



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

CONSTITUTIONAL PETITION NO. E 005 OF 2020

**IN THE MATTER OF ARTICLES 1,2,3,10 (1) &(2),19,20 (1),(2) & (4),21,22 (1)
& (3),25 (c),27 (1) &(2),40,43,47 (1) &(2),50 (1), 61 (1), 64(b), 67, 68, 73(1), 75(1),
(2) & (3),159,162,176,184 &232(1) OF THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT, 2012

AND

IN THE MATTER OF THE LAND REGISTRATION ACT, 2012

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT, NO.17 OF 2012

AND

IN THE MATTER OF THE URBAN AREAS AND CITIES ACT, NO. 12 OF 2012

AND

AND IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT, NO.5 OF 2012

AND

IN THE MATTER OF THE LEADERSHIP AND INTEGRITY ACT, NO.19 OF 2012

AND

IN THE MATTER OF THE PUBLIC OFFICER ETHICS ACT NO.4 OF 2003

AND

IN THE MATTER OF THE PUBLIC SERVICE COMMISSION ACT NO.10 OF 2017

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF
RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES,2013**

BETWEEN

NAVINCHANDRA LAIJI SHAH.....1ST PETITIONER

SANDIP LAIJI SHAH.....2ND PETITIONER

-VERSUS-

COUNTY GOVERNMENT OF KISUMU.....1ST RESPONDENT

CITY MANAGER.....2ND RESPONDENT

AND

KISUMU CITY BOARD.....INTERESTED PARTY

RULING

BRIEF FACTS

The petitioners seek orders that pending the Hearing and determination of this petition, a temporary injunction do issue restraining the Respondents whether by themselves, their agents, servants or any other person claiming through them from trespassing upon, interfering with, evicting, demolishing or otherwise interfering with the Petitioners'/Applicants' use and possession of the following parcels of land:

- a) L.R. No. Kisumu Municipality/Block 10/503
- b) L.R. No. Kisumu Municipality/Block 10/504
- c) L.R. No. Kisumu Municipality/Block 10/505
- d) L.R. No. Kisumu Municipality/Block 10/506
- e) L.R. No. Kisumu Municipality/Block 10/507
- f) L.R. No. Kisumu Municipality/Block 10/508
- g) L.R. No. Kisumu Municipality/Block 10/509
- h) L.R. No. Kisumu Municipality/Block 10/510
- i) L.R. No. Kisumu Municipality/Block 10/511
- j) L.R. No. Kisumu Municipality/Block 10/512
- k) L.R. No. Kisumu Municipality/Block 10/513
- l) L.R. No. Kisumu Municipality/Block 10/514
- m) L.R. No. Kisumu Municipality/Block 10/515
- n) L.R. No. Kisumu Municipality/Block 10/517

An interim conservatory order do issue ex parte in the first instance in terms of prayer 2 foregoing. Costs of this Application be provided for. The Application was supported by the Affidavit of Navinchandra Laiji Shah who deposed as follows:

1. That his father Laiji Pananachand Shah and him were registered as the joint proprietors of the leasehold interest in all that parcel of land comprised in Land Registration No. Kisumu Municipality/Block 10/105 measuring approximately 2.850 Hectares or 7 Acres located in Milimani Estate in the City of Kisumu.
2. That they sought to subdivide the parcel into several parcels and the Original Lease was surrendered to the Commissioner of Lands, made all the necessary payment as advised, property was surveyed and the process have birth to various parcels of land.
3. That before and at the time the properties were being sub-divided as aforesaid the area in which the properties were located was within the geographical jurisdiction of the defunct Municipal Council of Kisumu which was therefore the rating authority but which

has since been subsumed by the County Government of Kisumu with the advent of devolution.

4. That sometimes in late June 1992, his father and him received a demand for rates from the 1st Respondent's predecessor in respect of L.R. No. Kisumu Municipality /Block 10/105 with the deadline for payment of rates being 30th June 1992. That they wrote to the defunct Municipal Council of Kisumu reminding them that the property has since been sub-divided owing to the fact that the deadline was only a day or so away. They were advised to write a letter clarifying the position but make a payment of the re-assessed fee for the old title as the council still required time to check and reconcile their records with those of the Department of Lands.

