



REPUBLIC OF KENYA



KENYA LAW
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**Kazungu v Inspector General, National Police Service & 7 others (Constitutional
Petition 22 of 2021) [2022] KEELC 4768 (KLR) (8 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4768 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

CONSTITUTIONAL PETITION 22 OF 2021

MAO ODENY, J

SEPTEMBER 8, 2022

**IN THE MATTER OF: THE CONTRAVENTION AND THREATENED CONTRAVENTION
OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 20,
22(1), 23(3), 40, 47, 232 AND 259 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF: TITLE NUMBER: KILIFI/ VIPINGO
SCHEME/ 305 MEASURING APPROXIMATELY 0.042 HECTARES.**

IN THE MATTER OF: CRIMINAL CASE NUMBER 1367 OF 2018, SHANZU LAW COURTS

AND

**IN THE MATTER OF: DEFENCE OF THE CONSTITUTION UNDER
ARTICLE 3(1) OF THE CONSTITUTION OF KENYA AND IN
THE MATTER OF INTERPRETATION, ENFORCEMENT AND**

**PROTECTION OF BILL OF RIGHTS UNDER ARTICLES 19, 20, 22,
23, 24, 165, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

RAMADHAN MWALIMU KAZUNGU PETITIONER

AND

INSPECTOR GENERAL ,NATIONAL POLICE SERVICE 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

DIRECTOR LAND ADJUDICATION & SETTLEMENT 3RD RESPONDENT

CHIEF LAND REGISTRAR 4TH RESPONDENT

CHIEF MARGISTRATE, SHANZU LAW COURTS 5TH RESPONDENT

MIKE KITHINJI MUNG'ORI 6TH RESPONDENT

LYDIA MUTHONI MWANGI 7TH RESPONDENT



RULING

1. This ruling is in respect of a Notice of Motion dated September 29, 2021 by the petitioner/applicant seeking the following orders:
 1. Spent
 2. That this honourable court be pleased to issue conservatory orders restraining the 1st, 2nd, 5th, 6th and 8th respondents by themselves, their employees, servants, agents, nominees, assigns or anyone claiming from or through them from prosecuting and/or continuing with the criminal prosecution of the petitioner in Criminal Case Number 1367 of 2018, Republic vs Ramadhan Mwalimu Kazungu at Shanzu Law Courts, pending the *inter partes* hearing of this application and further pending the hearing and determination of the Petition herein.
 3. That declaration be made that the initiation, maintenance and prosecution of Criminal Case 1367 of 2018, Republic vs Ramadhan Mwalimu Kazungu at Shanzu Law Courts against the petitioner herein is an abuse of the criminal justice system and a contravention of the petitioner's constitutional rights to freedom and security of the person, right to freedom of movement and right to secure protection of the law and gross abuse of his right to the suit property.
 4. That a conservatory order or temporary injunction do issue restraining the 6th respondent by himself, his agents, servants and/or assigns from entering into, selling, disposing, transferring, charging, mortgaging, developing, encroaching, subdividing any other manner whatsoever title number: Kilifi/ Vipingo Scheme/ 305 pending *inter partes* hearing of this application and further pending the hearing and determination of the Petition herein.
 5. That cost of this application be provided for.
2. Counsel agreed to canvas the application vide written submissions which were duly filed.

Petitioner/applicant's case

3. The application was supported by grounds on the face of the application and a supporting affidavit sworn by Ramadhan Mwalimu Kazungu on September 29, 2021 who deponed that prior to his father's demise in 2008 they lived on a piece of land initially belonging to Vipingo Estate Limited but the company later gave portions of their land to the squatters who were residing on the suit land. He also deponed that after his father's demise the 6th respondent's father lay a claim on plot number 305 whereby he asserted that he made a report to the land committee and later wrote a letter dated January 14, 2016 to the chairman National Land Commission through the County Land Management Board, Kilifi.
4. It was the applicant's case that he later found out that the 7th respondent had been issued with a letter of allotment for plot number 305 and further that on August 7, 2018 he was detained at Mtwapa police station under unclear circumstances and was later arraigned at the Shanzu Law Court on September 20, 2018 and charged with the offence of forcible detainer.
5. The applicant further stated that 6th respondent and his family have been using every unconstitutional, illegal, unlawful and wrongful means to ensure that they take the land from his family. According to



him, the allocation of the land in Vipingo trading center was supposed to be made to the residents only on the basis of the allottee having put up a structure or cultivated the portion of land.

