



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

PET NO 37 OF 2020

ABDULLAHI OMAR SAID.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT

RULING

1. This ruling is in respect of the Notice of Motion dated 28th October 2020 which was filed by the Petitioner together with the Petition. In the application, the petitioner/applicant seeks the following orders:

1. Spent

2. Spent

3. Spent

4. That pending hearing and determination of this petition, this court be pleased to issue a temporary conservatory order restraining, prohibiting and stopping the respondents jointly and severally, their agents, officers and any person acting under them from further demolishing, threatening to demolish or in any other way destroying any buildings, installations, or erection on the parcel of land known as PLOT NO.MN/1/1502/R.

5. That pending hearing and determination of this petition this court be pleased to issue a temporary conservatory order restraining, prohibiting, and stopping the respondents jointly and severally, their agents, officers and any person acting under them from entering upon or trespassing, encroaching, constructing any structures, offering for sale, selling, disposing of, charging, sub-dividing, dealing, alienating, occupying, managing, letting or otherwise using, residing and remaining or representing themselves as the registered owners of the property known as PLOT MN/1/1502/R.

6. That pending the hearing and determination of the petition, the OCS and OCPD Bamburi Police Station to enforce the orders sought above.

7. That the costs of this application be borne by the respondent.

2. The petitioner's case as elaborated in the petition is that he has been and continues to be the legal and beneficial owner of all that property known as LAND REFERENCE NO.MN/1/1502/R (hereinafter referred to as the suit property) situate in Bamburi within Mombasa County measuring approximately 45 ft by 72 ft which lies between PLOT NO.1501/I/MN and PLOT NO.21152/I/MN (a disused access road). That the petitioner has been in occupation of the suit property since the year 2016 and has constructed residential and commercial premises thereon. The petitioner avers that he followed due process by making a formal application to the National Land Commission for allocation of the subject property owing to the fact that the said access road had become redundant and was not in use and not servicing any parcel of land. That the National Land Commission then wrote to the Executive Committee requesting for confirmation that the suit property was not required for any use or purpose and that it was recommended that the petitioner be allocated and be issued with title of the said plot since the development thereon had not blocked access to any adjoining plots, though it was surveyed as a road reserve. The petitioner averred that to his surprise, on 10th October, 2020, the respondent invaded the suit property and demolished the structures built on it. The petitioner assessed the damage to the property at Kshs.3,200,000/=. In the petition, the petitioner prays for inter alia, a declaration that he is rightful, legal and beneficial owner of the suit property, an order of mandamus directed to the National Land Commission to register and issue title in his favour as well as an order for compensation. The petitioner contends that his fundamental rights and freedoms as enshrined under the constitution have been contravened and infringed upon by the respondent and that the respondent's action is illegal, unlawful, wrongful and an infringement and violation of the petitioner's constitutional rights to property.

3. The application is supposed by the affidavit of Abdullahi Omar Said, the petitioner sworn on 28th October, 2020. He has annexed copies of payment receipt for construction approvals, approval issued by the respondent, NEMA EIA License, Letters, Survey Report, Valuation Report among other documents.

4. The respondent has opposed the application through a replying affidavit sworn by Felix Dindi on 8th December, 2020. He has deposed that the suit property is an access road. The respondent has denied infringing on the petitioner's rights, adding that since the suit property is an access road, the respondent represents the general public. That the petitioner has not tendered evidence of ownership of the suit property by way of either a title deed or a lease and cannot rely on letters to claim ownership over the suit property. It is the respondent's contention that the application is unfounded, frivolous and vexatious and is a waste of this court's time.

5. The application was canvassed by way of written submissions. The petitioner filed his submissions on 1st February, 2021 through the firm of Khalid Salim & Company Advocates. It was submitted that the petitioner has met the threshold for grant of conservatory orders, the petitioner having shown interest over the suit property. Counsel for the petitioner relied on the case of **Anne Mumbi Waiguru –v- County Assembly of Kirinyaga (2020)eKLR; Okiya Omtata Okiiti –v- Cabinet Secretary for Information, Communication and Technology & 2 Others; Mohamoud Mohamed Noor & 6 Others (Interested Parties) (2019)eKLR** and submitted that the petitioner has an arguable case. It was also submitted that the petition will be rendered nugatory should this application not be allowed and the orders sought granted. The petitioner further submitted that the respondent, as a public body, owes it to the public to respect their rights and freedoms and relied on the case of **Satrose Ayuma & 11 Others –v- Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 Others (2011)eKLR**.

