



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**CONSTITUTIONAL PETITION NO. E006 OF 2021**

**IN THE MATTER OF ENFORCEMENT OF RIGHTS AND FUNDAMENTAL FREEDOMS**

**UNDER CHAPTER 4, ARTICLES 22 AND 23 (1) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

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

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

**AND**

**IN THE MATTER OF THE LAND ACT, NO. 6 OF 2012**

**AND**

**IN THE MATTER OF LAND PARCEL KISUMU MUNICIPALITY BLOCK 7/530**

**BETWEEN**

**BABUBHAI CHAGANBHAI PATEL.....PETITIONER**

**AND**

**KENYA RAILWAYS CORPORATION.....1<sup>ST</sup> RESPONDENT**

**KISUMU CITY BOARD.....2<sup>ND</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF KISUMU.....3<sup>RD</sup> RESPONDENT**

**NATIONAL LAND COMMISSION.....4<sup>TH</sup> RESPONDENT**

**NEW KISUMU DISTRICT COOPERATIVE UNION LTD.....5<sup>TH</sup> RESPONDENT**

**RULING**

Babubhai Chaganbhai Patel (hereinafter referred to as the Petitioner) has come to this court vide a Notice of Motion Application dated 25<sup>th</sup> February 2021 filed under Rule 23 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice Rules and all other enabling provisions of the Law seeking orders that pending the hearing and determination of this petition, a temporary conservatory order do issue restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, their agents, servants and or whomsoever acting on their instructions from forceful acquisition, trespassing into or proceeding with demolition of the Applicant's property situate on Land Parcel Kisumu Municipality/Block 3/121.

Pending the hearing and determination of the petition, the O.C.S. Kisumu Police Station to ensure compliance of this order by protecting the Applicant's property from demolition or the eviction of the Applicant and maintain law and order. Such further or other orders and directions

be issued to facilitate just, expeditious and fair determination of this Application and Petition and that costs of this Application be provided for.

The Petition was supported by the Affidavit of **BABUBHAI CHAGANBHAI PATEL** who deposed and that he is the registered proprietor of all that land parcel known as Kisumu Municipality/Block 3/121 and that he developed the property with a workshop and commercial office space where he undertook construction of his business.

He deposes that he purchased the property from the 5<sup>th</sup> Respondent who was the one allocated by the Government of Kenya and that prior to the purchase he undertook the due diligence to confirm the authenticity of the ownership by the 5<sup>th</sup> Respondent. He proceeded with the transfer and payment of stamp duty and all processes towards acquisition of his certificate of lease.

He thereafter charged the property to his bank to raise sufficient revenue for his development. That ever since the acquisition, he has been paying the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents land rates without a problem.

The 1<sup>st</sup> Respondent visited his premises and marked it for demolition. It is apparent that they not only want to destroy it but also take it away from him.

He is not aware that the Government of Kenya is planning to compulsorily acquire his property and has not received any such notice. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents may move any time to unlawfully evict him and destroy his heavy investment that runs to hundreds of millions of Kenya Shillings.

He laments that in the event he is evicted, his property destroyed, he stands to lose his livelihood. That they stand to suffer irreparable injury if the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are not stopped from further destructions. That in the circumstances, it is just and proper that all the reliefs sought in their application are granted. That he is that he has a prima facie case with high probability of success. That he gives an undertaking as to damages and are willing to abide the conditions that the court will impose on him to issue the injunctive relief. That it is a proper and fit case to grant the orders sought.

VALENTINE OIRO through a Replying Affidavit filed on 12<sup>th</sup> March 2021 in opposition of the Application stated that all the three Respondents are different government entities created under different statutes with different mandates and as such suing them together without clear linkage in execution of their different mandate is an abuse of the court process.

That the Notice of Motion Application dated 25<sup>th</sup> February 2021 lacks the requisite precision required in petitions in that there is no clarity as to whom is culpable of the wrongs complained of leaving court with task to grope in the dark and place it acts on the one culpable of the acts complained of.

That the Applicant has explicitly stated that paragraph 9 of the Supporting Affidavit that the 1<sup>st</sup> Respondent visited his premises and marked it for demolition and produced photos to as BCP 15 to vouch for the claim.

That the 2<sup>nd</sup> Respondent has been wrongfully joined in this suit noting that the 2<sup>nd</sup> Respondent has no interest in the properties of Kenya Railways corporation neither are they working in corporation to achieve a common objective. That the certificate of lease produced is a fraudulent as it has anomalies.

