



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

PETITION NO. E007 OF 2021

DOUGLAS MUINDU MBUVI.....PETITIONER/APPLICANT

VERSUS

THE INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

THE COMMANDANT GSU.....2ND RESPONDENT

THE COMMANDING OFFICER RUIRU KIMBO GSU.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

CLUSTER 2 NEIGHBOURS RESIDENTS ASSOCIATION.....INTERESTED PARTY

RULING

Douglas Muindu Mbuvi, hereinafter the Applicant/Petitioner has brought a Petition dated **9th June 2021** against the Inspector General of Police, the Commandant, General Service Unit, the Officer Commanding Ruiru General Service Unit and the Hon. Attorney General hereinafter 1st, 2nd, 3rd and 4th Respondents, respectively seeking the following reliefs: -

a. Declaration that the Petitioner is the legal and registered owner of parcel No. Ruiru/Mugutha Block 1/8702 hereinafter the suit premises.

b. Declaration that officer of the Respondent's actions to trespass and refuse to vacate the suit premises are breach of the Applicant's Constitutional rights as to ownership.

c. Permanent Injunction restraining the Respondents from trespassing in the subject land and/or interfering with construction works thereon by harassing, intimidating, threatening and arresting the petitioners and his servants, employees, workers and contractors.

d. An order of mandamus directing the 1st, 2nd, and 3rd Respondents to remove and relocate their water pipes encroaching on, trespassing through or passing through the Petitioner's land.

e. Damages for violation of his Constitutional rights.

f. Costs and interests.

g. Any other further incidental or alternative reliefs this court may grant.

Alongside the Petition, the Petitioner/Applicant moved the Court under a Certificate of Urgency and a Notice of Motion Application dated **9th June 2021**, bought under **Article 23, Rule 23** of Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, and all other enabling provisions of the law). The orders sought are: -

1. Spent

2. A conservatory order restraining the 1st, 2nd and 3rd Respondents whether acting directly or through third parties, agents employees, officers and /or proxies, from trespassing on the Petitioner's parcel No. title No. Ruiru/Mugutha Block 1/8702 and interfering with the Petitioners construction of his family home on the said land pending the service, hearing and determination of this Petition.

3. A conservatory order restraining the 1st, 2nd and 3rd Respondents, whether acting directly or through third parties, agents, employees, officers and or proxies from harassing, intimidating, threatening and arresting of the Petitioner and his servants, employees contractors and or workers while working on petitioner's parcel No. Ruiru/Mugutha Block 1/8702 pending hearing and determination of this Petition.

4. An Injunction restraining the 1st, 2nd and 3rd Respondents whether acting directly or through third parties, agents, employees, officers and or proxies from trespassing on the Petitioner's land parcel No. Ruiru/Mugutha Block 1/8702 and interfering with the construction of his family home on the said Petitioners parcel of land known as No. Ruiru/Mugutha Block 1/8702 pending the service, hearing and determination of this Application.

5. An Injunction restrain the 1st, 2nd and 3rd Respondents whether acting directly or through third parties, agents, employees, officers and or proxies from harassing, intimidating, threatening and arresting of the Petitioner and his servants, employees, contractors, and or workers, while working on the Petitioner's land parcel No. Ruiru/Mugutha Block 1/8702 pending hearing and determination of this application.

6. Costs.

7. Such other further incidental or alternative reliefs as the Honorable Court may deem just and expedient.

The Application is supported by the Affidavit of **Douglas Muindu Mbuvi**, sworn on **9th June 2021** attaching annexures marked DMM 1 – DMM 10.

The Application is Opposed and the Respondents' filed a Replying Affidavit on **5th July 2021**, sworn by **C.I Kibet Yegon** on **2nd July 2021**, to which he had attached annexures marked KXI – KY4 B. He averred that vide **Gazette Notice 5951** dated **24th November 1992**, the Government advertised for hearings on any claims for compensation by persons who may be affected by the GSU water project. That the parcels affected were identified and the government engaged with **Nyakinyua Investment Company**, with the aim of procuring easements and compensating affected proprietors and the project commenced with no objections.

Parties were directed to file written submissions and the Petitioner/Applicant filed his written submissions dated **5th July 2021** through the **Law Firm of Ngwele & Co. LLP**, while the Respondents' filed their submissions dated **6th July 2020**, through **State Counsel Benson Njagi for the Attorney General**. The Interested Party was not opposed to the Petitioner's/Applicant's Application hence did not file any response.

