



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC PETITION NO. E003 OF 2020

IN THE MATTERS OF AN APPLICATION UNDER ARTICLES 20, 22 AND 23 OF THE

CONSTITUTION OF KENYA 2010 FOR ENFORCEMENT OF FUNDAMENTAL

RIGHTS AND FREEDOMS

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND

FREEDOMS UNDER ARTICLES 28, 29, 40, 43, 47 AND 53 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 62,

63, 66, 67 AND 68 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE REGISTERED LAND ACT CAP 300 LAWS OF KENYA (REPEALED)

AND

IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012 AND

THE LAND ACT NO. 6 OF 2012 AND THE LAND ACQUISITION ACT CAP 295

(REPEALED) AND THE GOVERNMENT LANDS ACT CAP 80

(REPEALED) AND PHYSICAL PLANNING ACT 1996 (REPEALED)

AND

IN THE MATTER OF LAND PARCEL NO. NKUENE/MITUNGUU/190

AND ALL THE SUDDIVISION THEREOF;

BETWEEN

THE DIOCESE OF MERU- REGISTERED TRUSTEES.....PETITIONER/APPLICANT

=V E R S U S =

KENYA TEA DEVELOPMENT AGENCY LIMITED.....1ST RESPONDENT

KIOGORA MUTAI	2 ND RESPONDENT
HONESTY KANYUA MANYARA.....	3 RD RESPONDENT
ERASTUS MIRITI ERASTO.....	4 TH RESPONDENT
FESTUS K. KATHENDU.....	5 TH RESPONDENT
JAPHET MBURUGU.....	6 TH RESPONDENT
JOSEPHINE KAGWIRIA.....	7 TH RESPONDENT
MWAMBA MAGANA.....	8 TH RESPONDENT
THE LAND REGISTRAR- IMENTI NORTH, SOUTH & CENTRAL DISTRICTS.....	9 TH RESPONDENT
THE HON. ATTORNEY GENERAL.....	10 TH RESPONDENT

AND

COUNTY GOVERNMENT OF MERU.....	1 ST INTERESTED PARTY
NATIONAL LAND COMMISSION.....	2 ND INTERESTED PARTY

RULING

1. This is the petitioner’s application dated 25/09/2020 brought pursuant to Articles 20, 21, 22, 23, 28, 29, 40, 47, 53, 63, 64, 65, 66, 67, 159, 162(b), 165(6) and 167(7) of the Constitution of Kenya 2010, Section 68 of the Land Registration Act 2012, Rules 4, 13, 23 and 24(1) of the Constitution of Kenya (protection of rights and fundamental freedoms) practice and procedure Rules 2013, Section 1, 1A, 3, 3A & 18 (1) of the Civil Procedure Act (Cap 21) and Order 40 rule 1 & 2 of the Civil Procedure Rules, where the following orders have been sought;

i. Spent.

ii. That an order of inhibition be issued restraining any dealings on land parcel No. NKUENE/MITUNGUU/190 measuring approximately 100 Acres (currently subdivided into land parcel No’s NKUENE/MITUNGUU/1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974 and 1975) until this application is heard and determined.

iii. That an order of inhibition be issued restraining any dealings on land parcel No. NKUENE/MITUNGUU/190 measuring approximately 100 Acres (currently subdivided into land parcel No’s NKUENE/MITUNGUU/1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974 and 1975) until this petition is heard and determined.

iv. That a conservatory order be issued restraining the 1st to 8th respondent by themselves, agents, relatives and/or through anybody else whomsoever acting on their behalf from, selling, entering, remaining on, leasing, building, cultivating, depositing building materials and/or otherwise howsoever interfering with ST. JOSEPH CHILDREN’S HOME-CARING HOME’S occupation, enjoyment and user of 15 acres of land parcel No. NKUENE/MITUNGUU/190 measuring approximately 100 Acres (currently subdivided into land parcel No’s NKUENE/MITUNGUU/1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974 and 1975) until this application is heard and determined.