5. That after verifying the position with the relevant offices, the Municipal Council of Kisumu proceeded to amend its Valuation Roll for purposes of rates in accordance with the subdivision.

6. That in June 2002, they were surprised when the defunct Municipal Council of Kisumu filed a suit against the 1st Petitioner's father and the 1st Petitioner demanding payment of the outstanding rates in respect of L.R. No. Kisumu Municipality /Block 10/105. That they immediately wrote to the Advocates representing the Council in the case advising them of the correct position and availed to them all documents confirming that the property had been sub-divided, rates paid for the old title at the point of subdivision and subsequently for the resultant sub-divisions being the suit properties upto and including for the year 2002 when the suit was filed. They have never heard from the defunct Council's counsel and I verily believe that the suit was either withdrawn, dismissed or otherwise abandoned.

7. That his father died on 1st October 2006 and since the ownership of the property was joint, he became the proprietor of the suit properties.

8. That on 14th January 2010, the 1st Petitioner transferred L.R. No. Kisumu Municipality /Block 10/503 into his name jointly with that of his mother who is now deceased. That he has since faithfully and consistently paid the rates to the 1st Respondent and land rent to the Ministry of Lands through Kenya Revenue Authority. That he used the title as collateral to borrow money from various financial institutions for which purpose to secured Certificate of Payment of Rates and other charges from the 1st Respondent.

9. That he transferred part of his share in the rest of the properties to the 2nd Petitioner who is his brother and now they are proprietors in common in portions of 33% and 67% for his brother and him respectively. They have faithfully and consistently paid the rates to the 1st Respondent and land Rent to the Ministry of lands.

10. That the original user of L.R. No. Kisumu Municipality /Block 10/517 was initially that of a health facility but they applied for and obtained from the 1st Respondent a change of user to a commercial cum residential.

11. That sometime in mid 2020, the 1st Respondent published a document and in the report the 1st Respondent designated the area in which the suit properties sit as public property and also purported to one part of it as a medium residential area despite the fact that it had allowed the request for change of user in respect of L.R. No. Kisumu Municipality /Block 10/517 where they had offices, go-downs, a works yard and a garage.

12. That by a memorandum dated 16th July 2020 and delivered to the Interested Party on even date we raised an objection to the proposals contained in the report but they have never received a response on the said objection.

13. That they were surprised when they were informed by Mr. Titus Wanyonyi, a security officer manning the properties that on or about 20th December, the 2nd Respondent without their knowledge forced his way into the enclosure securing the suit properties in the company of members of the press, security and enforcement officers employed by the 1st Respondent and other unknown persons to them. They manhandled the security officer manning the suit properties and the 2nd Respondent proceeded to address members of the press declaring that the suit properties were public properties which had been grabbed and will be repossessed and the developments therein demolished. The 2nd Respondent left notices which were issued to persons alleged to occupy public land in Makasembo Estate and along Kondele -Kibos Road. The 2nd Respondent informed them that they will be evicted based on those notices even though the suit properties are not in those locations.

14. That the Respondents have declined to formalize their directives so that they could respond appropriately. The Respondents have continued to issue verbal directives through their enforcement department directing the petitioners to vacate the suit properties failure by which they will be forcibly evicted and the developments on the suit properties demolished.

15. That the Kisumu City Board has the mandate to prepare the planning and land use and development plans for the City of Kisumu and to deal with the issue of illegal use or occupation of land within its jurisdiction.

16. That the actions of the Respondents are unconstitutional and in utter disregard of the rule of law and their responsibilities as a state organ and public officers as well as the Petitioners rights under the law.

17. That the conduct of the 2nd Respondent who trespassed the suit properties was in violation of the Constitution and the law of the Petitioners' rights and fundamental freedoms.

18. That the promulgation the "Kisumu City Local Physical and Land Use Development Plans" by the 1st Respondent, the designation of some of the suit properties as public property and the decision by the 2nd Respondent to proceed to purport to

repossess the suit properties without addressing their objections amounts to a usurpation of the powers and responsibilities of the Interested Party and in is in contravention of the objects of devolved government as set out in the Constitution.

