



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC PETITION NO. 03 OF 2020

EVANS ERUSTUS MENGE ORINA.....PETITIONER/APPLICANT

VERSUS

COUNTY GOVERNMENT OF NYAMIRA.....1ST RESPONDENT

THE COUNTY EXECUTIVE COMMITTEE

MEMBER FOR ROADS, TRANSPORT

AND PUBLIC WORKS.....2ND RESPONDENT

RULING

INTRODUCTION

1. Contemporaneously with the Petition dated 9th June 2020, the Petitioner/Applicant filed a Notice of Motion under Certificate of Urgency seeking the following orders,

a) Spent

b) Spent

c) That this Honorable Court be pleased to issue conservatory orders restraining the Respondents either by themselves, their appointed agents, servants, employees and/or officers from trespassing on, carrying out demolitions or excavations and/or in any other manner interfering with the Applicant's use and occupation of his properties known as LR. NO. WEST MUGIRANGO/SIAMANI/4068 and LR. NO. WEST MUGIRANGO/SIAMANI/6524 (hereinafter referred to as *the suit properties*) pending the hearing and determination of his Petition.

d) That the costs of the application be provided for.

2. The application is premised on the grounds set out in the Notice of Motion, and the Petitioner's Supporting Affidavit in which he averred that he is the registered proprietor of the suit properties.

3. He further averred that the Respondents were carrying out demolitions of private properties within Nyamira town in the same location as the suit properties in the guise of paving way for the construction of a new access road without paying compensation, carrying out public participation or even following due process imposed by the law on compulsory acquisition.

4. It was the Petitioner's further averment that the trajectory taken by the impugned access road would cut across the suit properties even though the same were not reserved for the construction of the access road according to the records held by the Ministry of Lands.

5. The Petitioner deponed that he was apprehensive that unless the Respondents were restrained, they would proceed with their plans to demolish the structures on the suit properties and unlawfully interfere with his quiet possession of the same.

6. In response to the application, the Respondents, filed a Replying Affidavit sworn by Zablon Onchiri, the County Executive Committee Member for Roads, Transport and Public Works (the 2nd Respondent). Mr. Onchiri denied all the allegations levelled against the Respondents by the Applicant and argued that they were all speculations and suspicions that were not supported by cogent evidence.

7. He averred that the 1st Respondent made a decision to open roads within Nyamira Town and other towns on 20th March, 2020. It was his contention that before the process commenced, he directed the Physical Planning Officer and the survey team to commence the exercise of identifying parcels of land reserved for access roads using the Master Plan of 1973 and the Development Plan of 1996 which exercise they conducted successfully.

8. It was Mr. Onchiri's deposition that several parcels of land including the suit properties were found to have encroached on the road reserve without due regard to the provisions of the Physical Planning Act which provides that an access road be constructed every 100 feet behind the commercial buildings.

9. Mr. Onchiri further averred that all affected persons including the Petitioner were duly notified by the relevant officers within his department.

10. He averred that he had gone ahead and instructed his officers to mark properties including the Petitioner's structures which had encroached on the road and blocked its path.

11. He contended that the Petitioner had not in any way demonstrated that his right to property had been violated as alleged and thus he did not deserve the prayers sought in this Application.

12. The court directed that the application be canvassed by way of written submissions. The Petitioner filed his written submissions on 4th December, 2020 while the Respondents filed their submissions on 8th October, 2020.

ISSUES FOR DETERMINATION

13. Having considered the Notice of Motion, rival affidavits and submissions filed in respect of the instant application, the sole issue for determination is whether the Applicant has met the threshold for grant of conservatory orders.

ANALYSIS AND DETERMINATION

14. The threshold for grant of conservatory orders were clearly outlined in the case of **Centre for Rights Education and Awareness (CREAW) & 7 Others v Attorney General [2011] eKLR** where the court expressed that: -

"..... I will not therefore 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"

15. Similarly, in the case of **Kenya Association of Manufacturers & 2 others v Cabinet Secretary-Ministry of Environment and Natural Resources & 3 others [2017] eKLR** it was held that: -

"In an application for a conservatory order, the court is not invited to make any definite or conclusive findings of fact or law on the dispute before it because that duty falls within the jurisdiction of the court which will ultimately hear the substantive dispute. The jurisdiction of the court at this point is limited to examining and evaluating the materials placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of a conservatory order. The court is also required to evaluate the materials and determine whether, if the conservatory order is not granted, the Applicant will suffer prejudice. Thirdly, it is to be borne in mind that conservatory orders in public law litigation are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the court in the public interest."

16. As has been held in above decisions, a prima facie case is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, an Applicant has to show that he or she has a case which discloses arguable issues and in a case alleging violation of rights, arguable constitutional issues.

17. In the instant application, it is contended by the Applicant that the actions taken by the Respondents fly in the face of the constitutional provisions in particular Articles 20, 21, 22, 23, 27, 28, 29, 31, 39, 40, 47 and 48 of the Constitution. The Applicant has demonstrated through documentary and photographic evidence that he is in occupation of the suit properties which are indeed registered in his name. In fact, the Respondents have acknowledged that the Applicant has constructed structures on the suit properties. The Applicant has demonstrated that the Respondents have threatened to demolish the structures standing on the suit properties which are registered in his name.

18. It is therefore clear from the material placed before the court that the Applicant has effectively demonstrated that he has an arguable case with a likelihood of success.

19. In as much the Respondents allege that the suit properties fall on the road reserve, this has not been supported by any evidence. That notwithstanding, the said allegations are substantive issues that can only be resolved at the hearing of the Petition dated 9th June 2020.

20. I am satisfied that the Applicant has demonstrated that his enjoyment of the suit properties is in imminent danger of being interfered with by the Respondents who intend to demolish his structures being thereon. The 2nd Respondent has at Paragraph 11 of the Replying Affidavit averred that he has instructed his officers to mark the structures belonging to the Applicant which he argued were on the road reserve. These are clear signs that the Applicant is likely to suffer irreparable loss if the Respondents are not restrained from their actions pending the hearing and determination of the main Petition.

21. The upshot is that the Applicant has met the threshold for grant of a conservatory order. I therefore allow the application and make the following orders:

i. A conservatory order is hereby issued restraining the Respondents either by themselves, their appointed agents, servants, employees and/or officers from trespassing on, carrying out demolitions or excavations and/or any other manner interfering the Applicant's use and occupation of their properties known **LR. NO. WEST MUGIRANGO/SIAMANI/4068** and **LR. NO. WEST MUGIRANGO/SIAMANI/6524**

ii. The costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED AT KISII THIS 27TH DAY OF OCTOBER, 2021.

.....

J.M ONYANGO

JUDGE