



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

CONSTITUTIONAL PETITION NUMBER E002 OF 2021

IN THE MATTER OF ARTICLE 22 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 40, 48 AND 232 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LAND ACT

BETWEEN

GRACE WAMBUI KARUNDITU (suing on her own and on behalf of the

Estate of KARUNDITU NYAMU) PETITIONER

VERSUS

1. WINSTON MWANGI GITHINJI

2. BONIFACE MUREITHI MUTHUNJIA

3. EVANS GATHIGO BENSON

4. CHIEF LAND REGISTRAR, KIRINYAGA

5. DISTRICT SURVEYOR, KIRINYAGA RESPONDENTS

RULING

1. By way of a Notice of Motion dated 12th January, 2021 and filed on 15th January, 2021, the Petitioner seeks the following orders: -

(a) SPENT

(b) SPENT

(c) Pending hearing and determination of this, Petition, the Court be pleased to issue a conservatory order restraining the 1st and 2nd Respondents whether by themselves, their agents and servants from selling, dealing, interfering, alienating or disposing of all those parcels of land known as Mweria Kiandai/959, Mweria Kiandai/960, Mweria Kiandai/961, Mweria Kiandai/962, Mweria Kiandai/963, and Mweria Kiandai/964.

(d) To enable the petitioner effectively exercise and protect her rights and fundamental freedoms, an order be issued under Article 35 (1) of the Constitution and Sections 4, 5 and 6 of the Right to Information Act compelling the Respondents to supply the Petitioners with copies of the sale agreement, application for consent of Land Control Board to subdivide Mweria Kiandai/952 into Mweria Kiandai/959, Mweria Kiandai/960, Mweria Kiandai/961, Mweria Kiandai/962, Mweria

Kiandai/963, and Mweria Kiandai/964, copies of transfers, receipts for stamp duty, registration fee and any other document(s) forming the basis of said subdivision of Mweria Kiandai/952.

(e) **Costs.**

2. The said application is premised on the following grounds: -

a. The Estate of Karunditu Nyamu (deceased) is the beneficial owner of the parcel of land known as Mwerua/Kiandai/952. The said parcel of land devolved to the Estate of Karunditu Nyamu (deceased) following the death of the registered proprietor, Karunditu Nyamu who died on 21/8/1999.

b. The Respondents have fraudulently colluded and dispossessed the Estate of Karunditu Nyamu (deceased) its rightful ownership of the parcel of land by creating and registering the following subdivisions from Mweria Kiandai/952;

i. Mweria/Kiandai/959, which was transferred to the 1st Respondent on 21/09/2001.

ii. Mweria/Kiandai/960 whose certificate of official search was not availed by the 4th Respondent

iii. Mweria/Kiandai/961 which was transferred to the 2nd Respondent on 22/06/2012.

iv. Mweria/Kiandai/962 which was transferred to the 2nd Respondent on 22/06/2012.

v. Mweria/Kiandai/963 which was transferred to the 2nd Respondent on 22/06/2012.

vi. Mweria/Kiandai/964 which was transferred to the 3rd Respondent on 22/3/1995.

c. The registered proprietor of the parcel of land known as Mwerua/Kiandai/952 died on 21/8/199 and as such the above subdivisions which are fraudulent because;

i. The process of succession and administration of the Estate of Karunditu Nyamu has not even commenced and as such any property registered in the name of Karunditu Nyamu (deceased) cannot be transferred and legally acquired.

ii. The Estate of Karunditu Nyamu (deceased) has never signed any agreement to subdivide and or sell any portion of the parcel of land known as Mwerua/Kiandai/952 to the 1st, 2nd, and 3rd Respondents.

iii. The Estate of Karunditu Nyamu (deceased) has never applied for Land Control Board Consent to subdivide, sell or otherwise transfer any portion of land known as Mwerua/Kiandai/952.

iv. The 4th Respondent has without any lawful justification refused to avail the parcel file/register of Mwerua/Kiandai/960 or give the certificate of official search or green card and insists that the file is not available in the registry.

d. Unless restrained by the Court, the respondents will dispose of aforesaid properties constituting the Estate of Karunditu Nyamu (deceased) thereby violating the constitutional rights of the beneficiaries to own property.

