



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC PETITION NO. E007 OF 2021

DOUGLAS MUINDU MBUVI PETITIONER

=VERSUS=

THE INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

THE COMMANDANT

GENERAL SERVICE UNIT.....2ND RESPONDENT

THE COMMANDING OFFICER

RUIRU KIMBO GSU.....3RD RESPONDENT

THE ATTORNEY GENERAL4TH RESPONDENT

CLUSTER 2 NEIGHBOURS

RESIDENTS ASSOCIATIONINTERESTED PARTY

RULING

1. The petitioner, Douglas Muindi Mbuvi, brought this petition in June 2021. He alleged that **General Service Unit Officers** from **Ruiru Kimbo Barracks (the Barracks)** had trespassed into his land, **Ruiru/Mugutha Block 1/8702**, and had blocked him from continuing with construction works which he was undertaking on the land. He added that the Commanding Officer of the Barracks had maintained that he was undertaking construction works on a wayleave on which water pipes supplying water to the Barracks lay, a contention which he disputed. It was his case that the water pipes had encroached on his land. Consequently, he sought various reliefs against the respondents, among them, a permanent injunction restraining the 1st, 2nd and 3rd respondents against harassing, intimidating, threatening and arresting him and his servants, employees, contractors, and workers; and an order of mandamus directing the 1st, 2nd and 3rd respondents to remove and relocate the water pipes.

2. Together with the petition, the petitioner brought a notice of motion dated 9/6/2021, seeking interlocutory injunctive orders restraining the 1st, 2nd and 3rd respondents in the following verbatim terms:

1) This application is hereby certified urgent and service thereof is hereby dispensed within the first instance.

2) A conservatory order restraining the 1st, 2nd and 3rd respondents whether acting directly or through third parties, agents employees, officers and /or proxies, from trespassing on the Petitioner’s parcel No. title No. Ruiru/Mugutha Block 1/8702 and interfering with the petitioners construction of his family home on the petitioner’s parcel of land known as title No. Ruiru/Mugutha Block 1/8702 pending the service, hearing and determination of this application.

3) A conservatory order restraining the 1st, 2nd and 3rd respondents, whether acting directly or through third parties, agents, employees, officers and or proxies from harassing, intimidating, threatening and arresting of the petitioner and his servants, employees contractors and/ or workers while working on petitioner’s parcel of land known as Title No. Ruiru/Mugutha Block 1/8702 pending hearing and determination of this application.

4) An injunction restraining the 1st, 2nd, and 3rd respondents, whether acting directly or through third parties, agents, employees, officer and/or proxies, from trespassing on the petitioner’s parcel of land known as title No. Ruiru/Mugutha Block 1/8702 and interfering with the petitioner’s parcel of land known as Title No. Ruiru/Mugutha Block 1/8702 pending the service, hearing and determination of this application.

5) *An injunction restraining the 1st, 2nd, and 3rd respondents, whether acting directly or through third parties, agents, employees, officers and/or proxies, from harassing, intimidating, threatening and arresting or the petitioner and his servants, employees, contractors and/or workers, while working on the petitioner's parcel of land known as Title No Ruiru/Mugutha Block 1/8702 pending the service, hearing, and determination of this application.*

6) *The costs of and incidental to this application shall abide in the outcome of the petition herein.*

7) *Such other, further incidental or alternative reliefs as the honourable court may deem just and expedient.*

3. Gacheru J heard the application interpartes and rendered a ruling thereon dated 15/7/2021. She granted the petitioner conservatory and injunctive orders in the following verbatim terms:

“A conservatory order restraining the 1st, 2nd and 3rd respondents whether acting directly or through third parties, agents’ employees, officers and /or proxies, from trespassing on the Petitioner’s parcel No. title No. Ruiru/Mugutha Block 1/8702 pending the hearing and determination of the Petition. Further, the court allows prayers No. 4 and 5 of the instant notice of motion pending the hearing and determination of the petition herein. Costs be in the cause.”

4. It does appear from the notice of withdrawal of appeal dated 12/10/2021 and from the submissions presented to the court by the parties’ advocates that, aggrieved by the ruling of Gacheru J, the respondents lodged an appeal through a notice of appeal dated 26/7/2021. Subsequent to lodging the appeal, the Attorney General brought a notice of motion dated 2/9/2021, seeking review and conservatory orders in the following terms:

1) *Spent*

2) *Spent*

3) *That the honourable court be pleased to discharge, review*

and/or vary its orders issued in the ruling dated 15th July, 2021 and any consequential orders arising therefrom.