6. The applicant urged the court to allow the orders as prayed as if not allowed he will suffer irreparable damage.

Petitioner / applicant's submissions

7. Counsel identified three issues for determination as follows:
 - a. Whether the petitioner/ applicant made cogent grounds for the orders sought in the application.
 - b. Whether the conservatory orders sought in Notice of Motion dated September 29, 2021 should issue?
 - c. What is the order as to costs of the Notice of Motion dated September 29, 2021?
8. On the first issue counsel submitted that the petitioner herein was charged with the offence of forcible detainer and went ahead to give a chronology of how the residents of Vipingo trading center petitioned for the regularization of the allocation of the land in their area and have also petitioned the National Land Commission citing historical land injustice. Counsel therefore submitted that the events leading to the present petition points to the serious constitutional and legal issues and relied on the case of *William Musembi & 13 others v Moi Educational Centre Co. Ltd & 3 Others* (2021) Eklr.
9. Mr Tindika submitted that the above Supreme Court case raised issued of right to property under article 40 of the *Constitution* and one of the issues raised by the Petition is how the 6th and 7th respondents were allocated Title Number Kilifi/ Vipingo Scheme/ 305, despite the fact that the same all along been in occupation and use of the applicant's family.
10. On the second issue as to whether the conservatory orders sought in the Notice of Motion dated September 29, 2021 should issue, counsel relied on the cases of *Erdemann Property Ltd & 2 others v Ethics and Anti- Corruption Commission & 5 Others* (2021) eKLR and *Samuel Asiago Kiari v Directorate of Criminal Investigations & 2 Others* (2021) eKLR on the definition of conservatory orders and what it entails to emphasize that there was breach of the applicant's constitutional rights both on the property which is the subject matter of this Petition and also the manner in which the applicant is being prosecuted on land which belongs to their family.
11. Counsel urged the court to allow the application with costs.

Respondents' case

12. The respondents filed grounds of opposition and stated that the applicant does not have *locus standi* to file and prosecute the petition and that the petition and application lack merit.
13. The 6th and 7th respondents deponed in a replying affidavit that the court ought not to entertain the petitioner's Petition as the orders sought therein as framed, if issued will give the petitioner a blanket moratorium and immunity against execution of all decrees issued in Shanzu Law Courts. That the Petitioner's father in his lifetime was an employee of Vipingo Estate Limited living within the servant quarters and that upon the Petitioner's father losing his job at the Vipingo Estate Limited, he was forced to vacate the servant quarters.
14. The respondents deponed that Mwalimu Kazungu Kambi did not own any parcel of land with the Vipingo trading centre and that the process of switching/ interchanging the suit property between



himself and the 7th respondent was open, public and due process was followed and no complaint was filed at the Kilifi lands registry. The 7th respondent also deponed that he is in possession of a good title to the suit property which he obtained without fraud and/or misrepresentation and urged the court to dismiss the application with costs.

