



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAROK

PETITION NO. 6 OF 2018

IN THE MATTER OF ALLEGED CONTRAVENTION OF

FUNDAMENTAL RIGHTS TO PRIVATE PROPERTY

UNDER ARTICLES 27, 40 AND 64 OF THE

CONSTITUTION OF KENYA

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE

PETITIONER'S INTERESTS AND RIGHTS AS A PROPRIETOR

UNDER SECTION 21, 24 AND 25 OF THE LAND

REGISTRATION ACT, 2012.

BETWEEN

KITILAI OLE NTUTU.....PETITIONER

AND

NAROK COUNTY GOVERNMENT.....RESPONDENT

RULING

The Application before me is the Petitioner's Notice of Motion dated 4th April, 2018 which was brought under Article 23 (2) of Kenya, Rule 13 of the Constitution of Kenya (Protecting of Fundamental rights and freedom, section 1 (a),(b), 3 and 3A of the Civil Procedure Act and under order 1 of Rule 1 and order 5. Rule (1) of the Civil Procedure Rules) the Applicants have sought the issuance of a conservatory order against the Respondent and its employees from encroaching, excavating, constructing of structures on the Applicant's property Narok Plot 298 (old 313) pending the hearing and determination of the petition that was filed together with the instant application.

The Application was based on the ground that the Applicant is the registered owner of the suit property hereinabove mentioned which is a surveyed plot whose boundaries have been demarcated and had beacons placed. The Applicant contends that on the night of 30th November, 2017 the Respondent trespassed upon the said parcel of land and demolished his buildings and begun to excavate a road passing through the said land without any lawful justification. He states that the Respondent's actions aforesaid amount to compulsory acquisition of his property without following due process and that the same amounts to a breach of his right to private property.

In support of the Application the Applicant also filed a supporting affidavit which basically expounded on the grounds upon which the Application is based and to the Affidavit the Applicant annexed his original letter of allotment together with various payment receipts issued to him by the Respondent.

The Respondent opposed the said Application by way of a Replying Affidavit sworn and filed by one Godfrey Ndubi Kwena who is the Narok Town Administrator and in his replying affidavit he states that the Applicant has made various misrepresentations of facts and denies that the Respondent trespassed on the Applicant's land and begun to excavate a road thereon. He contends that it is the Applicant who has encroached on a 12 Metre Road Reserve that is adjacent to the Applicant's plot and erected illegal structures on the said Road Reserve and despite several cautions he refused and failed to adhere to several orders served on him to remove the aforesaid structures and that the action

they took was well within the Respondent's mandate to protect public utility land. On the replying affidavit the Respondent annexed a letter dated 21st September, 2016 directing the Applicant to demolish and remove all structures he erected on the subject plot.

When the Application came up for hearing before me it was agreed that the Application shall be disposed off by way of written submissions and both parties filed their respective submissions.

I have read the application together with the affidavit and the supporting documents and the submissions filed by both parties and the issue for determination before me is whether the Applicant has laid reasonable grounds for the grant of conservatory orders pending the hearing and determination of the petition.

The grant of conservatory orders by a court is now settled. In the case of Muslim for Human Rights –Versus-The Hon. Attorney General & others Petition No. 7 of 2011 Ibrahim J noted that:

“a conservatory order is not an injunction as known but an order that tends to preserve the subject matter or set of circumstances that exist on the ground so that the cause of action is not rendered nugatory”.

The above position presupposes that the dispute between the parties requires a conservation of the status quo. From the facts before me the Applicant contends that the Respondent's had on the night of 27th November, 2017 moved and demolished structures on his parcel of land a fact which the Respondent does not dispute but states that the structures were on a road reserve. From the above its clear that the action that the Applicant complains about and to which he seeks the court's protection has already taken place and it is my view therefore that court's should not give orders in a vacuum and hence there is nothing for the court to conserve at this stage.

From the foregoing therefore I find that the Applicant has not met the grounds for the warrant of the orders sought and I therefore dismiss the application dated 4th April, 2018 with costs to the Respondent.

DATED, SIGNED and DELIVERED in open court at **NAROK** on this **3rd day of July, 2018.**

MOHAMED N. KULLOW

JUDGE

3/7/18

In the presence of:

Mr Kamwaro holding brief for Mr Kemboy for the respondent

N/A for the petitioners

CA:Chuma