REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT ELDORET

ELC CASE NO.93 OF 2020 (O.S)

KIMITEI SAMOEI.....APPLICANT

VERSUS

MICHAEL NGIGE.....1ST RESPONDENT

WILFRED NG'ANG'A.....2ND RESPONDENT

BEATRICE WANGUI NG'ANG'A.....3RD RESPONDENT

RULING

This ruling is in respect of an application dated, 20th January, 2021 by the 1st Respondent/applicant seeking for the following orders;

a. Spent

b. That this Honourable court be pleased to grant a conservatory order preserving the suit land from being entered into or used or any dealings pending the hearing and determination of this suit.

c. That costs be provided for.

ANALYSIS AND DETERMINATION

Counsel agreed to file written submissions but only the applicant filed submissions which I note that addressed the issues of adverse possession which is in respect of the main suit and not an application for conservatory orders. The submissions therefore do no address the issues why conservatory orders should be granted

The principles in regard to the granting of interim or conservatory orders were outlined by the Supreme Court in the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others, Supreme Court Application NO. 5 of 2014 (2014) eKLR**, where the Court held that:-

> ***[85]*** *These are issues to be resolved on the basis of recognizable concept. The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of stay, conservatory orders and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of "stay orders" is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light.*
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> [86] "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 supplicant'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 magnitudes, and priority levels attributable to the relevant causes." (Emphasis added).

The principles in regard to grant of Interim conservatory orders were further reiterated in the case of **Nubian Rights Forum & 2 others vs. Attorney General & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre for Intellectual Property & Information Technology (Proposed Amicus Curiae) Petition Nos. 56, 58 & 59 of 2019 [2019] eKLR,** where the Court observed that:-

[91] This Court is granted powers to issue conservatory orders in constitutional petition under Article 23(3) (c) of the Constitution and Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and procedure Rules 2013.

[92] The applicable principles for the grant of conservatory orders were detailed by Onguto J. in Board of Management of Uhuru Secondary School v. City County Director of Education & 2 Others [2015] eKLR. 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 a 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 gnat or deny a conservatory order.

[93] We are also guided by the principle that in determining whether or not to grant conservatory orders, the Court must bear in mind that it is not required to enter into a detailed analysis of the facts and the law. As Musinga, J (as he then was) observed in High Court Petition No.16 of 2011, Nairobi – Centre for Rights Education and awareness (CREAW) & 7 others" "…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 prejudice as a result of the violation or threatened violation of the Constitution."

[105] We have already found that the Petitioners have established, and the Respondent have conceded that there is a risk of prejudice being caused to members of the public and their right to privacy by the disclosure of certain types of personal information in the absence of proposals on how that data will be protected. As regards where the public interest falls in light of the respective prejudices that will be caused if the implementation of NIIMS is stayed, we are persuaded by the definition of public interest by the Indian Supreme Court in the case of Dattraj Nathuji Thaware v State of Maharashta, Indian & Others [2004] INSC 755 S.C 755 of 2004 which adopted the meaning of public interest as set out in Stround's Judicial Dictionary Vol. 4 (v Ed) as: "A matter of public or general interest does not mean that which is interesting as gratifying curiosity or a love of information or amusement but that in which a class of community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected."

[106] We take the view that it is in the public interest to have an efficient and organized system of registration of persons, and the responsible use of resources in the process, in light of the socio-economic gains of the system that have been illustrated by the Respondents. There is, however, also a public interest in ensuring that the said system does not infringe on fundamental rights and freedoms. There is thus a need for a balancing of the competing public interest rights while the consolidated Petitions are heard, so as to safeguard rights and resources, and ensure that the Petitions are not rendered nugatory." (Emphasis Added)

The principles required to be satisfied before granting conservatory orders or interim conservatory orders comprises of the following:-

a) First, an Applicant must 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.

b) The second principle is whether the 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.

c) Thirdly, the court should consider whether, if an interim conservatory order is not granted, the substratum of the matter will be rendered nugatory.

d) The final principle for consideration is whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.

The application does not meet the threshold for grant of a conservatory order as prayed. No evidence has been led to demonstrate the issues being alleged are correct and as such they remain mere allegations. I find that the application lacks merit and is therefore dismissed with costs

DATED AND DELIVERED AT ELDORET THIS 18TH AGUGUST, DAY OF 2021

M. A. ODENY

JUDGE