4) *That the honourable court be pleased to issue conservatory orders restraining the respondent herein from proceeding with construction on Parcel No. Ruiru/Mugutha Block 1/8702 which construction is directly over the Government wayleave and water pipe pending the hearing and determination of this application.*

5) *That the honourable court be pleased to issue conservatory orders restraining the respondent herein from proceeding with construction on Parcel No. Ruiru/Mugutha Block 1/8702 which construction is directly over the Government way leave and water piper pending the hearing and determination of the Petition.*

6) *That the costs of this application be in the cause.*

5. The said application by the respondents, dated 2/9/2021, is the subject of this ruling. Also falling for determination in this ruling is the petitioner’s **notice of preliminary objection** dated 7/10/2021 through which the petitioner objects to the respondents’ application dated 2/9/2021 and invites the court to strike out the application in its entirety on the following verbatim grounds:

1) *That the 1st, 2nd, 3rd and 4th respondents’ application for review dated 2nd September, 2021 is fundamentally defective since it contravenes the mandatory provisions of Section 80(1)(a) of the Civil Procedure Act Cap 21 Laws of Kenya and should be struck out.*

2) *That the 1st, 2nd, 3rd and 4th respondents’ application for review dated 2nd September, 2021 is fundamentally defective, contravenes the mandatory provisions of Order 45 rule 1(a) of the Civil Procedure Rules and should be struck out.*

6. Besides the application dated 2/9/2021, the respondents, through the Attorney General, brought a cross-petition dated 12/10/2021, seeking the following reliefs against the petitioner:

i. *A declaration that the respondent’s construction on Ruiru/Mugutha Block 1/8702 has illegally encroached on the cross-petitioners’ way leave.*

ii. *The permanent injunction do issue restraining the respondent, his agents, employees and/or proxies from trespassing or continuing to trespass on the cross petitioners’ legally acquired way leave.*

iii. *An order of mandamus do issue directing the respondent herein to remove all structures that have encroached on the cross petitioners’ legally acquired wayleave.*

iv. *That the petition dated 9th June 2021 be dismissed in its entirety.*

v. *That the respondent to the cross petition be condemned to pay the costs of the petition and the cross-petition.*

7. Both the petitioner's notice of preliminary objection dated 7/10/2021 and the respondents' application dated 2/9/2021 were canvassed in the same sitting. Because the notice of preliminary objection raises the question of jurisdiction of this court, I will dispose it before dealing with the application (See **Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd [1989] eKLR**).

8. Canvassing the application in the virtual court, Mr Ngwele, counsel for

the petitioner submitted that the respondents' application was fundamentally defective because it offended the mandatory provisions of Section 80 of the Civil Procedure Act and Order 45 rule 1 of the Civil Procedure Rules. Counsel added that a party who elects to exercise the right of appeal by lodging an appeal has no right to seek review of the impugned decision. Counsel submitted that the respondents opted for an appeal; filed and served a notice of appeal dated 26/7/2021; and subsequently brought the application dated 2/9/2021 seeking a review of the same decision against which they had preferred an appeal. It was the position of the petitioner that by the time he brought the notice of preliminary objection, the court was seized of both the notice of appeal and the application for review. Counsel argued that in so far as the application for review was filed when there existed an appeal, it was incurably defective. Counsel cited the case of **William Karani & 47 others v Wamalwa Kijana & 2 others [1987] eKLR** and submitted that once an appeal is lodged, the review jurisdiction is ousted. Counsel contended that by purporting to file a notice of withdrawal of appeal on the same day that the application for review came up for hearing, the respondents were trying to steal a match on the petitioner.

9. Mr Benson Njagi, state counsel, submitted that the respondents withdrew the notice of appeal on 12/10/2021. He added that the respondents did not lodge any other document in the Court of Appeal. The learned state counsel argued that once the notice of withdrawal was filed, it breathed life into the application for review. He urged the court to reject the preliminary objection.

10. I have considered the two grounds itemized in the notice of preliminary objection dated 7/10/2021. I have also considered the court record and the parties' respective submissions. The application dated 2/9/2021 had two limbs. The first limb was an invitation to the court, by the respondents, to review the decision of Gacheru J within the framework of Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. The second limb of the application was a plea to the court to grant the respondents conservatory orders restraining the petitioner against proceeding with construction on the alleged Government wayleave and over the water pipe. It is therefore within this context that the respondent objected to the application and invited the court to find the application wholly incompetent.