APPLICANT'S CASE

3. The Applicant supported her application vide a supporting affidavit which she swore on 12th January, 2021.

4. In the said affidavit she deponed that she was a beneficiary of the Estate of Karunditu Nyamu (deceased) who was the owner of parcel of land known as Mwerua/Kiandai/952 and that the said parcel of land devolved to the said deceased's estate following his death on 21/8/1999.

5. She further deponed that Respondents have fraudulently colluded and dispossessed the Estate of Karunditu Nyamu (deceased) its rightful ownership of the parcel of land by creating and registering the following subdivisions from Mweria Kiandai/952;

a. Mweria/Kiandai/959, which was transferred to the 1st Respondent on 21/09/2001.

b. Mweria/Kiandai/960 whose certificate of official search was not availed by the 4th Respondent

c. Mweria/Kiandai/961 which was transferred to the 2nd Respondent on 22/06/2012.

d. Mweria/Kiandai/962 which was transferred to the 2nd Respondent on 22/06/2012.

e. Mweria/Kiandai/963 which was transferred to the 2nd Respondent on 22/06/2012.

f. Mweria/Kiandai/964 which was transferred to the 3rd Respondent on 22/3/1995.

e. She further deponed that the registered proprietor of the parcel of land known as Mwerua/Kiandai/952 died on 21/8/199 and as such the above subdivisions which are fraudulent because;

a. The process of succession and administration of the Estate of Karunditu Nyamu has not even commenced and as such any property registered in the name of Karunditu Nyamu (deceased) cannot be transferred and legally acquired.

b. The Estate of Karunditu Nyamu (deceased) has never signed any agreement to subdivide and or sell any portion of the parcel of land known as Mwerua/Kiandai/952 to the 1st, 2nd, and 3rd Respondents.

c. The Estate of Karunditu Nyamu (deceased) has never applied for Land Control Board Consent to subdivide, sell or otherwise transfer any portion of land known as Mwerua/Kiandai/952.

d. The 4th Respondent has without any lawful justification refused to avail the parcel file/register of Mwerua/Kiandai/960 or give the certificate of official search or green card and insists that the file is not available in the registry.

6. She also deponed that she had inquired from the other beneficiaries of the estate namely Agnes Micere Karunditu, Harrison Wambui Karunditu, Kennedy Murimi Karunditu, Mary Wacera Karunditu,

Josephat Murimi Karunditu and Patrick Somba Karunditu and had informed her that they had never participated in any transaction leading to the creation of the said sub-divisions.

7. On 11/5/2020 she objected to the said fraudulent subdivisions when she required the 4th Respondent to prohibit or restrict dealings of the said parcels of land.

8. She further stated that Mwerua/Kiandai/952 and the subsequent subdivisions created thereon remained the property of the deceased herein and that she believed that the 1st, 2nd, and 3rd Respondents were colluding with the 4th Respondent and 5th Respondent to:

a. Abuse the office of lands registrar and district surveyor to violate the property rights of the Petitioner and the Estate of Karunditu Nyamu (deceased).

b. Commit a corruption offence of abuse of office contrary to Section 46 of the ACEC Act by conferring an improper benefit to the 1st, 2nd and 3rd Respondents.

c. Dispossess or otherwise violate the property rights of the Estate.

9. She also filed a further affidavit which she swore on 17th March, 2021 in reply to the 1st Respondent's Affidavit sworn on 15/2/2021 whereby she deponed as follows: -

a. She is aware that as at 18/1/199 when the deceased died the suit property was one piece known as Mwerua/Kiandai/952 and the deceased had not placed or caused any surveyor to survey, place beacons, applied for or obtained consent of land control Board or taken any other step towards subdividing the land.

b. in the year 1995 when the alleged subdivisions and transfers happened, she was an adult aged about 26 years and being the 2nd born to the deceased she was a mandatory participant to any meeting of the land control board and neither her nor her father applied attended or participated in any meeting of the Land Control Board of Mwerua/Kiandai/952.