That the allegations that the Petitioner undertook due diligence prior to the purchase of the suit land is not true because they ought to have easily revealed that the lease certificate is not supported with most primary documents and further despite the fact that the alleged parcel is adjacent to Kenya Railways Line, the applicant has not demonstrated that they contacted the Kenya Railways Corporation to ascertain the genuinity of the title and was given node to proceed with the alleged acquisition of the suit parcel of land and eventually develop the same.

That the 2<sup>nd</sup> Respondent received rates on account of the records maintained at the Ministry of Lands which have turned out to be irregular and fraudulent and as such the Applicant cannot rely on his credence on the fraudulent titles to enforce a right that arises out of illegal acts and commissions.

That the allegation that 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondent have recently engaged in wanton destruction of property is without merit and justification and every case should be treated with its unique set of circumstances without taking a general position noting that this is a petition which requires concise precision as to the violation of the provisions of the bill of rights.

That the Applicant/Petitioner has not proved that he is likely to suffer irreparable injury if the orders sought are not granted in that private interest and has never been greater than public interest that serves the vast majority being residents of Kisumu County and the Kenyan nation at large. That the petition presented is feeble and meek and do not establish a prima facie case thus should be dismissed with costs to the 2<sup>nd</sup> Respondent.

The 1<sup>st</sup> Respondent filed a Replying Affidavit on 20<sup>th</sup> April 2021 where GEOFFREY WEKESA deposed and that as a senior cartographer with the 1<sup>st</sup> Respondent and being conversant with the layout and extend of the 1<sup>st</sup> Respondent's lands and Railway reserve in Kisumu, he is aware that the suit land parcel Kisumu Municipality/Block 3/121 is one of the Kenya Railways industrial plots within block 3. That from the records kept by the 1<sup>st</sup> Respondent, the 1<sup>st</sup> Respondent has a full history of their ownership of the suit land.

That all land that was vested in the East Africa Railway Corporation by any written law as well as any land conveyed to that corporation or otherwise placed at that corporation's disposal vests in the Cross-Petitioner herein.

That wide plan of KUR & H FR No.43/53 and maps, the suit land falls within the 1<sup>st</sup> Respondent's industrial parcels; further from the ground survey he conducted between 1<sup>st</sup> to 3<sup>rd</sup> March 2021, the allegedly demolished wall had encroached on a railway diamond comprising safety and train operations between the new Kisumu station and the port line.

That the 1<sup>st</sup> Respondent is entitled by law under the Kenya Railways Act Cap. 397 to construct and maintain among other accommodations, Railway Level Crossings on both public and private roads in the manner described both in the Act and the Railways and Harbours Engineering Manual Volume 1(1962).

That the said crossing, there is a mandatory legal requirement for the maintenance of what is called **visibility diamond** stretching 300 feet on each of the four directions along the diagonals of the crossing. The Law prohibits any construction or erection of any structures and even growth of any plants growing beyond 9 inches within the **visibility diamond**. The aim of this legal requirement **"shall be to maintain a distance standard visibility that will enable a motorist, when he is atleast 300 feet from the crossing , to see the leading component of the train when it is also qat least 300 feet from the crossing"** and equally the locomotive driver.

That the alleged suit property despite being the 1<sup>st</sup> Respondent's industrial parcel, the premises and wall were within a **'VISIBILITY DIAMOND'** on a Rail/Road Level Crossing and that if indeed the Petitioner acquired title to such land and went ahead to erect a storeyed building without the approval of the 1<sup>st</sup> Respondent's Managing Director then the said act were both illegal and created a danger to the general public, motorist and even the Locomotives using the level crossing.

That if any structures are erected on the said **"VISIBILITY DIAMOND"** without the approval of the Managing Director, the 1<sup>st</sup> Respondent would entitle to have such structures removed which endanger safety at the Level Crossing and the petitioners would not be entitled to any compensation.

That the suit parcel falls on the right hand side of Busia road and accessible from SABUNI Road though on the ground, the suit parcel has direct access form class 1 which is 60m wide on the upper side it neighbors the new Kisumu passenger terminus which is under construction.

That from annexure marked GW-3, yellow portion Depicts the suit parcel whilst the purple shows part of the railway land (portion at which the new station works are ongoing).