v. That a conservatory order be issued restraining the 1st to 8th respondent by themselves, agents, relatives and/or through anybody else whomsoever acting on their behalf from, selling, entering, remaining on, leasing, building, cultivating, depositing building materials and/or otherwise howsoever interfering with ST. JOSEPH CHILDREN’S HOME-CARING HOME’S occupation, enjoyment and user of 15 acres of land parcel No. NKUENE/MITUNGUU/190 measuring approximately 100 Acres (currently subdivided into land parcel No’s NKUENE/MITUNGUU/1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974 and 1975) until this petition is heard and determined.

vi. That a conservatory order be issued staying the proceedings in Nkubu ELC No. 46 of 2020 until this application is heard and determined.

vii. That an order be issued transferring the court file in Nkubu ELC No. 46 of 2020 to this honorable court for purposes of consolidation with this petition.

viii. IN THE ALTERNATIVE AND WITHOUT PREJUDICE to order (vii) herein above, a conservatory order to issue staying the proceedings in Nkubu ELC No. 46 of 2020 pending the hearing and determination of this petition..

ix. That the cost of this application be provided for.

2. The application is based on the grounds on the face of it and on the supporting affidavit of SR. Josephine Gakii Mwitari, the regional superior of the applicant. She avers that a congregation known as Poor Hands Maids of Jesus Christ-Registered Trustees (herein referred to as the congregation) a duly registered trustee under the societies Act owns and operates a children's home by the name ST. JOSEPH CHILDREN'S HOME-CARING HOME'S, that the suit land is public land which was initially registered in the name of the defunct county council of Meru. That in or about 2007 the congregation under the supervision of the petitioner applied for allocation of a part of the said parcel of land to the defunct county council of Meru and was allowed occupation of 15 acres of the said land by the relevant authorities. The congregation took up occupation of the land, fenced it and commenced developments.
3. Further the congregation established a children's home by the name of ST. JOSEPH CHILDREN'S HOME-CARING HOME, which houses about 100 children and 10 employees and the community leaders approved an additional 4 acres to the congregation which makes the fenced area around 19 acres with developments worth over 100 million KSH.
4. The applicant contends that the children's home is rightfully and lawfully on the land. In July 2020, the 2nd respondent filed a suit NKUBU SPM ELC NO. 49 OF 2016 against the petitioner herein and the children's home claiming ownership of the land owned and occupied by the children's home and seeking injunctive orders to prevent the children's home from entering into the 19 acres. Upon running a search, the applicant discovered that the respondents had fraudulently tampered with the official records by sub-dividing and registering the land in the names of the 1st-8th respondents. The respondents are grabbers of public land and want to use court orders to effect their fraudulent and illegal actions.
5. That this court is the most suitable forum to hear and determine the suit as it involves fraudulent acquisition of public property and it involves a matter of public interest thus it is important that NKUBU ELC NO. 49 OF 2016 be transferred to this court for consolidation and this application be allowed lest the applicant suffers prejudice if the eviction orders are granted in the lower court.
6. The applicant contends that it has learnt that the respondents are planning to dispose off the suit land to 3rd parties and/or charge the same so as to frustrate this suit, hence it is important that orders are given to preserve the suit land and its only just and fair if the application is allowed.