c. That she was informed by her mother Agnes Micere Karunditu and her siblings that they did not participate in the said Land Control Meetings and that she knows from practice that it would not be possible to obtain any or a valid Land Control Board consent without involving the wife and adult children of the deceased. And thus the 1st Respondent does not have a valid Land Control Board Consent.

d. The deceased did not subdivide the said land and that the respondents have criminally and fraudulently back dated, altered, added to, erased, defaced, mutilated and destroyed documents, instruments, entries and the subdivisions to purport that the deceased subdivided and transferred subdivisions of the suit property. Thus the 1st respondent did not purchase Mwerua/Kiandai/959 from the deceased as the deceased did not execute any transfer form.

e. The transferor in annexure WMG 3 is not the deceased as therein it indicates Karinditu instead of Karunditu, the consideration in the transfer is materially different from the consideration of Kshs. 135, 000.

f. The purported transfer is not authentic because there are conspicuous alterations of the purported transferor, the alterations are not counter-signed or finger printed by the purported transferor and the names, address, stamps and particulars of the Advocate who witnessed execution are not indicated or legibly indicated.

g. The transfer cannot be a genuine copy made from the original as it is not endorsed with the date it was received by the registry,

does not bear the name of any registrar, is not signed and stamped by the registrar, is not stamped by the collector of stamp duty and does not show the date and time it was registered.

h. The transfer was registered on 21/1/2001 which was about 2 years after the death of the deceased and was also not a party to the receipts of payment of purchase price.

i. She has been informed by her brothers Francis Chomba and Josphat Muriithi who are illiterate that they did not witness the deceased selling land to the 1st respondent.

j. Patrick Chomba could not ratify the sale agreement as he was and is not the personal representative of the deceased and further that she has been informed by her brother Patrick Chomba that he did not witness the alleged agreement for sale.

k. She believes that the purported transfer, agreement of sale and other documents produced by the 1st Respondent are not authentic as her advocate on record requested Advocate Otuke to allow him inspect their original copies of the purported transfer, agreement of sale and other documents but the 1st Respondent declined over some unconvincing excuses.

l. That the allegation that the 1st Respondent commenced farming and has been in occupation of the land for 22 years was false because her mother and siblings have continuously farmed the same land before and after the death of the deceased.

m. That she and the beneficiaries of the estate did not discover the fraud in the sub divisions and sale until around May 2019 when they started hearing rumours that the respondents had somehow obtained title deeds without the knowledge and consent of the children and wife of the deceased whereupon they conducted a search and found that the respondents had subdivided and transferred Mwerua/Kiandai/952.

n. The 1st Respondent had often attempted to dispossess them of the land by violence, threats of violence and intimidation by erecting a fence in the year 2020 but they had resisted and maintained possession.

1ST RESPONDENT'S CASE

10. The 1st Respondent opposed the said application vide a Replying Affidavit which was sworn on 15th February, 2021 and filed on 16th February, 2021.

11. In the said Replying Affidavit he deponed as herein under: -

a. Land parcel Mwerua/Kiandai/138 was originally registered in the name of Gikunyi Chewa.

b. The said land passed on to the deceased herein, Karunditu Nyamu, by way of transmission upon filing succession cause number 59 of 1994.

c. On 18th January, 1995 the deceased subdivided the said parcel of land into Mwerua/Kiandai/952 and 953.

d. On 1st March, 1995 the deceased further caused sub-division of Mwerua/Kiandai/952 into land parcels Mwerua/Kiandai/959 – 964.

e. In the year 1997 he purchased land parcel Mwerua/Kiandai/959 from the deceased at an agreed sum of Kshs. 130, 000 which he paid at different intervals until completion.

f. On 16th February, 1998 the deceased separately sold to him the items on the land being coffee and banana plants at Kshs. 3,200.

g. Patrick Chomba one of the deceased's son had confirmed that the 1st Respondent had bought the said Mwerua/Kiandai/959 and all that was on the land for a cost of Kshs. 130,000 and Kshs. 3,200 respectively and thus the said land belongs to him and does not form part of the estate of the deceased.

h. In 1998 he entered the land occupied and commenced farming the land and has been enjoying exclusive and uninterrupted occupation of the said land for over 22 years now and for all that period no beneficiary let alone the deceased's wife who is still alive has ever laid claim over the land

i. The petitioner was not sincere in feigning ignorance of the fact that her father actually sold the land and two of her brothers were witnesses in person and affixed their signatures.

j. He had not violated the petitioner's right to own property and it was actually the petitioner who was violating his right to own property.

k. The Petition and Notice of Motion dated 12th January are devoid of merit and ought to be dismissed with costs.