That based on the foregoing, it is not in dispute that the suit parcel falls within industrial plots vested on the Kenya Railways Corporation and owned by it and which parcels have never been surrendered to the Government of Kenya for allocation to any other party including the Petitioner/Applicant.

That the 1<sup>st</sup> Respondent was not involved in the transfer of the suit land to neither the petitioner herein nor any other unnamed persons; therefore, the alleged allocation and or ownership by the Petitioner is not only illegal, fraudulent, null and void but is also irregular.

That the demolitions complained of by the Petitioner were undertaken by a Government of Kenya Multi-agency operation team composed of National Government, Administrative Officers, Presidential Delivery Unit, National Police Service and Kenya Railways Officers after sufficient notices were duly served.

That the 1<sup>st</sup> Respondent deny being responsible for the actions complained of and add that the Petitioners and any other encroachers and trespassers on Railway Lands and reserves had been given sufficient notices to vacate and or remove any illegal structures. The first notice was a Public Notice in the My Government Publication on 20/03/18, another in the Daily Newspapers on the 27<sup>th</sup> September 2019 and again on the 30<sup>th</sup> of September 2019.

That since the structures allegedly demolished were either on a railway reserve or a visibility diamond as explained above, they formed a danger to the general public safety on the Railway Level Crossing and as such the balance of convenience does not tilt in favour of the Applicant.

That the Petitioner/Applicant will be required on trial to demonstrate how she acquired title to land reserved for a Railway reserve and or Level Crossing Visibility Diamond and proceeded to erect structures on it which would jeopardize the safety of the general public who use the railway line and the road in that area.

That if the Applicant hold any letters of Allotment or titles to the suit land the nature of which are different from long term leases granted by the Cross-petitioner, then the same must have been irregularly acquired. This is so because the 1<sup>st</sup> Respondent has surrendered the suit Land to the Government of Kenya for allocation to other parties including the Applicant.

That the Applicant is not entitled to the orders sought including the orders as he has come to court with unclean hands, the balance of convenience does not tilt in his favour, similarly what is complained of is for the benefit of the general public and the application has also not demonstrated whether an award of damages would not be an adequate compensation. That in the view of the foregoing the Applicant cannot be entitled to the prayers sought and his Application ought to be dismissed with costs.

On 23<sup>rd</sup> March 2021, the Petitioner filed a Notice of Withdrawal of Petition against the 2<sup>nd</sup>,3<sup>rd</sup> and 5<sup>th</sup> Respondents. Parties were directed by the court to file and serve written submissions.

The Applicant filed a Supplementary Affidavit on 2<sup>nd</sup> June 2021 pursuant to the leave of court dated 20<sup>th</sup> April 2021, he deposed that he sought orders restraining the Respondents, its agents, servants and or whomsoever acting on its instructions from forceful acquisition,

trespassing into or proceeding with demolition of his property situate on land parcel number Kisumu Municipality/Block 3/121.

That on 3<sup>rd</sup> March 2021, the firm of M/S Gitonga Advocates LLP wrote to the Respondent enquiring on the position of his parcel and further proposing on parties reaching an amicable solution regarding this issue.

That on 5<sup>th</sup> March 2021, the Respondent responded to the said letter informing the said firm of its intend to send its Land Surveyors to proceed to Kisumu to undertake a boundary verification exercise on Monday 8<sup>th</sup> 2021 to enable him erect his perimeter wall.

That the contents of this letter show knowledge on the part of the Respondent as regards his parcel of land. That on the strength of the letter, he instructed Opiyo & Associates, Licensed Land Surveyors, to visit the suit parcel of land and determine its position on the ground.

That on 25<sup>th</sup> April 2021, Mr. Patrick Opiyo visited the suit parcel of land and after undertaking survey and reestablishing the corner beacons made a finding that the suit parcel of land is a government land and not the Respondent's. That on 27<sup>th</sup> April 2021, he wrote to the National Land Commission complaining about the intent of the Respondent to demolish his parcel of land.

That on 29<sup>th</sup> April 2021, the said Commission wrote to the Respondent requesting for documents showing that the land belonged to the Respondent because their records showed that the land is Government land and there was no irregularity during allocation of the said parcel of land.

That the documents confirm his position that he is the rightfully entitled to the suit property and that the Respondent's acts are infringing on his rights to own property. That it is in the interest of justice that his Application be allowed as his livelihood is at great risk of being extinguished.

