



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ELC PETITION NO. E001 OF 2020

IN THE MATTER OF ARTICLES 2(2), 10(20, 19, 21(1),

22(1), 23(1), 50(1) & 165(3)(B) & (6) & (7) OF

THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF

RIGHTS OR FUNDAMENTAL FREEDOMS UNDER

ARTICLES 10, 19, 20, 21, 40, 47 AND 50 OF

THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF RULES 3, 4(1), 10 & 13 OF

THE CONSTITUTION OF KENYA

(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)

PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

PETER MUTHEE KIRIGI.....PETITIONER

-VERSUS-

THE NYERI DISTRICT LAND REGISTRAR1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

GLADYS WAMUYU WAHOME.....INTERESTED PARTY

RULING

A. INTRODUCTION

1. By notice of motion application dated 19th October 2020, by the Petitioner sought the following orders:

(a) Spent.

(b) Spent.

(c) That pending the hearing and determination of this Petition, this Honourable court be pleased to order that an injunction issues restraining the 1st Respondent from making further amendments and registering other entries as relates title Numbers Kabaru/Ngonde/Blk II/611 (Ngatha), Kabaru/ Ngonde/Blk II/709 (Ngatha), Kabaru/Ngonde/Blk II/740 (Ngatha) and Kabaru/Ngonde/Blk II/741 (Ngatha).

(d) Spent.

(e) That pending the hearing and determination of the petition, this Honourable court be pleased to issue a conservatory order restraining the 1st respondent from registering any further dealings with title numbers Kabaru/Ngonde/Blk II/611 (Ngatha), Kabaru/Ngonde/Blk II/709 (Ngatha), Kabaru/Ngonde/Blk II/740 (Ngatha) and Kabaru/Ngonde/Blk II/741 (Ngatha).

(f) That pending the hearing and determination of this application and petition, this Honourable court be pleased to compel the 1st Respondent to produce the Green Cards for title numbers Kabaru/Ngonde/Blk II/611 (Ngatha), Kabaru/Ngonde/Blk II/709 (Ngatha), Kabaru/Ngonde/ BlkII/ 740 (Ngatha) and Kabaru/Ngonde/Blk II/741 (Ngatha).

(g) That costs of this application be borne by the Respondents.

2. The said application was premised on the grounds on the face of it and the supporting affidavit of Peter Muthee Kirigi sworn on the 19th October 2020.

B. THE PETITIONER'S APPLICATION

3. The Petitioner's case was that he was the registered proprietor of Title No. Kabaru/Ngonde/Block II/709 having purchased it for value from one Ephraim Wahome Gatere who transferred it to him and that he was duly issued with a title deed in the year 2008. The Petitioner states that in the year 2018, after conducting an investigation he discovered that his title had been cancelled on the 5th August 2009 without any notice to him. All attempts to obtain a search or a green card have been futile to date.

4. Subsequently, the Petitioner learnt that one Gladys Wamuyu Wahome, the Interested Party herein, had lodged a claim with the then Kieni East Land Dispute Tribunal (*the Tribunal*) against Ephraim Wahome Gatere (*the previous owner*) claiming 3 acres of the land then known as Kabaru/Ngonde/634. The Tribunal made an award in favour of the Interested Party on 26th July 2007, ordering Ephraim Wahome Gatere to transfer 3 acres out of land parcel Kabaru/Ngonde/Block II/611 to the Interested Party – Gladys Wamuyu Wahome or alternatively refund her KShs. 105,000/=.

5. The award of the Tribunal was eventually adopted as a judgment of the court by the Chief Magistrate's Court at Nyeri. A decree was issued and the executive officer of the court was authorized to sign all the necessary transfer documents to give effect to the resultant decree in favour of the interested party.

6. The Petitioner averred that at all material times, he was not party to any of the proceedings. He was never served with any pleadings and neither was he notified of any adverse orders against him.

7. The Petitioner pointed out that the decree from the Chief Magistrate's Court was in respect of Title No. Kabaru/Ngonde/Block II/611 yet this title number was non-existent at the time the order was issued having already been subdivided. It was, therefore, impossible in the Petitioner's view to effect the award of the Tribunal.

8. In his supporting affidavit, the Petitioner exhibited a letter by the District Surveyor Nyeri ("PMK6") informing the Senior Principal Magistrate Nyeri that Title No. Kabaru/Ngonde/Block II/611 was subdivided in 2009 resulting in Kabaru/Ngonde/Block II/709 and Kabaru/Ngonde/Block II/710 measuring 0.405 ha and 0.989 ha, respectively.

9. The Petitioner contended that the cancellation of his title was therefore illegal, irrational and unconstitutional. The court order was in reference to Kabaru/Ngonde/Block II/611 not his own title number Kabaru/Ngonde/Block II/709. His right to own property has therefore been violated. He further stated that all this was done in violation of his rights to fair administrative action.

C. THE RESPONDENTS' RESPONSE

10. The Respondents did not file any response to the Petitioner's application.

D. INTERESTED PARTY'S RESPONSE

11. The Interested Party, Gladys Wamuyu Wahome, filed a replying affidavit sworn on the 5th February 2021 in response to the application. She averred that she was the registered owner of Kabaru/Ngonde/Block II/740 measuring approximately 1.21 ha. which she acquired from Ephraim Wahome Gatere. The Interested Party accused the Petitioner of encroaching into her land and alleged that the Petitioner had dubiously purchased a portion from the mother title and that there was a pending dispute at the land offices.

12. The Interested Party opposed the grant of the prayers sought by the Petitioner on the basis that granting them would amount to an infringement of her rights. She concluded by stating that she intended to sub-divide her land and give it out to her children.