7. The application is opposed by the 1st respondent vide a replying affidavit filed on 2/12/2020, sworn by **John Kennedy Omanga** the group company secretary and chief legal advisor of the 1st respondent. He avers that the 1st respondent had the mandate of managing Kinoro Tea Factory Company Limited, Kionyo Tea Factory Company Limited and Imenti Tea Factory Company Limited among other tea factories within the republic of Kenya until 2010. That on 22nd June 2005, the defunct County Council of Meru leased to the 3 tea factory companies land parcels NKUENE/MITUNGUU/189 and 1975 measuring 150 acres for a term of 20 years thus the petitioner could not have been allocated the land as it had already been leased to the 3 tea factories.
8. Further that vide a council meeting on 13/05/2011, the county council resolved to change the reservations of the land parcels NKUENE/MIRUNGUU/189 and 1975 from Nkuene Societies and Abogeta Societies respectively to KTDA factories who were the then users. Also on 8/7/2011 the ministry of lands approved the change of reservation for land parcels no NKUENE/MITUNGUU/189, 1973 and 1975.
9. That parcel NKUENE/MITUNGUU/190 was subdivided on 28/11/2002 into 9 land parcels namely; NKUENE/MITUNGUU/1965-1975 and on 9/09/2011, a letter of allotment was issued to the 1st respondent by the lands commissioner in respect to land parcel no NKUENE/MITUNGUU/1975 which measures approximately 21.8 acres and subsequently a lease certificate was issued to the 1st respondent as trustees of the 3 factories and the correct procedure was followed in the allocation of land parcel no NKUENE/MITUNGUU/1975.
10. The petitioners claim that they were allocated 15 acres out of land parcel no NKUENE/MITUNGUU/190 in the year 2008 cannot be true as at the time the said parcel did not exist as it had already been subdivided into the 9 parcel being land parcel no NKUENE/MITUNGUU/1965 to 1975 and the 1st respondent's tea factories were already in occupation under lease. The 1st respondent denies grabbing public land, the petitioner has no valid claim against the 1st respondent, the same lacks any element of public interest claim as the claim is personal to the petitioner and filing the same is an abuse of the court process, hence the application ought to be dismissed. The petitioner ought to have filed a suit for the claim of the land and not seek remedy as a constitutional remedy as there are clear provisions under the law.
11. The application is also opposed by the 2nd respondent vide a replying affidavit dated 27/01/2021, averring that he does not know how he has infringed on the applicants right to own property. His mother the 3rd respondent gifted him parcel land no NKUENE/MITUNGUU/1967 and he is the current registered owner. He added that the applicant has been using unorthodox means to stake claim over the land even to the extent of using children to harass workers on the land. He has sued the applicant in NKUBU ELC NO. 46 OF 2020 to stop them from interfering with his land, the applicant ought to direct its claim over land parcel no NKUENE/MITUNGUU/1975 and not over the whole portion of 100 acres but just the 15 acres.
12. Honesty Kanyua, the 3rd respondent has also opposed the application averring inter-alia that the applicant cannot purport to litigate on behalf of the residents of Mitunguu, and that the suit before Nkubu court relates to parcel 1967 and not 1975 where the children's home is located.
13. The matter proceeded orally on 26/05/2021. It was argued for the applicants that there is a children's home on the suit land claimed by the respondents. The applicant avers that they have availed a letter dated 5/8/2015 where the county council acknowledges that fraud was committed and the petitioners are lawfully on the suit land. The title held by KTDA for parcel no NKUENE/MITUNGUU/1975 as per the green card was apparently opened on 15/6/2015 but the register of the mother title was closed on 28/11/2002. It follows that land parcel no