### **Petitioner/Applicant's Submissions**

The Petitioner/Applicant filed submissions on 26<sup>th</sup> May 2021 where he submitted that a litigant who seeks grant of an interim injunction must demonstrate the three limbs as set out in the famous case of **Giella vs Casman Brown (1975) E.A 358** which are:

- a) A prima facie case,**
- b) Irreparable harm and,**
- c) Balance of convenience.**

That he has demonstrated the he has a prima facie case and relied in the case of **Mrao Ltd v First American Bank of Kenya Limited & 2 Others (2003) eKLR** which defined a prima facie case.

That the bone of contention in the main petition revolves around the ownership of land parcel number Kisumu Municipality/Block 3/121 which the Applicant is holding as a registered leasehold in his name. That the Applicant validly purchased the same from the New Kisumu Cooperative Union Ltd who was allotted the same by the Government of Kenya way back on 1<sup>st</sup> May 1979 and prior to the purchase, the Applicant undertook due diligence as per the annexures.

That the Ministry of Lands through the Director of Land Administration upon an inquiry being made, categorically confirmed that as per their records, the Kisumu District Co-operative Union the Vendor was the allottee of the property from the Government of Kenya. The property was unsurveyed before allocation to Kisumu District Cooperative Tribunal and this meant that it had no previous registered or recorded owner. The name of Kenya Railways appears nowhere.

That the 1<sup>st</sup> Respondent had without any notice or laid down procedure of the constitution and written law expressed marked the Applicant's property for demolition and forceful take over. The Applicant obtained interim orders on 24<sup>th</sup> February 201 and which orders were served upon the Respondent on the same date but out of impunity the Respondent went on and knocked down part of the Applicant's perimeter wall. The Applicant is apprehensive that the Respondent if not restrained will proceed with pulling down the remainder of the wall including his biding within.

The Applicant submitted that he has the constitutional right to own property in Kenya but this right is under threat by the actions of the Respondent and to prove ownership, he has availed the leasehold title in his name, search certificate, white card, allotment letters and sale agreement.

The Respondent has deponed that the entire the suit property where the Applicant's plot is situated belongs to it. The Respondent has failed to furnish the court with ownership documents in support of this contention. The Respondent has only furnished a 1935 map to try to show ownership. That maps are not evidence of ownership documents and the current map with the Ministry of Lands supersedes old maps.

The Claim that the Applicant's parcel is posing a danger to the Respondent's train and other users of the road crisscrossing the same remains unproven. That the Surveyor's Report clearly shows that the suit property is not part of the railway land. It is isolate with its own title and distinct features. The Applicant is entitled to notice and a form of compensation if he is to lose land for the Respondent or public utility. That we are a country governed by law and there is a law governing compulsory acquisition of private property. The Respondent has not demonstrated that it has complied nor has it shown any form of compensation it made to the Applicant.

If the Respondent desires the Applicant's property to revamp the existing meter gauge, then it ought to do the Honourable thing by complying with the legal provisions of the law on compulsory acquisition and compensate the Respondent. The Applicant never grabbed the property from anyone. The Applicant complied with the law by negotiating and purchasing the same from the previous allottee executed the necessary legal instruments to obtain title and paid value for the property. The Respondent has not demonstrated or even alleged that the Applicant obtained the title illegally.

The Applicant further submitted that section 24 of the Land Registration Act states that the registered proprietor of a land has absolute ownership and rights thereof. The Respondent having failed to avail ownership documents that rivals that of the Applicant, it remains that the Applicant has established a prima facie case with high probabilities of success in the main petition.

On the issue of irreparable harm, the Applicant submitted that in the event the Respondent proceeds with the demolition, there will be nothing left for the court to determine as the substratum will have been lost. The Applicant is bound to suffer irreparable loss that no amount of financial compensation will be sufficient to restore the loss. The Respondent has not denied the fact that substantial loss will visit the Applicant nor has it challenged the claim of the Applicant suffering irreparable injury should stay be declined. The Respondents have demonstrated all the eagerness to forcefully take over the Applicant's property to erect a train station therein. This means that in the event the Petition succeeds, the Applicant will be in no position to have the land restored back to him. The Applicant will not only be denied economic use of the same but further have real difficulties regaining it for its original use. The Applicant shall no doubt suffer irreparable harm unless the injunction is granted.

On the issue of balance of convenience, the Applicant submitted that the balance of convenience tilts in their favor in that he is the one not only having physical possession and use of the land but he is the only one holding a registered leasehold title for the same and the title has been verified by the Ministry of Lands officials.

