 brought pursuant to the provisions of Order 40 Rule 1 & 4, Order 51 Rule 1 of the [Civil Procedure Rules](#), Sections 1A, 1B, 3 & 3A of the [Civil Procedure Act](#) in which the Applicant seeks the following orders:-
 1. Spent.
 2. That pending the hearing and determination of this application, the 1st Defendant/Respondent by himself, his servants, agents, and/or employees be restrained by a temporary injunction from entering into, trespassing on and/or in any other way interfering with the Plaintiff's/Applicant's property known as Makueni/Nguu Ranch/31 measuring 383 hectares.
 3. That pending the hearing and determination of this suit, the 1st Defendant/Respondent by himself, his servants, agents and/or employees be restrained by a temporary injunction from entering into, trespassing on and/or in any other way interfering with the Plaintiff's/Applicant's property known as Makueni/Nguu Ranch/383.
 4. OCS Emali Police Station to ensure compliance.



5. That the costs of this application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of the Applicant sworn on even date.

The Applicant's Case

3. The Applicant averred that he is the legal owner of the suit property having purchased the same from Agnes Ndavi the legal owner. He further averred that the 1st Respondent trespassed on his land and has illegally constructed a fence without his consent and/or authority. The Applicant contended that the 1st Respondent has violated his proprietary rights by denying him the right to use his property. He argued that, unless the 1st Respondent is restrained by an order of injunction, his proprietary rights over the suit property will be defeated.

The 1st Respondent's Case

4. In opposing the application, the 1st Respondent vide his replying affidavit sworn on 18th of July 2022 averred that the application is misconceived, ill-advised and an abuse of the Court process since the Applicant has not been in possession of the suit property. He went on to state that upon application for a settlement plot at Nguu Settlement Ranch in 2018, the Director of Land Adjudication and Settlement issued him a letter of offer for plot No 31 on 24th of January, 2017. He further averred that after the surveyor pointed out the beacons, he paid the requisite fees and took possession of the suit property.
5. He further averred that, the office of the Director of Land Adjudication and Settlement confirmed that he was the legal allottee of the suit property after it conducted a validation exercise in 2018. He contended that the Applicant would adversely deal with the suit property if the orders sought are granted.
6. The application was canvassed by way of written submissions.

The Applicant's Submissions

7. The Applicant's submissions were filed in Court on 11th of October, 2022.
8. Counsel submitted on the threshold for the grant of interlocutory injunctions as per the case of *Giella v Cassman Brown* (1973) EA 358. It was Counsel's submissions that the Applicant has met the threshold for the grant of an injunction.
9. On the first limb, Counsel submitted that the Applicant has established a prima facie case since he has demonstrated via documentary evidence that he is the legal owner of the suit property.
10. On the second limb Counsel submitted that the Applicant will suffer substantial loss if the 1st Respondent continues to trespass on the suit property, since he will be hindered from enjoying his property.
11. Finally, Counsel submitted that having satisfied the first two conditions, the balance of convenience lies in favour of the Applicant.

The 1st Respondent's Submissions

12. The 1st Respondent submissions were filed in Court on 31st of August 2022.



13. Counsel submitted that the only issue that arises for determination is whether the Applicant is entitled to an order of a temporary injunction.
14. Counsel submitted that the Applicant has not met the threshold for the grant of an injunction as per the case of *Giella v Cassman Brown supra*.
15. Counsel submitted that the Applicant has not established a prima facie to warrant the issuance of the orders sought since the sale agreement does not confer on the Applicant any proprietary interest over the suit property.
16. Counsel argued that the Applicant was aware the 1st Respondent took possession of the suit property after he was allocated the same
17. On the second limb, Counsel submitted that the Applicant will not suffer any substantial loss as he is not in occupation of the suit property. Counsel went on to add that the Applicant has not produced any title, lease or any evidence to demonstrate that he was allocated suit property.
18. On the third limb, Counsel submitted that the balance of convenience lies in favour of declining to grant the orders sought.