The court has considered the instant Application, the Replying Affidavit, rival written submissions filed as well as the authorities relied upon. The key is for determination is *whether the Applicant has satisfied the criteria upon which the courts exercise the discretionary and equitable jurisdiction to grant the prayers sought in the Application.*

According to the Applicant, he is the registered owner of land parcel No. **Ruiru/Mugutha/Block 1/8702**, as per title deed dated **23rd April 2021**, and a search dated **8th March 2021**, with no encumbrances as per the survey map, and mutation form.

The Petitioner/Applicant deposes he sought and obtained building approvals from the County Government of Kiambu on **29th April 2021**, and entered into a construction contract. That when works commence, the Respondents' allegedly came to stop it and ordered his workers to vacate the premises alleging they had a **wayleaves** rights over the subject land.

The Petitioner/Applicant disposes he contracted a land surveyor who visited the site and prepared a report dated **8th June 2021**, and marked as DMM 10. In the said report the land surveyor states: -

“..... there is a water pipe that is touching part of the plot. The water piper is 3 meters from plot No. Ruiru/Mugutha Block 1/8701 boundary towards Ruiru/Mugutha Block 1/8702 plot on the shortest side of the plot indicated 8 meters on the map.”

Further, the Petitioner/Applicant states that officers from 1st, 2nd and 3rd Respondents have since illegally occupied, harassed, intimidated and threatened him and his workers with threats of forceful eviction, re-possession, Order of imprisonment, death and physical harm if he enters into the premises to resume construction works.

On the other hand, the Respondents' have accused the Petitioner/Applicant of misleading the Court and maintaining a water supply project which was commenced in **1990s**, pumping water from Ruiru River to Ruiru General Service Unit Base cutting across the open land between the Coffee Plantation and the river.

They further alleged that by the time the project was undertaken, there was no title to the suit property and the land belonged to **Nyakinyua Investment Company** and its members and that the affected persons were compensated after which the contractor laid water pipes within the **Wayleave** this according to them was before the Petitioner /Applicant bought his land.

Further **C. I. Kiboi Yegon**, depones that the water pipes pass through the Petitioner's/Applicant's land and he (Applicant) has illegally started his construction works over the water pipes and hence his actions are not only prejudicial to the Respondents' but also many residents of the area, who depend on the project for their water needs. He maintains that the Petitioner/Applicant ought to be restrained from proceeding with his illegal construction over a valid wayleave.

The bond of contention between the parties herein appear to be a wayleave. The state enjoys the power of eminent domain which is exercisable under **Article 40(3)** of the Constitution which provides as follows:-

“(3)The state shall not deprive a person of property of any description, or any interest in or right over property of any description unless the deprivation:-

(a) Result from an inquisition of land as conversion of an interest in land or title to land in accordance with Chapter V or;

(b) Is for public purpose or in the public interest as is carried out in accordance with this Constitution and any Act of Parliament.

Article 40 of the Constitution of Kenya guarantees every person the right to property. It protects a person from arbitrary deprivation of his property by the state or any person. This right can only be limited by law.

The body that is empowered to create a public right of way also known as **Wayleave** for the National Government is the **National Land Commission**.

In the *John Peter Mwangi Kagiri vs National Land Commission & Anor 2019 eKLR* the Court stated:-

“A public right of way is a right that is attached and thus with the Land on which it has been created and shall be binding on all land owners irrespective of the manner of occupation.

Section 28(c) of the Land Registration Act recognizes right of way as an overriding interest in land, a right that subsists and affects land without being noted on the register. Equally rights of compulsory acquisition are classified as overriding interest so much so that once it is done in accordance with the law, its subsists on the land.

What is the purpose of wayleave? It mandates an authorized person to enter into the servient land for purposes of executing such works such as building and maintaining installations and structures on the servient land and to pass and repass along the wayleave in connection with the purposes of the institutions or bodies concerned.”

According to the Respondents, the Wayleave is necessary for conveying water to the Ruiru GSU camp. The water pipes are alleged to pass a number of parcels of Land. It is however not clear which parcels of land as the Respondents' deponent merely says at the time the Wayleave was acquired, there were no titles to the property, but was open land. Chief Inspector **Kibet Yegon** has not attached any survey report to confirm that indeed the Petitioner's/Applicant's property falls squarely on top of the water pipes and that the construction works would seriously undermine the water pipeline. On the other hand, the Petitioner's/Applicant's Land Surveyor says the water pipeline encroaches on the suit property by 3 meters as well as the neighboring **plot No. 8701**.