The Applicant submitted that the court grant orders sought in the Application with costs.

### **1<sup>st</sup> Respondent's Submission**

The 1<sup>st</sup> Respondent filed its submissions on 23<sup>rd</sup> August 2021 and raised the following issues for determination:

- i. Whether or not a temporary conservatory order should issue pending hearing and determination of the Petition as sought.
- ii. Costs of the Application.

In the case of **Progress Welfare Association of Malindi & 3 Others v County Government of Kilifi & 4 Others (2020) e KLR** the court guided by several authorities laid down the law on conservatory orders. It stated that:

*“This remedy is one in rem and in respect to a particular state of affairs and can only issue where the Applicant has the onus of demonstrating that he has established a prima facie case likely to succeed and unless granted, there is real danger that he will suffer prejudice as a result of violation or threatened violation of the Constitution court also found that in determining whether there will be a real danger, this must be weighed against the public interest. This order can also issue on inherent merit of the case bearing in mind public interest, constitutional values, proportionate magnitude and priority levels attributable to the relevant causes.”*

On whether the Petitioner demonstrated the criteria to warrant issuance of the conservatory orders sought, the 1<sup>st</sup> Respondent submitted that the allegations raised in the response to the Application as the cross-petition remain uncontroverted. This means that the Petitioner admits that the suit property falls within the railway visibility diamond as deposed by the 1<sup>st</sup> Respondent and which comprises the safety of the train operations between the Kisumu station and the port line.

The Petitioner failed to demonstrate that he lawfully acquired title to the suit property to enable him enjoy indefeasibility of title. That the title held by the Petitioner has been challenged as there is no proof of how the title to the suit property was lawfully acquired by the 5<sup>th</sup> Respondent to demonstrate whether or not the 5<sup>th</sup> Respondent had proprietary interest to pass to the Petitioner. The Petitioner annexed to his Affidavit a copy of title issued in favour of the Respondent. There is no letter of allotment, proof of compliance with the terms of the letter of allotment, there is no copy of the lease issued in favour of the 5<sup>th</sup> Respondent or proof that a survey exercise was undertaken to curve out the suit property in favour of the 5<sup>th</sup> Respondent.

That it is not in issue that the property falls within the railway reserve as can be noted from the maps, survey plan and the classical model of safety triangle at level crossing and was acquired with involvement of the 1<sup>st</sup> Respondent.

The concept of indefeasibility of title enshrined under Article 40 of the Constitution as read with Section 24, 25 and 26 of the Land Registration Act that stipulates that one who has title to a particular parcel of land enjoys a right over that property against the whole world. This right however is not absolute and is subject to limitation in accordance with Article 24 of the Constitution. This limitation can be seen under Clause 6 of Article 40 of the Constitution as read with Article 26 of the Land Registration Act. The 1<sup>st</sup> Respondent relied in the case of **Henry Muthee Kathurima vs Commissioner of Lands & Another (2015) eKLR**.

In the case of **Funzi Island Development Limited & 2 Others Vs County Council of Kwale & 2 Others (2014) eKLR** the court stated that a registered owner of land enjoys absolute and indefeasible title to property if allocation was legal, proper and regular. A court of law cannot therefore sanction an illegality in cases where one claims indefeasibility of title if the same was not obtained through lawful means.

In **Republic vs Land Registrar Kilifi & Another ex parte Daniel Ricci (2013) eKLR**, the court held that a title deed is an end product of a process. For a title deed to be protected by Article 40(1) of the Constitution, the holder of the title deed has to establish that he followed the laid down procedures in acquiring it.

In **Kassim Ahmed Omar & Another vs Awuor Ahmed Abel & Others, Malindi ELC No. 18 of 2015**, the court held as follows:

**“A certificate of Title is and end product of a process, if the process that followed in issuing the title did not comply with the law, then such a title can be cancelled by the court.”**

The Petitioner has annexed a copy of the title deed illustrating that it is registered as proprietor of the suit property. The 1<sup>st</sup> Respondent submitted that for one to enjoy the right to own property under Article 40 of the Constitution, if and when challenged, one has to demonstrate how he acquired title to justify such enjoyment as was the holding in **Munyu Maina vs Hiram Gathiha Maina, Civil Appeal Number 239 of 2009**.