2ND RESPONDENT'S CASE

12. The 2nd Respondent opposed the application by way of a Replying Affidavit which was filed on 1st February, 2021.

13. He deponed as follows in the said affidavit: -

- a. Land parcel Mwerua/Kiandai/138 was registered in the name of Gikunyi Chewa which was later transmitted to the Deceased herein after filing succession No. 59 of 1994.
- b. On 18th January, 1995 the deceased subdivided the said land parcel into Mwerua/Kiandai/952 and 953.
- c. On 1st March, 1995 he subdivided the said Mwerua/Kiandai/952 into Mwerua/Kiandai/959 – 964.
- d. On 15th October, 1998 and 16th October 1998, the deceased transferred land parcels Mwerua/Kiandai/961 – 963 to Alice Njeri and Robert Mwangi.
- e. On 28th February, 2006 the said Alice Njeri and Robert Mwangi transferred the said Mwerua/Kiandai/961 – 963 to Nginyo Peter Muthii who approached him and informed him that he intended to sell the three parcels of land.
- f. He went to the lands office and did a search and confirmed that the said Nginyo Peter Muthii was that registered proprietor of the said parcels.
- g. On 15th June, 2012 they entered into a sale agreement where he bought land parcels Mwerua/Kiandai/961 – 963 for a consideration of Kshs. 650, 00 and he paid the entire purchase price.
- h. They applied to Ndia Land Control Board for consent to transfer and the same was granted and thus his registration and the proprietor of land parcels No. Mwerua/Kiandai/961 – 963 are legal and he followed all the statutory processes.
- i. He has been in open and exclusive possession of the said land parcels and thus the application lacks merit and should be dismissed with costs.

3RD RESPONDENT'S CASE

14. The 3rd Respondent opposed the said application vide a Replying Affidavit which he swore on 29th January, 2021.

15. He deponed as follows: -

- a. He is the registered proprietor of land parcel Mwerua/Kiandai/964 which he purchased from the deceased herein upon which he entered occupation and planted 150 coffee trees during the lifetime of the deceased.
- b. He became the registered proprietor of the said land parcel on 26th March, 1995 and has been in occupation of the said parcel of land for the last 25 years and it does not form part of the estate of the deceased.
- c. From the petitioners own annexure A2, land parcel Mwerua/Kiandai/952 which was the original title from which his land parcel Mwerua/Kiandai/964 resulted was closed on 1/3/1995 and therefore he had been improperly joined in this matter.
- d. The said application be dismissed with costs.

4TH AND 5TH RESPONDENTS CASE

16. From the records of the court the 4th and 5th Respondents have never filed anything in opposition to the instant application.

SUBMISSIONS OF THE PARTIES

17. When the matter came up for hearing on 22nd March, 2021 the parties agreed to argue the same orally.

APPLICANT'S SUBMISSIONS

18. The counsel for the Petitioner submitted that the principles for granting conservatory orders is established in the classicus case of *Peter Munya Vs Dickson Mwenda (2014) e K.L.R* which indicates that conservatory orders are granted on the inherent merits of the case and that irreparable damage will occur if the same are not granted. Thus, the question is whether the application has any merit and whether irreparable damage will occur.

19. He submitted that the undisputed facts were that the deceased died on 19th August, 1999 and that before the sub division and after the

subdivision the deceased remained the registered owner.

20. He also submitted that the 1st Respondent had conceded that he was registered as owner on 21/9/2001 which was two years after the death of the deceased and that that in itself made the purported registration completely illegal because the *Succession Act* prohibits the intermeddling of the estate of a deceased person. He relied on the case of in *re-Estate of Paul M'Maria (deceased) 2017 e K.L.R* which states that a transfer done after the death of a registered owner is simply void and thus the party should have gone to the succession court and file a succession case.