Analysis And Determination

19. The Petitioner has brought this application pursuant to the provisions of Sections 1, 1A, 1B, 3 and 3A of the [Civil Procedure Act](#) and Order 40 Rules 1 and 4 and Order 51 Rule 1 of the [Civil Procedure Rules](#). This being a Constitutional Petition, it was expected that the 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](#).
20. In the case of [James Yator Kisang v 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.”
21. Although 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 find that failure to cite the correct provisions of the law cannot by itself defeat the present application. The main concern of the Court is to do substantive justice as opposed to technical justice. 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](#).
22. 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.



23. The law on the issuance of Conservatory Orders is well settled. Conservatory Orders were defined in the case of *Judicial Service Commission v 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.”

24. The principles in regard to granting of interim Conservatory Orders were outlined by the Supreme Court in the case of *Gatirau Peter Munya v 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.”

25. In the case of *Wilson Kaberia Nkunja v 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.

26. 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.

27. A prima facie case was defined in the case of *Kevin K Mwiti & others v 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.”



28. Proof of a *prima facie* case is pertinent in respect of applications as well as for purposes of conservatory orders. The Petitioner must demonstrate that there is a possibility that the acts by the 1st Respondent infringed on his rights.
29. The Petitioner contended that he has established a *prima facie* to warrant the grant of the orders sought. The Petitioner contended that on 17th of June, 1997 he purchased the suit property from Alice Ndavi. In this regard he produced a sale agreement dated 19th of June, 1997 (annexure CML1). He further averred that prior to the sale, Alice Ndavi was the legal owner of the suit property. To this end, he produced a letter of offer dated 28th of September 1995 issued to Agnes Ndavi (annexure CML2) and a letter of acceptance dated 19th of June 1996 (annexure CML3). The Applicant averred that the 3rd Respondent illegally allocated the suit property to the 1st Respondent without his consent and/or authority. The Petitioner contended that the 1st Respondent's has trespassed on his property and violated his fundamental right to access and own property.
30. On the other hand, the 1st Respondent averred that he is legal owner of the suit property. He further averred that he was allocated the suit property by the 3rd Respondent. In this regard he produced a letter of offer dated 28th of January, 2017 and a payment receipt dated 20th of September 2020.
31. He further averred that the 3rd Respondent established that he was the lawful allottee of the suit property pursuant to validation exercise conducted on plots situated in Nguu Ranch. In this regard he produced an extract of the updated Accountability List for Nguu Ranch Settlement Scheme dated 31st of August, 2018.
32. 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, the letters of offer and acceptance issued to Agnes Ndavi, while the 1st Respondents claim is anchored on the letter of offer, payment receipt and an extract of the Accountability list from Nguu Ranch Settlement Scheme.
33. The issue of ownership of the suit property is an issue that will 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.
34. 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 v Cabinet Secretary – Ministry of Environment 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.”
35. 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.
36. From the pleadings and the documents presented by the parties herein, it is clearly discernible from the updated Accountability list for Nguu Ranch Settlement Scheme that the suit property is registered in the names of 1st Respondent. I find that the Petitioners have not established a *prima facie* case to warrant the grant of Conservatory Orders.



37. 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 v 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.”

38. The Petitioner contended that the 1st Respondent has constructed an illegal fence around the suit property which has exposed him to substantial loss since he cannot use the property. From the Petitioners pleadings and annexures, it is crystal clear that he 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 since he is not in occupation of the suit property.

39. 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 be served better by preserving the records held by the 3rd Respondent until the issue of ownership is heard and determined.

40. The upshot of the foregoing is that the application dated 16th of June, 2022 is devoid of merit and is hereby dismissed with costs to the 1st Respondent.

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HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 1ST DAY OF FEBRUARY, 2023.

In the presence of: -

Court Assistant – Mr. Kwemboi

Ms Otieno holding brief for Nzioki for the Applicant.

Mutungu for the 1st Respondent.