Munyao J, in the case of **Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others (2016) eKLR** held as follows:

**“A court when faced with a case of two or more titles over the same land has to make investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they a title deed or Certificate of Lease, then they have a right over the property. The other party has a similar document and there is therefore no advantage in hinging ones case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.”**

The Petitioner has failed to demonstrate that there is real danger which is imminent that he will suffer prejudice unless the conservatory orders are issued as sought. The 1<sup>st</sup> Respondent relied in the case of **Centre for Human Rights Education and Awareness (CREW) & 7 Others** where the court held that **a party seeking a conservatory order is only required to demonstrate that he has a Prima facie case with a likelihood of success and that unless the conservatory order is granted, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.**

The 1<sup>st</sup> Respondent also relied in **Martin Nyaga Wambora v Speaker of the County of Assembly of Embu & 3 Others (2014) eKLR**. The Applicant submitted that in the case of **Progress Welfare Association of Malindi & 3 Others v County Government of Kilifi & 4 Others (2020) eKLR** the court in declining to issue conservatory orders as sought found that **the applicants had not demonstrated that the bitumen finish will adversely affect the economic status of the residents as it was in the public interest to have the roads accessible, maintained and upgraded where necessary to make it easier for the residents of Malindi to have ease of transport and movement on a daily basis for their personal and commercial use.**

The 1<sup>st</sup> Respondent submitted that it is not disputed that in the performance of its statutory duties, reasonable notices were issued to encroachers on land vested in the 1<sup>st</sup> Respondent requiring them to vacate. That the Petitioner has failed the test for the grant of conservatory orders and therefore the court should decline to issue the orders.

#### **ISSUES FOR DETERMINATION**

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

- a) Whether the orders sought should be granted

#### **ANALYSIS AND DETERMINATION**

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

This court has carefully looked at the Pleadings filed in court and can confirm that the property is registered in the name of the Petitioner. The Petitioner in his Supporting Affidavit has clearly demonstrated how he acquired the suit property. The letter of allotment issued by the Municipal Council of Kisumu has confirmed that the suit parcel of land was issued to Kisumu District Co-operative Union who in the end obtained a Certificate of Lease and later on sold the suit property to the Petitioner. In **Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another [2015] Eklr** it was held that:

**“It is well established that, in order to secure the injunctive relief sought, the appellant must first establish a prima facie case with a high chance of success. In this case, the appellant must show that he owned the suit property, or had a valid claim, which would be capable of defeating a third party claim in respect of the same property.”**

The 1<sup>st</sup> Respondent in their Replying Affidavit stated that it was not involved in the transfer of the suit land to neither the petitioner herein nor any other unnamed persons; therefore, the alleged allocation and or ownership by the Petitioner is not only illegal, fraudulent, null and void but is also irregular. This court has looked at the evidence presented before it and concludes that the Petitioner was a bonafide purchaser for value as he purchased the property from Kisumu District Co-operative Union who had acquired the property from the County Government. At this stage the respondent has not established fraud.

The Petitioner has clearly stated that in the event he is evicted and the property demolished, he is likely to lose his livelihood and if the demolition takes place there will be nothing left for the court to determine.

**In the case of Pius Kipchirchir Kogo vs Frank Kemeli Tenei [2018] eKLR.** the Court held as follows;

**“.....irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury’.**

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.”***

***Centre for Rights Education and Awareness (CREAW) & another v Speaker of the National Assembly & 2 others (2017) eKLR*** the Court was emphatic that: -

***“A party who moves the court seeking conservatory orders must show to the satisfaction of the Court that his or her rights are under threat of violation; are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending case or Petition.”***

The 1<sup>st</sup> Respondent have alleged that the suit property belongs to them through a copy of the Kenya Railways Corporation (Vesting of Land) Order, 1986 and only relies on the ground survey conducted between 1<sup>st</sup> to 3<sup>rd</sup> March 2021. This evidence ought to be tested during full hearing. This court finds that the Petitioner has established his case on a balance of probabilities and therefore allows the Application and issues orders that pending the hearing and determination of this petition, temporary conservatory order do issue restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, their agents, servants and or whomsoever acting on their instructions from forceful acquisition, trespassing into or proceeding with demolition of the Applicant’s property situate on Land Parcel Kisumu Municipality/Block 3/121.

Pending the hearing and determination of the petition, the O.C.S. Kisumu Police Station to ensure compliance of this order by protecting the Applicant’s property from demolition or the eviction of the Applicant and maintain law and order. Costs of this Application be in the petition.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 28<sup>TH</sup> DAY OF OCTOBER, 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**