



**Moseti v Municipal Manager & another; Kisii County Government
(Interested Party) (Environment & Land Petition 6 of 2021)
[2022] KEELC 14555 (KLR) (3 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14555 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT & LAND PETITION 6 OF 2021

JM ONYANGO, J

NOVEMBER 3, 2022

**IN THE MATTER OF ARTICLES 1, 2, 10(2), 19(1), 20(1), 21(1) & (2), 23, 25,
27(1) & (2), 40, 47, 48, 50(1), 159 (2), 162(2) AND 258 OF THE
CONSTITUTION, 2010.**

AND

**IN THE MATTER OF: VIOLATION AND/OR INFRINGEMENT ON THE
FUNDAMENTAL RIGHTS OF THE PETITIONERS**

AND

**IN THE MATTER OF THREAT TO DEMOLISH KIOSKS AND MAKESHIFT STALLS
WITHIN KISII MUNICIPALITY**

AND

IN THE MATTER OF LR NO. KISII MUNICIPALITY/BLOCK III/177

AND

IN THE MATTER OF SECTION 111 OF THE COUNTY GOVERNMENT ACT, 2012

AND

**IN THE MATTER OF SECTION 56 OF THE PLANNING AND LAND USE PLANNING
ACT, 2019**

AND

IN THE MATTER OF SECTION 20 OF THE URBAN AND CITIES ACT, 2011

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
& FUNDAMENTAL FREEDOM) PRACTICE AND PROCEDURE RULES, 2013**



BETWEEN

ALOYS MATAYA MOSETI PETITIONER

AND

MUNICIPAL MANAGER 1ST RESPONDENT

MUNICIPAL BOARD-KISII MUNICIPALITY 2ND RESPONDENT

AND

KISII COUNTY GOVERNMENT INTERESTED PARTY

RULING

1. This ruling is in respect of the petitioner’s application brought by way of notice of motion dated April 27, 2021 seeking conservatory orders against the respondents following a demolition notice issued by the latter in respect of the structures constructed by the petitioner on the portion of land known as LR No Kisii Municipality/Block 111/177.
2. The application is premised on the petitioner’s supporting affidavit sworn on the April 27, 2021 in which he deposes that he is the registered owner of LR No Kisii Municipality/Block 111/177 where he has constructed assorted structures which he has rented out to tenants for commercial use. It is the petitioner’s case that on or about the April 13, 2021, the respondents in purported exercise of their powers under section 20 of the *Urban Areas and Cities Act, 2011* caused a demolition notice to be affixed on the frontage of the petitioner’s premises threatening to demolish the petitioner’s premises on the grounds that they were unauthorized kiosks/ makeshift stalls.
3. The petitioner maintains that the structures sought to be demolished are not kiosks as they are quasi permanent in nature and are excluded from the meaning of kiosk. Further, that the respondents, who are statutory bodies have not been conferred with the authority to issue demolition notices and /or otherwise undertake demolition whatsoever and their actions are therefore ultra vires.
4. The petitioner depones that if the threatened eviction is carried out, he will be deprived of his livelihood and he will suffer irreparable loss which cannot be compensated by way of damages.
5. Despite being served with the application, the respondent did not file any replying affidavit but instead file a notice of preliminary objection which was heard and dismissed vide a ruling dated May 11, 2022.
6. The application was canvassed by way of written submissions and only the petitioner filed his submissions which I have considered.

Issues for Determination

1. The sole issue for determination is whether the petitioner is entitled to a conservatory order pending the hearing and determination of the main suit.
7. The following principles have been developed over time to guide the courts in granting conservatory orders:



- i. An applicant must demonstrate an arguable prima facie case with a probability of success and to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice.
 - ii. Whether the grant of the conservatory relief will enhance constitutional values and objects of specific right or freedom in the Bill of Rights.
 - iii. 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 for prejudiced by a decision to exercise the discretion to grant or deny a conservatory order.
8. The petitioner's case is that the notice of demolition was issued ultra vires the statutory powers of the respondents and that the same is in violation of the petitioner's right to property under article 40 and 43 of the *Constitution*. It is the petitioner's contention that he has established a prima facie case with a probability of success. He has relied on the case of *Progress Welfare Association of Malindi & 3 others v County Government of Kilifi & 4 others* (2020) eKLR where the Court held that:

“A prima facie case 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, an applicant has to show that he or she has a case which discloses serious and arguable constitutional issues to be tried or a case alleging violation of rights.

In this regard I am comforted by that the judgment of Odunga J in *Kevin Mwiti & others v Kenya School of Law & others* stated that:

“the first issue for determination is whether the petitioner has established a prima facie case. A prima facie case, it has been held is not one which must succeed at the hearing of the main case. However, it is a case which discloses constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success”

9. The petitioner has alluded to the fact that he would suffer irreparable loss if his structures were demolished as he derives his livelihood from the same. In the absence of any averments to the contrary, I am persuaded that he has met the threshold for a prima facie case.
10. Regarding the second test as to whether granting the orders would advance constitutional values and the objects of the Bill of Rights, the petitioner has stated that in issuing the said notice, the respondents contravened the provisions of article 10(2) of the *Constitution* and threatened his rights under article 40 of the Constitution of Kenya. The petitioner further claims that he is entitled to protection of his rights under articles 20(2), 21(1), 27 and 40 of the *Constitution of Kenya*.
11. The right to property is enshrined in article 40 of the Constitution and the same should not arbitrarily be denied without due process. Furthermore, the respondents who are public officers are bound by the national values and principles such as public participation, human rights, rule of law and good governance enshrined in article 10 of the Constitution. Issuing demolition notices to demolish the petitioners' structures contrary to the provisions of article 10 of the *Constitution* and section 152E of the *Land Act* which stipulates that an eviction demolition notice be served three months before the due date is a violation of the petitioner's rights and the same cannot be sanctioned by the court.



12. Additionally, it goes without saying that if the petitioner's structures are demolished before the case is heard on its merits, the suit shall be rendered nugatory.
13. In view of the foregoing and more particularly because the application is unopposed the same is hereby granted in the following terms:
 - a. A conservatory order is hereby issued barring and/or restraining the respondents either by themselves, their agents, servants or employees from carrying out or undertaking the threatened demolition of the structures standing on LR No Kisii Municipality/Block 111/177 pending the hearing and determination of the petition herein.
 - b. A conservatory order is hereby issued to protect and conserve the status of the structures and buildings on the suit property which were lawfully erected on the suit property in accordance with the *Physical Planning Act* pending the hearing and determination of the petition herein.
 - c. An order of temporary injunction is hereby granted restraining the respondents from implementing the demolition notice dated April 13, 2021 and in particular as concerns structures standing on LR No Kisii Municipality/Block 111/177 registered in the name of the petitioner /applicant.
 - d. The conservatory orders to be implemented by the OCPD Kisii central police division
 - e. The costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 3RD DAY OF NOVEMBER, 2022.

J.M ONYANGO

JUDGE

