



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

CONSTITUTIONAL PETITION NO. 10 OF 2019

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010 ARTICLES 19, 22, 23, 40, 47, 50 AND 64

AND

IN THE MATTER OF BREACH OF FUNDAMENTAL RIGHTS AND FREEDOMS CONTRARY TO ARTICLE 75 OF THE CONSTITUTION

AND

IN THE MATTER OF CONTRAVENTION OF RIGHT TO OWN PROPERTY CONTRARY TO ARTICLE 40 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT

AND

IN THE MATTER OF THE REGISTERED LANDS ACT CHAPTER 300, LAWS OF KENYA

BETWEEN

DAVID KIPLAGAT KIPRUGUT.....1ST PETITIONER

JAMES KIPKOECH KIPRUGUT.....2ND PETITIONER

VERSUS

GABRIEL KIPKURGAT KIPTEGEN.....1ST RESPONDENT

THE LAND ADJUDICATION OFFICER, BARINGO.....2ND RESPONDENT

LAND REGISTRAR, BARINGO COUNTY.....3RD RESPONDENT

RULING

[NOTICE OF MOTION DATED 12TH SEPTEMBER, 2019]

1. The Petitioners moved the Court through the Motion dated the 12th September, 2019, seeking for stay of proceedings in **Kabarnet SPMCC No. 11 of 2019** between **Gabriel Kipkurgat Kiptegen Vs Benard Kibet**, and stay of execution of orders arising out of the ruling delivered on the 29th August, 2019 pending the hearing, and determination of the Petition. They also pray for costs. The application is based on the sixteen (16) grounds on its face, and supported by the affidavit sworn by **David Kiplagat Kiprugut** on the 12th September, 2019.

2. The application is opposed by the 2nd and 3rd Respondents through the grounds of opposition dated the 29th October, 2019.

3. The application was on the 12th September, 2019 certified urgent, and ex parte interim order of stay in terms of prayer 2 granted. On the 29th October 2019, directions on filing and exchanging submissions were given and matter placed for mention on the 23rd January, 2020. On that date, the Petitioners' Counsel indicated that they will rely on their pleadings, and will not be filing submissions. The matter was then fixed for mention on the 11th March, 2020 when Counsel for the 2nd and 3rd Respondents reported that they had filed their submissions dated the 6th February, 2020.

4. The following are the issues for the Court's determinations;

(a) Whether the Petitioners have made a case for stay of proceedings and execution order to issue as prayed.

(b) Who pays the costs?

5. The Court has carefully considered the grounds on the Motion, grounds of opposition, affidavit evidence, submissions by the Counsel for 2nd and 3rd Respondent and concluded as follows;

(a) That from the grounds on the Motion and affidavit evidence by the 1st Petitioner, the Petitioners are seeking to stay proceedings, and execution arising out of the ruling on 29th August, 2019 issued in ***Kabarnet SPMCC No. 11 of 2019 between Gabriel Kipkurgat Kiptegen Vs Benard Kibet***. That the Plaintiff in that suit is the 1st Respondent herein and the Defendant is reportedly a son to the 1st Petitioner. That it is obvious the Petitioners, 2nd and 3rd Respondents are not parties in that suit.

(b) That though the 1st Petitioner concedes to be aware of the Lower Court suit that is against his son, and was served with eviction orders issued therefrom, there is nothing to show that the order has been challenged through appeal or review application. That further, the Petitioners have not indicated whether they or any of them, has taken any steps to move the Lower Court to be enjoined in those proceedings so as to be heard on their alleged interests over the suit land. That as there is no evidence adduced to suggest that the Lower Court has no pecuniary jurisdiction to hear and determine the matter before it, and as this matter is not an appeal against the Lower Court ruling, the Court finds that the Petitioners have failed to make a reasonable case with a probability of success upon which the orders sought could be based.

(c) That superior courts have time and again held that where legislation has provided the road map for redress, then that is the route to be followed by the aggrieved, and not constitutional petitions. That the petition has cited **Article 19, 22, 23, 40, 47, 50, 64 and 75 of the Constitution of Kenya, 2010** while the Motion subject matter of this ruling is brought under **Order 9 Rule 9, Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act**. That the Court is of the view that the Motion being based on a constitutional petition ought to have been brought under the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**, popularly referred to as the ***Mutungua Rules*** made pursuant to **Article 22(3) of the Constitution**.

(d) That the Petitioners have not established that they are likely to suffer irreparable loss or damages if the stay order sought are not issued pending the hearing and determination of the petition. That they have also not shown that the balance of convenience tilts in their favour as there exists an order regularly issued by the Lower Court in a matter they are not parties, and they have not sought to be enjoined in.

(e) That as the 2nd and 3rd Respondents have opposed the Motion and participated in its hearing, they are entitled to costs as the Petitioners have failed to prove that they are entitled to the orders sought.

6. That flowing from the foregoing, the Petitioners' Motion dated the 12th September, 2019 is without merit, and is dismissed with costs to the 2nd and 3rd Respondents.

Orders accordingly.

Delivered and signed at Eldoret this 6th day of May, 2020

S. M. KIBUNJA

JUDGE

Ruling read in the absence of all the Parties/Counsel and is to be transmitted digitally by the Deputy Registrar through the online media given by Counsel/Parties.

Court Assistant: Christine