19. That if the properties were acquired illegally, the Respondents should have gone to court or if appropriate, to another independent and impartial tribunal or body for an appropriate order declaring that the properties were acquired illegally where the matter would have been determined in a fair manner within the law.

20. That the Respondents have threatened to destroy and repossess property valued at Kshs. 600,000,000/= and they stand to suffer loss.

21. That if the application is not allowed, the threatened invasion and destruction is allowed to go on and the petition eventually succeeds, the restoration of the suit properties will cost time, money and gross inconvenience to them and members of the public.

22. That they have been in possession of the suit properties for over 30 years. The Respondents have had no problem with their use and occupation and been collecting rates and other levies therefrom.

On 30th December 2020 when the matter was placed before the Court under Certificate of Urgency, the following orders were issued:

- a) That the matter is certified urgent and the Petitioners to serve within 7 days.
- b) That the Respondents to reply within 7 days of service.
- c) That Hearing on 21st January 2021.
- d) That in the meantime, prayer 2 of the Notice of Motion Application dated 29th December 2020 is granted.

The 2nd Respondent on behalf of the 1st and 2nd Respondent filed a Replying Affidavit opposed the Petitioners' Application and deposed as follows:

1. That the Application seeks a conservatory order restraining the 1st and 2nd Respondents from repossessing the property known as land title number KISUMU/MUNICIPALITY/BLOCK 10/105("THE Original title") of which the Respondents maintain has been irregularly and unprocedurally appropriated by the Applicant. The Original Title was subsequently subdivided into 14 parcels which constitute the suit properties.
2. That at the time of the alleged acquisition of the Original Title, the procedure for issuance of Government Land and Government Leases was governed by the provisions of GLA. Consequently, the dispute over the acquisition of the suit properties ought to be resolved using the previous land regime laws and it is therefore the GLA which is operative in the circumstances of this case. Under the GLA, two entities had power to issue Government land and Government Lease. These are the President and the Commissioner of Lands. The powers of the President under section 3 of the GLA reproduced above were delegated to the Commissioner of Lands.
3. That the Commissioner or an officer of the Lands Department may, subject to any general or special directions from the President, execute for and on behalf of the President any conveyance, lease or license of or for the occupation of Government lands, and do any act or thing, exercise any power and give any order or direction and sign or give any document, which may be done, exercised, given or signed by the president under the GLA and relied on the procedure provided by GLA from section 9 to 13.
4. That the Original Title was not granted to the Applicant directly by the President.
5. That there are public policy reasons why the Government hold certain land and it does not give away to private individuals.
6. That in so far as town plots are concerned, unless such land ceased to serve as public a public function, then such land could not be issued as to private individuals.
7. That public land cannot be offered to private individuals if the public purpose for which the land was reserved still existed especially a health facility.
8. That the suit properties are in the Respondents considered view, owned by the County Government of Kisumu which is a public body and to be used for a public purpose. The Commissioner for Lands had a duty to inquire from the public body and all other stakeholders.
9. That this Honourable Court should declare that the Commissioner of Lands failed to follow through the requisite mandatory procedure to dispose of public land and therefore the Respondents are entitled to redress.
10. That there is no evidence adduced before this Honourable Court of an Application by the Applicant to be allotted the Suit Property for commercial purposes.
11. That the Commissioner of Lands did not follow the procedure of offering public land for public auction and neither did the Commissioner of Lands offer it to the general public or in any other way. No allotment letter has been produced by the Applicant.

12. That suit properties are public land and any conversion of the space to private property was illegal and unlawful as none of the mandatory statutory procedures were followed.

13. That the correct procedure for disposal of allocation of the suit property to the Applicant would have been supported by key documents including minutes from the County Council of Kisumu, a Part Development Plan (PDP) and a map to show the location of the suit properties.

14. That the Applicants have not provided any evidence of their letter of application addressed to the Commissioner of Lands seeking to be allocated the suit land.

15. That the 2nd Respondent has a right to own property and it is entitled to its property only to the extent that the said was acquired and purchased in accordance with the correct procedure and within the framework of the law.

16. That the moment a property is reserved for public use, it remains public utility land incapable of giving rise to a private proprietary interest capable of being protected by a court of law.