21. He further submitted that the copies which had been supplied by the first Respondent was a draft as it does not have the date it was presented, the date the fees were paid, the name of the transferor is different from that of the deceased, the consideration first given as purchased was different and that the date purported to have been signed by the deceased was 8th December, 1997 yet in the affidavit, they had said that the deceased executed on 21/7/1997 together with the agreement of sale.

22. He submitted that *Section 65 of the Evidence Act* says that the contents of a document can only be proved by producing the document itself for the Court to inspect and thus the 1st Respondent cannot be heard to say that there is another transfer anywhere without availing it in court for inspection.

23. He submitted that the second illegality is that none of the Respondents is able to produce the Consent of the Land Control Board for subdivision and transfer which makes the transfer and registration illegal. He relied on *Section 6 of the Land Control Act* and submitted that whatever the subdivision and transfer done by the 1st Respondent was thus void for all purposes.

24. Pertaining the 2nd Respondent, he submitted that his title and the predecessors are void because the registration from the deceased to Alice was itself illegal. He relied on the *Civil Appeal No. 163 of 2009, Kenya Railways Corporation Vs Fermonto Investments Ltd* where the Court of Appeal held that where the title is questioned it is not enough for registered owner to dangle the title and state that it is conclusive, the person who is asserting bears the burden of proving the root of the title and know how it was acquired. Thus the 2nd Respondent bears the burden of proving how the title was acquired by Alice and finally to him.

25. He submitted that where the title is derivative, the owner should demonstrate that the predecessor had a valid title. If the root is tainted then the subsequent owner is also tainted.

26. He further submitted that the 2nd Respondent did not produce a consent form for the sub division and transfer. He relied on the case of *Richard Gitau Muguro Vs Benson Macharia Wandungo and 2 others (2017) e KLR and Kenya Anti-Corruption Commission Vs Frann Investments Limited and 6 others (2020) e KLR*.

27. Pertaining the third Respondent, the Counsel for the Petitioner submitted that he did not also produce the transfer or the consent from the land control Board.

28. He submitted that the allegation that the deceased subdivided and transferred the parcels of land to them cannot be admitted in evidence as *Section 97 of the Evidence Act* is instructive that it is not open for the Respondents to merely state but the law requires them to demonstrate by producing the documents.

29. He further submitted that *Section 8 of the Land Registration Act* requires the Land Registrar to keep records of all transactions and is also mandated under *Section 10* to provide documents to members of the public.

30. He accused the Registrar of failing in that duty which is why they are seeking orders in terms of Prayer No. 4 and submitted that they had satisfied the grant of the orders sought and that the petitioner will suffer irreparable injury unless the orders sought are granted.

1ST RESPONDENT'S SUBMISSIONS

31. The counsel for the 1st Respondent submitted that the petitioner was speaking from two sides of the mouth. This is because she averred that the 1st Respondent illegally created the subdivisions and yet in her submissions she stated that the deceased was the registered owner before and after subdivision. For this reason, he prayed that the petitioner be treated with suspicion.

32. He further submitted that the petitioner had submitted that the Respondents are guilty of intermeddling of the estate of a deceased person yet the sale agreement was entered into during the lifetime of the deceased. He submitted that the said agreement was entered into on 21/7/1997 and the deceased died on 19/8/1999.

33. He submitted that the Petitioner was a crying baby since the law behooves that whoever alleges must prove. It was thus not the duty of the Respondent to supply documents to the petitioner to prove her case. He stated that he had furnished the sale agreement and as such *Section 97* aids the case of the 1st Respondent.

34. He further submitted that the petitioner was not genuine that she learnt of the subdivisions and transfers in 2019 because the 1st Respondent has been in occupation of the land since 1998 and has planted crops thereon openly. Thus, she has been in full knowledge of the occupation as her family are residents of Kirinyaga and would have noticed the activities of the 1st Respondent.

35. He submitted that granting the orders sought would be prejudicial to his client who relies on the suit land for his livelihood

36. He also submitted that the applicant had not proved her case and relies on mere allegations. He pointed out that parcel of land Number Mwerua/Kiandai/952 doesn't exist and thus the applicant had failed to demonstrate a prima facie case to warrant the orders sought.