6. In their submissions filed on 3rd June, 2021 through Mr. Murtaza Tajbhai, the County Attorney, the respondent submitted that a constitutional petition is brought when there is a likelihood or a right to be infringed or a rights has already been infringed. That in the instant case, there is ample material in the court record including the petition itself that shows that the rights of the petitioner in the suit land had not crystallized as at the time of commencement of the petition or even after filing of the petition. That the petitioner does not have title to the suit land and therefore violation of rights does not arise. The respondent submitted that the right of one individual cannot supersede the rights of the general public and that of general good. It was submitted that it is not in contention that indeed the subject matter of this petition is a public access road and as such the court should decline to issue any conservatory orders. The respondent's counsel relied on the case of **Judicial Service Commission –v- Speaker of the National Assembly & Another (2013) eKLR; Gitirau Peter Munya –v- Dickson Mwenda Kithinji & 2 Others (2014)eKLR** and the Indian Supreme Court decision in the case of **Ashok Kumar Pandey –v- State of West Bengal**.

7. Although the Interested Party was enjoined to the suit, they did not file any response nor submissions within the time granted by the court or at all.

8. I have carefully considered the application and the submissions made. The issue for determination is whether the court should grant the conservatory orders sought by the petitioner pending the determination of the petition herein.

9. The principles on which the court will grant conservatory orders are fairly well settled. The first is that the applicant must show a prima facie case with a likelihood of success, and that if the conservatory orders are not granted, he/she is likely to suffer prejudice.

10. In the case of Centre for **Rights Education and Awareness (CREAW) & 7 Others –v- Attorney General (2011)eKLR**, Musinga, J. (as he then was) observed:

“....It is important to point out that the arguments that were advanced by counsel and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the petitioner's application and not the petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer irreparable prejudice as a result of the violation of the constitution.”

11. In **Muslims for Human Rights (MUHURI) & 2 Others –v- Attorney General & 2 Others (2011)eKLR**, Ibrahim J (as he was then), after citing the words of Musinga J in the CREAW case stated as follows:

“I would agree with my brother, that an applicant seeking conservatory orders in a constitutional case must demonstrate that he has “prima facie case with a likelihood of success.”

12. In the case of **Gitirau Peter Munya –v- Dickson Mwenda Kithinji & 2 Others (supra)**, the Supreme Court stated as follows:

“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 a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitude, and priority levels attributed to the relevant causes....”

13. From the foregoing, it is clear that in considering whether to grant conservatory orders, the court has to consider if the case before it is arguable, whether the matter before the court will be rendered nugatory if the orders are not granted and also whether it is in the public interest that the orders be granted. There is therefore a need for an applicant to demonstrate an arguable prima facie case with a likelihood of success and to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice and that the substratum of the suit will be rendered nugatory. The question then is whether, in the present case, the petitioner has met the criteria enunciated above.

14. The gist of the petitioner's case is that he is the beneficial owner of a disused public access road known as MN/1/1502/R that lies between PLOT NOS. 1502/I/MN and PLOT NO 21152/I/MN. The petitioner's complaint is that the respondent has demolished some structures erected on the suit property. The applicant contends that there is real risk that the remaining structures on the subject property will be demolished by the respondent unless the orders sought herein are granted. In response, the respondent contends that the suit property is an access road and has denied that the petitioner's rights have been or are likely to be infringed.

15. Invoking the principles laid out in the decisions stated above, the question then is whether the petitioner herein has met the set criterion. Is there a prima facie case with a likelihood of success? And if no order is granted in the interim as sought, will the petitioner be prejudiced and his petition rendered nugatory?

16. I am conscious of the fact that as I determine whether or not I should grant the conservatory orders in this matter, I must not venture into the scrutiny of the facts and evidence. That will be for the trial court. However, the petitioner ought to demonstrate how his rights and freedoms have been impeded or put to risk.

17. In this case, the petitioner has conceded that the structures that have been demolished were on an access road. In my considered view, the petitioner has not demonstrated that he has a prima facie case with a likelihood of success. Moreover, the applicant has stated that he has instructed a valuer to undertake an assessment of the demolished premises which were valued at Kshs.3,200,000. With this, the prospects of irreparable harm occurring does not arise because the value of the petitioner's structures can be ascertained. I am not therefore persuaded that the petition will be rendered nugatory if the court declines to grant the conservatory orders sought.

18. In the result, I decline to grant the orders sought. I find that the notice of motion dated 28th October 2020 is devoid of merit and the same is hereby dismissed with costs to the respondent.

19. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 5TH DAY OF JULY 2021.

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C.K. YANO

JUDGE

In the presence of:

Tajbhai for Respondent

Ms. Nafula holding brief for Khalid for Petitioner

Mutugi for Interested Party

Court Assistant – Yumna

C. K. YANO

JUDGE