11. The single question falling for determination in the notice of preliminary objection dated 7/10/2021 is whether the respondents' application dated 2/9/2021 is wholly incompetent by dint of the fact that the respondents presented it when there existed a duly filed and served notice of appeal.

12. This question is not new in our jurisprudence. The question was the subject of determination in **Otieno Ragot & Company Advocates v National Bank of Kenya Limited (2020) eKLR**. The Court of Appeal pronounced itself on the question as follows:

"Section 2(2) of the Court of Appeal Rules defines an appeal to include an intended appeal. it is not permissible to pursue an appeal and an application for review concurrently. If a party chooses to proceed by way of an appeal, he automatically loses the right to ask for review of the decision sought to be appealed. In the case of Karani & 47 others v Kijana & 2 others 2 other [1987] KLR 557, the court held thus:-

"...once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal."

13. On my part, I would add that Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules grants the aggrieved party the right to elect to either pursue an appeal or pursue a review application. Once either of the two redress mechanisms is initiated through the filing and service of the relevant initiation instrument, the door to the other redress mechanism is automatically shut.

14. It therefore follows that once the respondents filed and served their notice of appeal on 26/7/2021, they lost their right to pursue a review redress mechanism in this court under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. Put differently, once the respondents filed and served their notice of appeal on 26/7/2021, this court's jurisdiction to exercise review mandate under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules was ousted. It therefore follows that the purported withdrawal of the notice of appeal on the morning or eve of the hearing day of the application dated 2/9/2021 did not confer review jurisdiction in the court.

15. In light of the foregoing, it is this court's finding that, to that extent, the respondents' application dated 2/9/2021, inviting this court to exercise review jurisdiction under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, is incurably incompetent by dint of the fact that the respondents brought the application when an appeal existed. Put differently, this court's review jurisdiction under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules was ousted the moment the notice of appeal was filed and served. The withdrawal of the notice of appeal on the eve of the day of hearing of the application dated 2/9/2021 did not confer jurisdiction in the court. Consequently, the petitioner's preliminary objection dated 7/10/2021 is upheld only in so far as the notice of motion dated 2/9/2021 seeks a review of the decision made by Gacheru J on 15/7/2021. It is, however noted, that the application dated 2/9/2021 had two limbs. The first limb focused on review of the decision made on 15/7/2021 while the second limb was a plea for conservatory orders.

16. No submissions were tendered by counsel for the petitioner to suggest that the second limb of the application dated 2/9/2021 was similarly incompetent. In the circumstances, the court finds that it has jurisdiction to consider the merits of the second limb of the respondents' application dated 2/9/2021, which is a plea for conservatory orders relating to the way leave and water pipe. I will therefore proceed to consider the merits of the application in so far as it seeks conservatory orders pending the hearing and determination of the petition and cross petition herein.

17. In their cross-petition dated 12/10/2021, the respondents contended that in 1990s, the Government of Kenya initiated a water supply project that involved pumping water from Ruiru River to the Ruiru General Service Unit Base. The project was to be in the open land between the coffee plantations and the river, while the water pipeline to the GSU Camp was to be partially through the open land and an

existing tract in the coffee plantation. On 24/11/1992, vide Gazette Notice No. 5951, the Government advertised for hearings on any claim for compensation by persons who were to be affected by the said project. The suit property was part of a bigger parcel belonging to Nyakinyua Investment Company and was affected by the project. All the affected proprietors were compensated and the project was carried out without any objections. They contended that the water pipe lay in the wayleave that was duly acquired by the Government of Kenya in the 1990s. They further contended that the petitioner's construction had encroached on the wayleave and was directly on top of the water pipe.

18. Annexed to the application under consideration were: (i) Letter dated 15/9/1992 from CAS Consultants to the Chairman of Nyakinyua Investments Ltd; (ii) Gazette Notice No. 5951; (iii) Letter dated 28/1/1993; (iv) Survey Maps; (v) Letter dated 3/8/2021 from the Attorney General to the Director of Surveys; (vi) Letter dated 23/8/2021 from the Ministry of Lands and Physical Planning to the Office of the Attorney General; (vii) Sketch Map.