37. He therefore prayed that the application be disallowed.

2ND RESPONDENT'S SUBMISSIONS

38. The Counsel for the 2nd Respondent relied on the Replying Affidavit sworn on 16/1/2021.

39. In brief he submitted that the petitioner's application had no merit as contrary to the allegation that the subdivisions and transfers were done after the demise of the deceased, the transfers with respect to parcels Nos. Mwerua/Kiandai/991-963 were done in the lifetime of the deceased.

40. He further submitted that the 2nd Respondents had been in lawful possession of the three parcels. Further that it was admitted in the grounds that the Petitioner had been dispossessed of the land.

41. He also submitted that the 2nd Respondent had demonstrated that he bought the land from Nginyo and had annexed the application for consent from the land control Board. He stated that *Sections 24 and 25 of the Land Registration Act* protects the interests of his client.

42. He therefore prayed that the said application be dismissed with costs.

3RD RESPONDENTS SUBMISSIONS

43. On behalf of the 3rd Respondent, Counsel relied on the Replying Affidavit sworn on 29/1/2021.

44. Counsel reiterated that the 3rd Respondent is the registered proprietor of land parcel No. Mwerua/Kiandai/964 and became registered on 222/3/1995 as can be ascertained from annexure EKB1.

45. He submitted that the petitioner at paragraph 6 of her supporting affidavit, she talked of dispossession. Also, at paragraph 7 she stated that the deceased died on 21/8/1999. The land was transferred to the 3rd Respondent 4 years before his demise and thus his clients land parcel Mwerua/Kiandai/964 does not form part of the deceased's estate.

46. He further submitted that as per the petitioner's annexure 9, the petitioner was seeking restriction and his clients land parcel was not amongst them. The petitioner had not offered any explanation why it was left out.

47. He also submitted that the 3rd Respondent has been in open and notorious occupation of the suit land from the year 1995 and the petitioner is not honest to say that she only discovered strangers in the suit land in 2019. He also stated that his client has planted cash crops on the suit land.

48. He thus submitted that the application is unmerited and is based on conjecture. This is because no succession case was filed in respect of the deceased. Further Mwerua/Kiandai/952 does not exist having been closed on subdivision in 1995. He thus prayed that the application be rejected.

APPLICANT'S SUBMISSIONS IN REPLY TO THE 1ST, 2ND AND 3RD RESPONDENTS

49. The counsel for the applicant relied on his authorities firstly in the case of *Kenya Railways (supra)*, *Section 97 and 65 of the Evidence Act*. He submitted that he challenging the root of the suit lands which can be seen in paragraphs 10 – 14 of the petition.

50. He submitted that the particulars of fraud had been pleaded in paragraph 11 of the petition, that the Respondents unlawfully subdivided and transferred the suit land and that they made false documents and put them in the lands office.

51. He submitted that it was not enough for the respondent to flash the title and allege that he is the registered owner as the Court of Appeal stated that the Respondent must prove the legality of how he acquired the said title and thus the burden is on the respondent to prove legality of the acquisition.

52. He further submitted that the Court of Appeal stated that where the title is derived from others, the Respondent must prove that he had a good title. If the foundation was tainted the substratum is also tainted. The 2nd respondent had not shown that the title of the predecessor was valid. The 3rd Respondent had produced a green card but had not demonstrated the root of the title.

53. He thus submitted that their reply had fallen short of the standard by the Court of Appeal and *Section 97 of the evidence Act*.

54. He submitted that none of the Respondents had produced a transfer or a mutation signed by the deceased as *Section 65 of the Evidence Act* says that a document can only be proved by a primary evidence. He urged that the primary evidence in this case was the document itself and not oral or affidavit evidence.

55. He submitted that the alleged transfer and subdivisions are null and void under the statutes that apply as they are not signed by the proprietor. Further that they had not produced any documents under the relevant acts e.g. the *Land Control Board Act*, the *Succession Act* etc.

56. He submitted that Paragraph 10 of the petition and paragraph 2 of the Notice of Motion is to the effect that the petitioner is stating that she was dispossessed of the right of ownership and not possession on the ground.