1st 3rd 4th 5th & 8th Respondents' submissions

15. Counsel submitted that the petitioner does not have *locus standi* to institute the present petition and that in the absence of a grant of letters of administration, the petitioner cannot sue or be sued in any matter touching on the suit property and relied on the case of *Otieno v Joash Ochieng Ougo & another* (1987) eKLR cited in the case of *Sisilia Nyakoe & another v Attorney General & 4 others* (2021) eKLR where the court held that an administrator is not entitled to bring an action as administrator before he has taken letters of administration. and if he does so, the action is incompetent at the date of inception.
16. Counsel further submitted that the allegations against the 5th respondent are unfounded and that the 1st respondent acted within the law and relied on the case of *Republic v Director of Public Prosecutions & 2 others* (2018) eKLR and that of *Ramadhan Idd Ramadhan & 5 Others v Director Public Prosecution & another: National Land Commission & another* (2020) eKLR.
17. Mr Ojwang submitted that the application and the Petition herein are only meant to delay the matter which is at the hearing stage and cited the case of *Christopher Okun v Director of Public Prosecutions & 4 others* (2015) eKLR.

6th and 7th Respondents' submissions

18. Counsel submitted that the if the application is allowed would occasion a great miscarriage of justice and that the determination of proprietary rights of a suit property in issue are purely vested and/or a reserve of this court.
19. Counsel submitted that the 6th respondent has good title to the suit property and relied on section 24, 25 and 26 of the *Land Registration Act* on indefeasibility of title. Counsel further stated that the 7th respondent acquired the title through a legal process which has been explained at length in the Replying Affidavit dated November 29, 2021 and relied on the case of *Eunice Grace Njambi Kamau & another v Attorney General & 5 others* [2013] eKLR where the court held that fraudulent conduct must be distinctly alleged and as distinctly proved.
20. Mr Obonyo submitted that the court ought not to entertain the petitioner's Petition and application as the orders sought therein as framed, if issued will give the petitioner a blanket moratorium and immunity against execution of all decrees issued in Shanzu Law Courts and/or any other court of competent jurisdiction and relied on the cases of *Francis K. Omenya v Director of Public Prosecutions & 6 Others; Independent Policing Oversight Authority (Interested Party)* (2021) eKLR and that of *Republic vs DPP & another Ex Parte Chamanlal Vrajlal Kamani & 2 others* (2015) Eklr.

Analysis and determination

21. The issues for determination are whether the petitioner has *locus standi* to file this petition and whether he has made a case for grant of conservatory orders.
22. On the first issue as to whether the petitioner has locus standi to file this Petition, article 22(1), (2) and 258 of the *Constitution* allows every person to institute court proceedings by way of constitutional petitions to protect their rights own property and fundamental freedoms in the bill of rights. The petitioner herein has lodged this petition on the grounds that his rights have been violated by the



respondents hence seeking relief from the court. This is to protect himself and the interest of his family on the suit land.

23. This therefore means that the court will only hear the issues that are related to the violation of the fundamental rights and freedoms in relation to the maintenance of the criminal case at Shanzu law Courts and not determination of the rights to the suit property. The petitioner cannot step in the shoes of his deceased father without letters of administration.
24. In the case of *Charles Ratemo Nyambati Vs Jacton Ocharo & 4 others* (2016) eKLR where the court observed as hereunder;

“And a legal representative is a person who has been issued letters of grant. This is provided under section 82(a) of the *Law of Succession Act*. It is true that under the Adjudication Act any one can appear to represent a dead person. But the court which deals with estates of deceased persons operates under the *Law of Succession Act* which gives specific direction on how such matters should be handled. The applicant cannot fail to follow this procedure and hide under article 22 (1) and 2 of the *Constitution*. The applicant herein has a specific claim which is the estate of his deceased brother.

It cannot therefore be anyone having a claim on this estate who can file a claim. The law of succession is clear that it must be the legal representative. The applicant has not shown that he is the legal representative. He therefore lacks the locus standi specific to this estate of his deceased brother.”