17. That the public has suffered significance loss and will continue to do so if the Application is allowed as the Applicants continue to illegally deny the public the benefits of a Public good.

ISSUES FOR DETERMINATION

It is my view that the main issues for determination are;

a) Whether a conservatory order should be granted as prayed.

ANALYSIS AND DETERMINATION

a) Whether the orders sought should be granted

In the case of **George Odera vs. Lake Victoria Environment Programme & 3 others [2015] eKLR**, the court stated that:

“an applicant for a conservatory order under rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 must demonstrate that: -

(i) He has a prima facie case.

(ii) Unless the conservatory order is granted, he is likely to suffer prejudice or injury as a result of violation or threatened violation of his constitutional rights or the constitution.

(iii) It would be in the public interest to grant the order.

Gatirau Peter Munya –vs- Dickson Mwenda Kithinji and 2 others, Supreme Court of Kenya, Application No. 5 of 2014, [2014] eKLR the Supreme court stated that: -

“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 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 magnitudes and priority levels attributable to the relevant causes.”

The 2nd Respondent in his Replying Affidavit alleges that the Applicants have not produced any allotment letter to show that the suit property was allotted to them by the Government in the Affidavit filed by HASMUKHRAI GOSAR SHAH indicates that the 1st Respondent acquired the suit property together with his father from him through a Sale Agreement. HASMUKHRAI SHAH has also stated that him and his brothers applied to be allotted a parcel of land in Kisumu and were issued with the same. He has produced documents to show how the 1st Petitioner and his father acquired the suit property, obtained consent, executed the transfer documents and how registration of the transfer was effected until a Certificate of Lease was issued.

The Respondents allege that the Petitioners acquired the suit property illegally and irregularly but they have not demonstrated to this court how the particulars of illegality and irregularity. I do find the Respondents allegations to be mere allegations.

The Petitioners having acquired the suit property from HASMUKHRAI GOSAR SHAH and his brothers, have clearly demonstrated that they have been paying land rent to the Ministry of Land and land rates to the 1st Respondent as is clearly indicated in the Petitioners’ annexures. If the suit property was illegally acquired, the Respondents should not have demanded rates from the Petitioners.

From the evidence on record, it is clear that the Respondents had accepted the Petitioners’ proposal for change of user yet through a

published document known as ‘The City of Kisumu Local Physical & Land Use Development Plans’ indicated that the suit property is public land and purported to zone it as part of a Medium Residential area despite the fact that it had allowed the request for Change of User. The Petitioners vide a letter dated 16th July 2020, raised an objection to the proposals contained in the 1st Respondents report but the Respondents to date have never received a response from the said letter.

I do find that the Petitioner have a prima facie case that they acquired the suit property legally and followed the relevant procedure to acquire the Certificate of Lease and has been faithfully paying land rates and rent to date. The Petitioners have been having a quiet and peaceful enjoyment of the property after acquiring the Certificate of Lease. However, the evidence will be tesyed during full hearing of the suit. Due to the foregoing, I am satisfied that the petitioners have established a prima facie case against the respondents.

CONCLUSION

1. Based on the above the Court I do find that the Petitioner’s Application has merits and give orders sought in the Application thus Pending the Hearing and determination of this petition, a temporary injunction do issue restraining the Respondents whether by themselves, their agents, servants or any other person claiming through them from trespassing upon, interfering with, evicting, demolishing or otherwise interfering with the Petitioners’/Applicants’ use and possession of the following parcels of land:

a) L.R. No. Kisumu Municipality/Block 10/503

b) L.R. No. Kisumu Municipality/Block 10/504

c) L.R. No. Kisumu Municipality/Block 10/505

d) L.R. No. Kisumu Municipality/Block 10/506

e) L.R. No. Kisumu Municipality/Block 10/507

f) L.R. No. Kisumu Municipality/Block 10/508

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l) L.R. No. Kisumu Municipality/Block 10/514

m) L.R. No. Kisumu Municipality/Block 10/515

n) L.R. No. Kisumu Municipality/Block 10/517

2. Costs of this Application be in the cause.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 23RD DAY OF SEPTEMBER, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE