



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC PETITION NO. E003 OF 2020**

**IN THE MATTER OF ARTICLES 22 AND 23 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS**

**AND FREEDOMS UNDER ARTICLES 40, 43 & 47 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ARTICLES 2(1), 2(4), 10 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS**

**AND FUNDAMENTAL FREEDOMS), PRACTICE AND PROCEDURE RULES, 2013**

**BETWEEN**

**RADO DEVELOPMENT COMPANY LIMITED.....PETITIONER**

**AND**

**THE COUNTY GOVERNMENT OF KISUMU.....1<sup>ST</sup> RESPONDENT**

**ABALA WANGA, KISUMU CITY MANAGER.....2<sup>ND</sup> RESPONDENT**

**RULING**

**BRIEF FACTS**

The Petitioner vide a Notice of Motion Application dated 16<sup>th</sup> September 2021 filed under Articles 22, 23, 159 and 258 of the Constitution of Kenya, 2010, Rule 23 and 24 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules 2013 and all other enabling provisions of the Law sought orders that pending the hearing and determination of the Petition herein, the court be pleased to issue conservatory orders restraining the 1<sup>st</sup> and the 2<sup>nd</sup> Respondent their agents servants or any person acting under their instructions, direction or control from entering upon the Applicant's property known as TITLE NUMBER KISUMU/MUN/BLOCK 9/111 to effect the impugned Notice or from otherwise howsoever interfering with the Applicant's business, quiet possession and enjoyment of the suit property. The Petitioner/Applicant be awarded costs of this Application.

The Petitioner through the supporting Affidavit of its Director, WALTER GENGA deposed and stated that the Petitioner acquired the suit property in 2012 for Kshs. 31,000,000/= and outlined the chronology of events leading to the acquisition of the suit property from the 1<sup>st</sup> Respondent's predecessor and issuance of the Certificate of Title.

The Petitioner stated that the Respondents have recently carried out demolitions in Kibuye area of Kisumu on the strength of the impugned notice is apprehensive that the threatened illegal demolition of its property is imminent. The Petitioner further stated that its tenants shall

suffer colossal and irreparable damage and loss should the court not immediately intervene and halt the Respondents' illegal acts. The Petitioner attached a bundle of documents containing documents on which the Petitioner relies.

The Petitioner RADO DEVELOPMENT COMPANY LIMITED, filed this petition on 16<sup>TH</sup> December 2020 against THE COUNTY GOVERNMENT OF KISUMU (1<sup>st</sup> Respondent) and ABALA WANGA, KISUMU CITY MANAGER (2<sup>nd</sup> Respondent) where the Petitioner alleged that it's the duly registered proprietor of the suit property known as TITLE NUMBER KISUMU/MUN/BLOCK 9/111 and has a valid Certificate of Lease for a term of 69 years from 1 April 1985, which term still subsists

The Petitioner stated in the Petition that the company purchaser from the 1<sup>st</sup> Respondent the suit property in the year 2012 for Kshs.31,000,000. In 2021, the County Council of Kisumu was inundated with debts and sought to dispose of the suit property to alleviate the burden.

On 3<sup>rd</sup> February 2012, a full meeting of the County Council approved the proposal for sale of the suit property and on 20<sup>th</sup> February 2012, the Permanent Secretary in the office of the Deputy Prime Minister and Ministry of local Government approved the sale.

The sale of the suit property was effected through an open, competitive tender which the Petitioner participated and won. The Agreement for Sale between the petitioner and the County Council was executed on 14<sup>th</sup> January 2012. After complying with all the requirements, the Petitioner was issued with a Certificate of Lease and since then the Petitioner has enjoyed open, quiet possession of the property.

On 14<sup>th</sup> December 2020, the Respondents caused purported notice dated 9<sup>th</sup> January 2020 to be affixed on the main gate of the suit property which notice indicated that the Petitioner and its 74 tenants must vacate the property within less than 48 hours and in default, the 1<sup>st</sup> Respondent would forcibly evict them and raze the suit property to the ground. That upon receiving the notice, the Petitioner instructed its Advocates to write to the Respondents to explain and demonstrate if ever there was any doubt, the Petitioner's ownership and lawful occupation of the suit property.

The Respondents refused to retract the impugned Notice in spite of the detailed explanation, complete with cogent documentary evidence by the Petitioner's Advocates' Respondents have recently carried out demolitions in Kibuye area of Kisumu on the strength of the impugned notice and the Petitioner therefore is justifiably apprehensive that the threatened illegal demolition of its property is imminent.

The Petitioner further alleged that all its 74 tenants shall suffer colossal and irreparable damage and loss should the court not immediately intervene and halt the Respondents' illegal acts. The Title held by the Petitioner has not need nullified or revoked in any process known to law. The Petitioner therefore prayed for the following orders:

1. Conservatory Orders directed at the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents, jointly and severally, restraining them or any other person acting under the instructions or direction and control from entering the suit Property known as TITLE NUMBER KISUMU/MUN/BLOCK 9/111 in pursuance of the impugned Notice or otherwise however interfering with the Petitioner's quiet possession and enjoyment of its property.
2. Prohibitory Orders directed at the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, jointly and severally, restraining them or any other persons acting under the instructions or direction and control from claiming, entering upon or attempting to demolish the suit property known as TITLE NUMBER KISUMU/MUN/BLOCK 9/111 in pursuance of the impugned notice or otherwise however interfering with the Petitioner's quiet possession and enjoyment of its property.
3. A Declaration that the purported "Public Notice" dated 9<sup>th</sup> December 2020 is null and void and of no legal consequence to the extent that it relates to the Petitioner's property known as TITLE NUMBER KISUMU/MUN/BLOCK 9/111.
4. A Declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents Police have threatened, infringed upon and violated the Petitioner's fundamental rights to privacy, property and fair administrative action.
5. A Declaration that, by their actions the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have acted capriciously, arbitrarily and have abused and exceeded their lawful powers.
6. A Declaration that as a result of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' impugned actions, the Petitioner has suffered damage and loss and is entitled to 9 exemplary damages.
7. An order for compensation as enshrined and provided for under Article 23 (e) of the Constitution, as shall be assessed and quantified by the Honourable Court.
8. General Damages.
9. Costs of the Petition.
10. Any other relief that the court may deem fit to grant.

On 17<sup>th</sup> December 2020, this Court gave the following orders:

- a. That the matter be certified urgent.
- b. That in the meantime conservatory orders granted in terms of prayer 2.
- c. That Hearing on 21<sup>st</sup> January 2021.

### **Grounds of Opposition**

The Respondents filed grounds of opposition on 20<sup>th</sup> January 2021 and puts forth the following grounds;

1. That the Petition and application are without merit and should be dismissed with costs.
2. That this Honourable Court should be guided by the provisions of the Evidence Act, Chapter 80 of the Laws of Kenya including section 5 of the Evidence Act which provides that no evidence should be given in any suit or proceeding except evidence of the existence or no-existence of non-existence of fact in issue and any other fact declared by any provisions of the Evidence Act to be relevant.
3. The fact in issue herein is whether the purported transfer of Land Reference Number TITLE NUMBER KISUMU/MUN/BLOCK 9/111 is valid and in accordance with the relevant laws of Kenya Applicable at the time of the purported transfer or whether the suit property was acquired either through fraud or illegally, unprocedurally or through a corrupt scheme.
4. That the Respondents will argue both the Application and the Petition are vexatious and constitute an abuse of the court process and waste of judicial time
5. That it is trite law that he who asserts must prove his case. The Respondents will expect the Petitioners to discharge this burden of proof that is at the center of Kenya's legal system.

The Respondents relied on various provisions of the Law and the sought the court to:

1. Declare the purported transfer of the Suit Property to the Petitioner/Applicant invalid for failure to adhere to express statutory provisions as stipulated under the Land Act, the Land Registration Act and the Transition Act.
2. Make an order under section 80(1) of the Land Registration Act directing the Registrar to rectify the register by cancelling the registration of the suit property as it was obtained or made by fraud, through a corrupt scheme and or mistake.
3. To dismiss the Application together with the Petition with costs.

### **ISSUES FOR DETERMINATION**

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

- a. Whether a conservatory order should issue

### **ANALYSIS AND DETERMINATION**

- a. Whether the orders sought in the Application should be granted

It is clear from the evidence on record that the 1<sup>st</sup> Respondent and the Petitioner signed an Agreement for Sale for the Suit Property on 14<sup>th</sup> June 2012. The Petitioner followed the necessary steps to ensure that they acquire a clean title and the chronology is clearly listed in the Supporting Affidavit of the Petitioner.

**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.”**

Although the Respondents rely on the provisions of section 26 of the Land Registration Act, that the Petitioner acquired the Certificate of title illegally, unprocedurally, or through a corrupt scheme, The Respondents have not adduced any evidence before this court to show the illegality of the Title.

I find that the Respondents Reply has no sufficient evidence as they have not clearly demonstrated to this Honourable Court how the Petitioner acquired the Title illegally yet they are the ones who sold the suit property to the Petitioner and from the letter dated 31<sup>st</sup> May 2012, the Respondents wrote to the Petitioner confirming that they won the tender.

Due to the foregoing, I am satisfied that the petitioners have established a prima facie case against the respondents.

### **CONCLUSION**

Based on the above the Court I do find that the Petitioner’s Application has merit and give orders sought in the Application thus pending the hearing and determination of the Petition herein, the court be pleased to issue conservatory orders restraining the 1<sup>st</sup> and the 2<sup>nd</sup> Respondent their agents servants or any person acting under their instructions, direction or control from entering upon the Applicant’s property known as TITLE NUMBER KISUMU/MUN/BLOCK 9/111 to effect the impugned Notice or from otherwise howsoever interfering with the Applicant’s business, quiet possession and enjoyment of the suit property. Costs in the cause.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 23<sup>RD</sup> 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 15<sup>th</sup> March 2020.**

**ANTONY OMBWAYO**

**JUDGE**