19. The petitioner did not file any response to challenge the evidence presented by the respondents to support their plea for a conservatory order. Mr. Ngwele submitted that the petitioner was relying on the evidence already on record.

20. In his submissions, Mr. Njagi, counsel for the respondents argued that the petitioner's construction had encroached on the wayleave and was being erected on the water pipe. He urged the court to conserve the wayleave and water pipe, pending the hearing and determination of the petition and the cross petition.

21. I have considered the respondents' plea for conservatory orders. The petitioner chose not to file a substantive response to the respondents plea for conservatory relief. In so far as that plea is concerned, two issues fall for determination. The first issue is whether the plea is an invitation to the court to set aside the existing order issued by Gacheru J. The second issue is whether the respondents have satisfied the criteria for grant of a conservatory order. I will make brief sequential pronouncements on the two issues in the above order.

22. I have looked at the verbatim order issued by Gacheru J. The first limb of the order was a conservatory relief restraining the respondents against trespassing on the suit property. The second and third limbs related to prayers 4 and 5 of the application, which were interlocutory injunctive orders restraining the respondent against trespassing on the suit property or interfering with the petitioner's construction work on the suit property, pending the hearing and determination of the petition. It is therefore clear that the conservatory and injunctive order granted by Gacheru J focuses on preserving and protecting the petitioner's right to enjoy Land Parcel Number Ruiru/Mugutha Block 1/8702. On the other hand, the second limb of the respondents' application is a plea for an interim relief preserving the wayleave and the water pipe, pending the hearing and determination of the petition and the cross petition. The respondents contend that the water pipe supplying water to the GSU Barracks lies in a wayleave acquired by the Government in the 1990s. It is their case that the wayleave was acquired from Nyakinyua Investment Company. They do not lay claim to the rest of the land claimed by the petitioner. Whether or not the wayleave was subsequently surveyed as part of Ruiru/Mugutha Block 1/8702 is a question to be answered after trial. It is clear from the foregoing that preservation of the wayleave and the water pipe can be achieved without interfering with the preservatory and injunctive orders granted by Gacheru J. That is my finding on the first issue in the application. I now turn to the second issue.

23. The principle upon which a conservatory order is granted was outlined by the Supreme Court of Kenya in **Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & 2 Others eKLR** in the following words:

“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 applicants 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”

24. The respondents case is that the water pipes were laid and are on a wayleave which was acquired by the Government of Kenya in the 1990s. They contend that the petitioner is erecting a development on the wayleave and right on top of the water pipe that supplies water to Ruiru Kimbo GSU Barracks. They have presented documentary evidence suggesting that a wayleave was indeed acquired by the Government of Kenya in the 1990s. The respondents have a cross-petition asserting the above position. Whether the suit property which the petitioner bought early this year was surveyed to include an existing wayleave is a question to be answered after trial.

25. Given the above circumstances and the evidence presented to the court at this stage, the court is satisfied that the respondents have satisfied the criteria upon which jurisdiction to grant a conservatory order is exercised. The court is, however, alive to the fact that, there exists conservatory and injunctive orders restraining the respondents against trespassing on the suit property and against interfering with the petitioner's construction work. The conservatory order to be granted to the respondents will, in the circumstances, only focus on preserving the disputed wayleave and the existing water pipe, pending the hearing and determination of the petition and the cross-petition herein. The petitioner will be entitled to continue utilizing and enjoying quiet possession of the rest of the suit property in tandem with the orders which Gacheru J granted.

26. In the ultimate, the respondents' application dated 2/9/2021 and the petitioner's notice of preliminary objection dated 7/10/2021 are disposed in the following terms:

a) The petitioner's preliminary objection is upheld only in so far as it relates to the respondents' plea for a review of the decision of 15/7/2021 under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.

b) The respondents' plea for a conservatory order is granted only to the extent that the petitioner is restrained against carrying out any or any further developments on the contested wayleave and or above the water pipe, pending the hearing and determination of the petition and cross-petition herein. The petitioner shall be free to continue utilizing the rest of land Title Number Ruiru/ Mugutha Block 1/8702.

c) Costs of the application and the preliminary objection shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 21ST DAY OF OCTOBER 2021

B M EBOSO

JUDGE

In the presence of: -

Mr Ngwele for the Petitioner

Ms Nyawira for the Respondents

Court Assistant: Lucy Muthoni

B M EBOSO

JUDGE