NKUENE/MITUNGUU/1975 ought to show that it was opened on 28/11/2002 when the mother title was closed. Thus there is a lost period and there is a need to have a full hearing to examine who says what.

14. For the 1st respondent, it was argued that, the said entity has not tampered with the official records and have not been involved in any fraud. That there are public properties for the company so may the application be dismissed.

15. For the 2nd and 3rd respondents it was argued that the petitioner applied for allocation of 15 acres as that was the only available portion, the others running from parcel 1967 - 1974 had already been allocated to other people. The two respondents claim that they have no interest in parcel NKUENE/MITUNGUU/1975. They further state that petitioners claim to have been given 15 acres, then speak of 19 acres of land which they were given by community, yet the land cannot be public land then community land. The petitioners should show how they came to occupy 19 acres and not 15 acres. They also opposed the prayer to transfer the lower court suit and questioned why the petitioner wants conservatory orders in respect to other parcels and not just land parcel no NKUENE/MITUNGUU/1975.

16. The petitioner responded that it is not in dispute that the original land was public land and the respondents have not explained how private entities got public land, that the acquisition of the land by the respondents is questionable. That the letter from the county government addresses everything and the occupation on the ground cuts across all the other parcel numbers so the other parties have to be in the proceedings. Further on the issue of transfer, it was argued that there cannot be 2 cases at the same time and the other case should be stayed. That the 2nd and 3rd respondents are sons of former KTDA and none have ever stepped on the land so KTDA is being used to facilitate fraud as an individual.

17. The issues for determination are whether the court should grant the inhibition and conservatory orders as well as a stay of proceedings and transfer of the Nkubu matter.

18. In the case of **Gatirau Peter Munya vs Dickson Mwendwa Kithinji and 2 others [2014]eKLR**, the court had this to say on the issue of conservatory orders.

‘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 the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.

Also see; **Board of Management of Uhuru Secondary School vs. City County Director of Education & 2 Others [2015] eKLR.**

19. It is not disputed that there is a suit filed by the 2nd respondent in Nkubu ELC No. 49 of 2020. The main prayer sought in the Nkubu matter is “*an order of permanent injunction restraining and stopping the defendants (read current petitioners) from interfering with plaintiff’s occupation and user of parcel 1967*”. For the petitioners, they are equally seeking inter-alia, “*permanent injunction against the respondents from using the suit parcels including 1967*”.

20. The common thread running through the claims of the parties is that these are competing interests, where each party is claiming ownership of the land via allocation by a former county council. To this end, the applicants have made assertions that the suit land was fraudulently transferred to the respondents. By extension, the applicants are challenging the titles held by the respondents. Those are matters that elicit heated arguments requiring the tendering of evidence in a full trial. The court would not wish to determine such substantive issues of ownership at this interlocutory stage.

21. The classification of land in Kenya is defined under Article 61 of the constitution such that the same falls under the category of public, private or community land. Though the applicants aver that the suit land was public land which was grabbed, it is not clear at this juncture whether they are litigating on behalf of the public, a community or they desire to have protection of property in relation to private land. Again these are issue which ought to be advanced during the trial. In the circumstances, I find that conservatory orders are not merited at this stage of the trial.

22. On inhibition, I make reference to the provisions of **Section 68(1) of the Land Registration Act** which provides that:-

“The Court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, generally until a further order, the registration of any land lease or charge.”

As it were, an order of inhibition issued under Section 68 of the Land Registration Act bars the registered owner of property under dispute from registering any transaction over the said property until the suit in which the said property is a subject is disposed of.

23. These provisions give court discretion to issue orders which are meant to preserve the property from acts that would otherwise render a court order incapable of being executed and or to give an opportunity to hear and decide the matter. To this end, I am inclined to allow the prayer for inhibition.

24. On the issue of stay of proceedings in Nkubu court, this court exercises supervisory jurisdiction over the magistrates’ courts and has powers to order a stay of proceedings. However, the court should not appear to arbitrarily interfere or choke the proceedings before those courts save on appeal or on application in matters of transfer of suits. The court has already established that there are competing interests in relation to the ownership of the land. The 2nd respondent herein has sought for injunctive orders against the petitioner in the Nkubu matter

and the latter is apprehensive that it may be evicted. However, the applicant cannot seek a stay or transfer of the proceedings in the Nkubu court on the basis that it fears eviction. For there are legal frame works that guides the manner in which redress should be sought in such circumstances.

25. Further, the applicant herein has not demonstrated that he has sought and been denied an order of stay of proceedings in the lower court. It may be safely presumed that the trial court would in appropriate circumstances entertain and consider an application for stay of proceedings on its merits and possibly where necessary defer its proceedings. Keeping in mind that the application for injunction before the Nkubu court is active, and having found that the element of public interests has not clearly been advanced by the petitioners, then I decline to allow the prayer for stay of proceedings or transfer of the Nkubu matter.

26. I find that the application only succeeds in terms of prayer no (3) on inhibition. The other prayers are declined. The costs of the application shall abide the outcome of the suit.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MERU THIS 21ST DAY OF JULY, 2021.

HON. LUCY. N. MBUGUA

ELC JUDGE