ANALYSIS

57. I have considered the parties pleadings, annexures thereto, list of authorities and rival submissions.

58. The Applicant is basically seeking a conservatory order pending hearing and determination of the petition.

59. In determining whether the applicant is entitled to a conservatory order this Honourable Court is guided by the classicus case of ***Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 others [2014] e KLR***, the Supreme Court of Kenya held that: -

“[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 suppliant’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.”

60. Further in the case of ***Kevin K. Mwiti & others Vs Kenya School of Law & others [2015] e KLR*** the Honorable Court held that: -

“Under what circumstances ought the Court to grant conservatory orders?”

51. The first issue for determination is whether the Petitioner has established a prima facie case. A prima facie case, it has been held 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 the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success. Accordingly in determining this application, the Court is not required-indeed it is forbidden- from making definite and conclusive findings on either fact or law. I will therefore refrain from making any determinations whose effect would be to prejudice the hearing of the main Petitions/Application.”

61. Also, in the case of ***Centre for Rights Education and Awareness (CREAW) & 7 others Vs Attorney General [2011] e KLR*** it was held that:

“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 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.”

62. From the foregoing, it is evident that for the petitioner to succeed in her application for conservatory orders, she ought to prove that: -

a. She has a prima facie case with a likelihood of success; and

b. She is likely to suffer prejudice as result of the violation or threatened violation of the Constitution.

63. The first issue is whether the petitioner has demonstrated that she has a prima facie case with a likelihood of success. At this juncture this Honourable Court is not required to delve into the merits of the case to the effect of determining the entire petition. This position was held in the case of ***Adrian Kamotho Njenga Vs Selection Panel for the Appointment of Commissioners of the Independent Electoral and Boundaries Commission (2021) & 2 others; Independent Electoral and Boundaries Commission [2021] e KLR*** where the Honourable Court held that:

*“37. When a court is called upon to determine whether a prima facie case has been established, it should not delve into a detailed analysis of the facts and law but should focus on determining whether the Applicant has put forward a case that is arguable and not frivolous. In the case of *Board of Management of Uhuru Secondary School Vs City County Director of Education & 2 others [2015] e KLR*, the Court posited that:*

“26. It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis...”

38. The definition of a “frivolous case” was provided by *Ringera J. in the case of Trust Bank Limited Vs Amin Company Ltd & another [2000] KLR 164*, as cited in *Mary Wangari Mwangi Vs Peter Ngugi Mwangi T/A Mangu Builders Ltd & 3 others [2013] e KLR*, as follows:

“A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action.”

64. From the applicant’s petition and application, the petitioner is challenging the subdivision and transfer of the resultant subdivisions of land parcel No. Mwerua/Kiandai/952 to the Respondents herein on grounds of fraud.

65. The applicant has alleged that at the time her deceased father died, that is on 21/8/1999, the said land parcel belonged to him and thus upon his death it devolved to his Estate. Further she has intimated that the subdivisions of the said land parcel were done after the demise of the deceased without following due procedure thus making the same fraudulent.

66. Without going into the merits of the case, I find this assertion strange as from the green card she has supplied and marked A2 in her supporting affidavit, Entry No. 3 indicates that the said title was closed on 1.3.1995. It is so obvious from the said material that the same was done in the lifetime of the deceased.

67. In her further affidavit at paragraph 9, the petitioner seems to allege that the said document was altered, added to, erased, defaced, mutilated and destroyed to purport that the deceased subdivided and transferred subdivisions of the said land.

68. This assertion appears nowhere in her petition. It is my view that a prima facie case is supposed to stem out of the petition. The fact that the applicant is introducing new grounds to her allegation of fraud through her further affidavit in response to the affidavits of the respondents it shows that the applicant is on a fishing expedition.

69. If this was not the case, then the said particulars or rather allegation would have been outlined in her petition. It is trite law that parties are bound by their pleadings. The petitioner cannot therefore be heard to say that she is investigating the root of the respondents’ titles yet the facts she depones to in her further affidavit do not reflect anywhere in her petition.