E. DIRECTIONS ON SUBMISSIONS

13. When the matter came up for *inter partes* hearing on 9th March 2021, the court directed that the Petitioner's application be heard by way of written submissions. The counsel representing the Respondents indicated that he was amenable to allowing the Petitioner's application for interim orders. The court directed the parties to file their submissions but none of the parties had filed submissions by the time of preparation of the ruling.

F. THE ISSUES FOR DETERMINATION

14. The court is of the opinion that the main issues for determination are:

(a) *Whether the Petitioner's application has met the threshold for grant of an injunction or conservatory orders.*

(b) *Whether the 1st Respondent should be compelled to produce green cards for title numbers Kabaru/Ngonde/BLK II/611 (Ngatha), Kabaru/Ngonde/BLK II/709, Kabaru/Ngonde/BLK II/740, (Ngatha) & Kabaru/Ngonde/BLK II/741 (Ngatha).*

ANALYSIS AND DETERMINATION

(a) **Whether the Petitioner's application has met the threshold for grant of an injunction, or conservatory orders**

15. **Article 23 of the Constitution** empowers the court to grant appropriate orders including an injunction and conservatory orders in order to uphold and enforce the bill of rights. In the case of **Board of Management of Uhuru Secondary School v County Director of Education & 2 Others [2015] eKLR** Onguto J summarized the applicable principles as follows:-

“In summary, the principles are that the applicant ought to demonstrate an arguable *prima facie* case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the court should decide whether a grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of rights, and whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order.”

16. It is noteworthy is that the Petitioner sought both an injunction and a conservatory order in respect of the same properties. Should he be entitled to both? The Petitioner's notice of motion was premised on **Article 23 (3) of the Constitution of Kenya**. The orders sought were against the Nyeri District Land Registrar and the Attorney General who were named as the 1st and 2nd Respondents respectively. No order was specifically sought as against the Interested Party directly.

17. Moreover, in **Michael Osundwa Sakwa v Chief Justice & President of the Supreme Court of Kenya & Another [2016] eKLR** which cited with approval an earlier decision **Judicial Service Commission v Speaker of the National Assembly & Another [2013] eKLR** whereby the court had expressed itself in regard to conservatory orders as follows;

“Conservatory orders in my view are not ordinary civil remedies but are remedies provided for under the constitution, the supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”

18. Having considered the Petitioner's application, the supporting affidavit thereof and the material on record the court is persuaded that he has demonstrated an arguable *prima facie* case with a likelihood of success. The response by the Interested Party lends some credence to the Petitioner's fears that unless the orders sought are granted he is likely to suffer prejudice. The Interested Party stated categorically that she intended to subdivide her land and share it out to her children.

19. As already stated above, the Petitioner in his application seeks the orders against the Land Registrar, a public authority. Guided by the precedents quoted above the court is of the view that the appropriate order to issue in this matter is a conservatory order rather than an injunction. Accordingly, the court is inclined to issue a conservatory order in terms prayer (e) in the Petitioner's application.

(b) **Whether the 1st Respondent should be compelled to produce green cards for the suit properties**

20. The Petitioner in his replying affidavit expressed his frustrations in accessing green cards for the parcels of land Kabaru/Ngonde/Block II/611/709/740 & 741 (Ngatha). The Petitioner's statements have not been controverted by the 1st Respondent. Indeed, counsel representing the Respondents expressed his willingness to have the application allowed. He, therefore, did not file any response nor submissions.

21. The court is of the opinion that Green cards are public documents and there is no good reason why any person should be denied the documents upon application and payment of the requisite fee. **Section 34 of the Land Registration Act 2012**, is categorical that any person who requires an official search in respect of any parcel **SHALL** be entitled to receive particulars of the subsisting entries in the register, certified copies of any document, the cadastral map, or plan filed in the registry upon payment of the prescribed fee.

22. The Petitioner has in his supporting affidavit demonstrated that he made attempts to conduct searches on the parcels of land mentioned in this matter but has been unsuccessful. Accordingly, the court is inclined to grant the prayer (f) of the Petitioner's application under consideration.

G. CONCLUSION

23. The upshot is that the court finds merit in the Petitioner’s notice of

motion application dated 19th October, 2020. Accordingly, the court makes the following orders for disposal thereof:-

(a) That pending the hearing and determination of the petition, the court hereby issues a conservatory order restraining the first respondent from registering any further dealings against Title numbers;

(i) Kabaru/Ngonde/Blk II/611 (Ngatha)

(ii) Kabaru/Ngonde/Blk II/709 (Ngatha)

(iii) Kabaru/Ngonde/Blk II/740 (Ngatha)

(iv) Kabaru/Ngonde/Blk II/741 (Ngatha)

(b) That pending the hearing and determination of the petition, the 1st Respondent is ordered to produce and make available to the Petitioner within 14 days the Green Cards for Title numbers;

(i) Kabaru/Ngonde/Blk II/611 (Ngatha)

(ii) Kabaru/Ngonde/Blk II/709 (Ngatha)

(iii) Kabaru/Ngonde/Blk II/740 (Ngatha)

(iv) Kabaru/Ngonde/Blk II/741 (Ngatha)

(c) That the costs of this application be in the cause.

It is so ordered.

Ruling dated and signed in chambers at **Nyeri** and **delivered** via Microsoft Teams platform this **14th** day of **July 2021**.

In the presence of:

Ms Mwangi for the Petitioner

No appearance for the Attorney General for the Respondents

The Interested Party in person

Court assistant - Wario

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Y. M. ANGIMA

ELC JUDGE