25. If that was the case that anyone having a claim on the estate can file a claim, then there would be many claimants from the estate filing numerous claims whereby the court might give conflicting orders resulting into embarrassment. There has to be an orderly manner in filing claims by legal representatives which can be tracked since the letters of administration are issued by the courts.
26. Similarly in the case of *Charles Ratemo Nyambati Vs Jacton Ocharo & 4 others* (2016) eKLR the court held that:

“And a legal representative is a person who has been issued letters of grant. This is provided under section 82(a) of the *Law of Succession Act*. It is true that under the Adjudication Act any one can appear to represent a dead person. But the court which deals with estates of deceased persons operates under the *Law of Succession Act* which gives specific direction on how such matters should be handled. The applicant cannot fail to follow this procedure and hide under article 22 (1) and 2 of the *Constitution*. The Applicant herein has a specific claim which is the estate of his deceased brother.

It cannot therefore be anyone having a claim on this estate who can file a claim. The law of Succession is clear that it must be the legal representative. The applicant has not shown that he is the legal representative. He therefore lacks the *locus standi*// specific to this estate of his deceased brother.”

27. At page 4 of the applicant’s application he states as follows:

“The suit property, to wit, Title Number: Kilifi/Vipingo/305 has all the years belonged to the petitioner’s Father and family over the years. During the lifetime of the petitioner’s Father, no one laid a claim of the said property”



28. I find that the applicant can only pursue the issue of violation of fundamental rights in respect of maintenance and prosecution of Criminal Case No 1367 of 2018 and not declaration that he owns the suit parcel of land as he does not have the requisite locus standi to seek for such orders.
29. The other issue is whether the applicant has met the threshold for grant of conservatory orders. The applicant seeks conservatory orders restraining the respondents from prosecuting him in Criminal Case Number 1367 of 2018. He contends that the initiation, maintenance and prosecution of the criminal case is an abuse of the criminal justice system and a contravention of his constitutional rights to freedom and security of the person, right to freedom of movement and right to secure protection of the law and gross abuse of his right to the suit property.
30. The principles to be satisfied in granting of a conservatory order was expressed by Justice Onguto J (as he then was) in the case of *Board of Management of Uburu Secondary School v City County Director of Education & 2 Others* [2015] eKLR are as follows;-
- “In summary, the principles are that the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the court should decide whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the bill of rights, and whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order.”
31. Further the Supreme Court of Kenya also rendered itself on conservatory orders in the Case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* eKLR 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”
32. Further in the case of *Kenya Small Scale Farmers Forum V Cabinet Secretary Ministry Of Education* High Court Petition No. 399 Of 2015 Eklr the court summarized the principles that ought to guide a court dealing with an application for conservatory orders as follows
1. The applicant ought to demonstrate a *prima facie* case with a likelihood of success and that he is likely to suffer prejudice as a result of the violation or threatened violation if the conservatory order is not granted.
 2. The grant or denial of the conservatory relief ought to enhance constitutional values and objects specific to the rights or freedoms in the Bill of Rights. If the conservatory order is not granted, the petition or its subtraction will be rendered nugatory.
 3. The public interest should favour a grant of the conservatory order.



4. The circumstances dictate that the discretion of the court be exercised in favour of the applicant after a consideration of all material facts and avoidance of inn material matters.
33. Following the finding that the applicant does not have *locus standi* in the substantive prayers sought in the petition, the applicant has an uphill task to prove that he has a *prima facie* case with a likelihood of success. The applicant's main contention is that he was charged with the offence of forcible detainer with regard to the Title Number: Kilifi/ Vipingo Scheme / 305 which he claims belongs to his deceased father. He contends that initiating, maintaining and prosecution of the criminal case is an abuse of the criminal justice system and a contravention of his rights to freedom and security.
34. The applicant has not demonstrated a *prima facie* case with a probability with a probability of success and has not shown that he is likely to suffer prejudice as a result of the violation or threatened violation if the conservatory order is not granted. Further there has been no demonstration the conservatory order should be granted in favour of public interest.
35. I note that the applicant has given a long background to the case but it is in respect of the issue of determination of the ownership and not on the conservatory order to stop the criminal case.
36. I have considered the application, the submissions by counsel and find that the application lacks merit and is therefore dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 8TH DAY OF SEPTEMBER, 2022.

M A ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