The Respondents' have not denied this averment at all by way of an expert report. Similarly, it has not been denied by the Respondents that others property holder have developed their parcels alongside the pipeline with no objection from them. Again the Respondents have not attached the **Wayleave report**, and or certificate showing its exact width and the neighborhood plots it passes through right from the river to the end destination. The acquirer must therefore define it.

The Interested party has through its advocates submitted that they have no objection to the **Conservatory orders** sought being granted.

As held by **Hon. Justice Okongo** in *Machareus Obaga Annuda vs Kenya Electricity Transmission Co. Ltd (2015) eKLR*;

“After service of the said Notice, the Commission is supposed to publish the application along the route of the proposed wayleave.”

The Respondents' have not stated that the Petitioner/Applicant herein has destroyed any water pipeline. The Respondents' have also not proved if any beacon exists demarcating the boundary lines. Further, the Respondents' have not pointed out if there is any marking out of water pipeline or the Wayleave route.

The Respondents appear to have acted in haste and forcefully trespassed into the Petitioner's/Applicant's land without following due process. **Wayleaves** as stated above are public rights. The Respondents' took the law into their own hands and allegedly occupied the Petitioner's/Applicant's land in the name of enforcing Wayleave rights. Their actions appear to have caused more damage, loss and suffering to the Petitioner/Applicant yet he has not destroyed the pipeline. The extent of loss if any by the Petitioner/Applicant has also not been ascertained by any known expert.

Given the foregoing, the single issue is whether the Petitioner/Applicant has satisfied the criteria for grant of Conservatory Orders. The Petitioner/Applicant states he has absolute rights of ownership and has obtained requisite approach to develop his land. On the other hand the Respondents say there is in existence an easement in form of Wayleave though they have offered no wayleave trace.

In the case of **Center for Rights Education and Awareness & another vs Speaker of the National Assembly & 2 Others (2017) eKLR** the Court held that:-

“A party who moves the Court seeking conservatory orders must show to the satisfaction of the Court that his or her rights are under threat of violation; are being violated or will be violated and such violation or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedoms and preserve the subject matter pending the hearing and determination by a pending case or petition.”

Articles 22(ii) and 23(3) of the Constitution states;

“A Court may grant appropriate relief including a conservatory order.”

Rule 23 of the **Mutunga Rules** provides for issuance of conservatory orders or interim reliefs. The principles in regard to granting of such orders were outlined by the Supreme Court in **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others (2014) eKLR**:-

“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 cause.”

The Respondents' have not denied continued occupation of the Petitioner's/Applicant's premises ostensibly to enforce a Wayleave. No Court order has been issued to enforce such a wayleave. Again the Petitioner/Applicant was not notified by the Respondents of any damage or interference with the water pipes. Indeed, no demonstration of any damage or justification why the Respondents' have taken such a drastic action to occupy otherwise private property and drive out the Applicant/Petitioner from his own land.

The Court notes that the written submissions filed by the Petitioner /Applicant wishes prayer number 4 and 5 of the instant Notice of Motion be amended by deleting the word "Application" and substituting it with the word "Petition". The said amendment is allowed entirely.

The upshot is that this Court finds and holds that the Notice of Motion Application dated **6th June 2021**, is merited and issues **Conservatory Order, in terms of maintaining the status quo. For avoidance of doubt the status quo herein is; -**

A conservatory order restraining the 1st, 2nd and 3rd Respondents whether acting directly or through third parties, agents' employees, officers and /or proxies, from trespassing on the Petitioner's parcel No. title No. Ruiru/Mugutha Block 1/8702 pending the hearing and determination of the Petition.

Further the Court allows prayers No. 4 and 5 of the instant Notice of Motion pending the hearing and determination of the Petition herein. Costs be in the Cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 15TH DAY OF JULY 2021.

L. GACHERU

JUDGE

15/7/2021

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the

parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Ngwele for the Petitioner/Applicant

Mr. Njagi for the 1st, 2nd, 3rd and 4th Respondents

Mr. Mkamba for the Interested Party

L. GACHERU

JUDGE

15/7/2021