70. In the case of *Mohansons (Kenya) Limited Vs Registrar of Titles & 2 others [2017] e KLR*, the Honourable Court held that: -

“[15] Section 26 of the Land Registration Act, 2012 the successor of the Registration of Titles Act has provisions similar to section 23 of the Registration of Titles Act. In considering section 26 in Republic v Land Registrar Taita Taveta District & another [2015] e KLR, this Court held as follows:

34. The Court must therefore uphold the Rule of Law with regard to the applicant’s rights, as a registered proprietor, under Sections 27 and 28 of the Registered Land Act as then applicable to the suit property (now section 25 of the Land Registration Act, 2012), until fraud shall have been established in accordance with Section 26 (1) of the Land Registration Act 2012 which provides as follows:

“26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except —

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.”

35. Before any order may be made in terms of Article 40 (6) of the Constitution of Kenya 2010 and section 26 (1) (a) of the Land Registration Act 2012 that the title to land was acquired by fraud, misrepresentation and or illegally and it is therefore not protected by the Constitution, the fraud, misrepresentation and illegality in the acquisition of property must be proved to the required standard. The case of fraud and illegality in the acquisition of the suit property herein must, therefore, be proved in proceedings brought by the Government in that behalf under the civil procedure relating to filing of actions before the Court.

[16] In the present case, there similarly has not been any determination that the petitioner’s title to the suit property is vitiated by fraud or misrepresentation to which the petitioner was a party or that its certificate of title was acquired illegally, un-procedurally or through a corrupt scheme. The 2nd respondent’s claim to the suit property is based on what counsel has called doubtful title of the petitioner. With respect, this is an instance where a party must rely on the strength of his case rather than the weakness of the other side’s case.”

71. From the foregoing, a holder of a certificate of title is presumed prima facie to be the absolute owner of the land in dispute until fraud is proved to the required standard by the Petitioner. In this case since there is a hot contest on the ownership of the suit lands and since the issue of fraud has not been determined, the same can only be done during full hearing of the petition. The assertions raised on the root of the

titles held by the respondents can only be ventilated during the full hearing of this petition. Until then the law provides that the respondents be held as the prima facie proprietors of the suit lands.

72. Further, the case of the petitioner in her petition being that land parcel Mwerua/Kiandai/952 belonged to her deceased father yet the green card tendered by her as prove of ownership shows that the said title was closed in the lifetime of her deceased father, I find that the applicant has not made out a prima facie case with chances of success.

73. In view of this I also find that the applicant will not suffer any prejudice if the orders sought are not granted. This is especially because even her family members who she alleges to be alive and to have continuously farmed the said land before and after the death of her father, have not sworn any affidavit to support this.

74. The applicant has also made a prayer to be furnished with documents forming the basis of the subdivision of Mwerua/Kiandai/952 under **Article 35 (1) and Sections 4, 5 and 6 of the right to Information Act**. The applicant has not furnished any material to the effect that she applied to be furnished with the same by the relevant authority and was declined.

75. Under **Article 22 (1) of the Constitution of Kenya**, a person is entitled to institute proceedings in court where a right in the bill of rights has been denied, violated or infringed, or is threatened.

76. This Honourable Court is further guided by the common law doctrine of exhaustion of remedies. The same is defined in the **Black's Law Dictionary** as follows: -

“The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The doctrine’s purpose is to maintain comity between the courts and administrative agencies and to ensure that the courts will not be burdened by cases in which judicial relief is unnecessary.”

77. This being the case, I find that the applicant has not exhausted the mechanisms laid out by the relevant authority to warrant her to move to court for redress.

CONCLUSION

78. In view of the foregoing, it is my view that the applicant’s application dated 12th January, 2021 is without merit and the same is hereby dismissed with costs. Accordingly, I also find that the interim orders granted on 14th January 2021 be and are hereby vacated.

Ruling DATED, DELIVERED physically in open Court at Kerugoya and SIGNED this 22nd day of October, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. Ondegu holding brief for Ndegwa for the Petitioner
2. Mr. Otuke for the 1st Respondent
3. Mr. P.M. Muchira for the 3rd Respondent
4. Mr. Siro for the 4th Respondent
5. Kabuta – Court clerk.