



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC PETITION NO 22 OF 2019

JOSHUA K. TANUI & 8 OTHERSPETITIONERS

VERSUS

BOROP MULTIPURPOSE

CO-OPERATIVE SOCIETY LTD & 2 OTHERS RESPONDENTS

RULING

1. This ruling is in respect of the petitioners' Notice of Motion dated 25th October 2019. The following orders are sought in the application:

i. *[Spent]*

ii. *[Spent]*

iii. *[Spent]*

iv. *THAT this honorable court be pleased to grant an order of permanent and/or temporary injunction against the respondents herein either by themselves, their agents, employees and/or servants from trespassing, entering, subdividing, allocating, occupying, selling, leasing, charging, transferring, subdividing, fencing, compulsorily acquiring, erecting any structures, cancelling the title deeds or dealing in any way with the petitioners pieces of land known as MAU SUMMIT/SACHANGWAN BLOCK 10/1-200 pending the hearing and determination of the main petition.*

v. *THAT costs of this application be provided for.*

2. The application is supported by an affidavit sworn by Joshua K. Tanui, the first petitioner. He deposed that the petitioners are members of the first respondent Borop Multi-purpose Co-operative Society Limited and that sometime in the year 2002 they were allocated parcels of land hived off L.R 9045/10 MAU SUMMIT SACHANGWAN BLOCK 10 which property was registered in the name of the first respondent to hold in trust for the members. That subdivision of the said property begun in 2000 as agreed upon by members after which the petitioners herein were issued with title deeds in respect of their parcels by the second respondent between the year 2006 and 2010, including the suit property. He annexed copies of title deeds.

3. He went on to state that the petitioners immediately moved into the land and started developing. That prior to issuance of the title deeds the first respondent had prepared a register of members in terms of what parcels of land the members balloted for. He annexed a copy of a register and added that sometime in the year 2010 the first respondent filed a dispute between it and its officials at the Co-operative Societies Tribunal *vide* Case No. 6 of 2010. That the petitioners herein were never parties to the proceedings before the tribunal even though the orders made have adversely affected their proprietorship.

4. He further deposed that the tribunal granted orders restraining the respondents therein from dealing in any way with all the documents of the first respondent and costs of the claim but declined to grant all the other prayers sought. He annexed a copy of the award issued by the tribunal. That following the award, the second respondent caused to be published *vide* Gazette Notice No. 7452, a 30-day notice of cancellation of the title deed for the suit property herein. He annexed a copy of the gazette notice and further stated that the second respondent proceeded to lodge a caveat on the title before the lapse of the 30 days thereby condemning them unheard.

5. Mr Tanui further stated that the petitioners lodged a complaint on the intended cancellation *vide* a letter dated 23rd September, 2019 but the said complaint has never been responded to by the second respondent. He annexed a copy of the letter and further deposed that the petitioners title deeds were issued upon due procedure and are therefore entitled to protection by law. That the petitioners have constantly been harassed by the respondents who insist that they surrender their titles even before being heard in violation of their constitutional rights. He went on to state that they are apprehensive that the respondents may at any time orchestrate the demolition of their houses where they

reside with their families. That the petitioners are entitled to a fair hearing before any administrative action as the one taken by the respondents against them and the action should be procedurally fair.

6. He also deposed that the petitioners were lawfully allocated the parcels of land and that the allocation was fully endorsed by elected representatives of the first respondents. That the respondents intend to keep the petitioners from peaceful enjoyment and use of the suit property and that unless they are permanently restrained, they are likely to continue with the acts. He further stated that the first respondent through a letter dated 16th October, 2019 threatened to bring about violent skirmishes in case the petitioners engage in any dealings with the suit properties and further insisted that the properties must be subjected to fresh sub-divisions. He annexed a copy of the said letter and added that the petitioners were being subjected to emotional, physical and psychological harm by the actions of the respondents and that they have legitimate expectation from the government to provide security and protection as provided under Articles 29 and 40 of the Constitution. He therefore urged the court to grant the orders sought.

7. The first respondent opposed the application through a replying affidavit sworn by John K. Rotich, its chairman. He deposed that the titles Mau Summit/Sachangwan Block 10/1-200 arose as a result of sub-division of Mau Summit Sachangwan Block 10 (Borop) owned by the first respondent. That when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership and that the petitioners have not demonstrated how they acquired the said titles and that they are members of Borop Multipurpose Co-operative Ltd. He annexed a copy of the share certificate issued to its members. He further deposed that the petitioners are not the legitimate owners of the suit property hence not entitled to any protection in law since the titles were issued by the previous management and after the tribunal order, further that the issuance of the titles were after the orders of the court thus contravention of the said orders is an illegal act with no basis in law.

8. He deposed that the cancellation of the titles vide gazette notice 7453 dated 9th August 2019 was the one that affected the orders of the Co-operative tribunal within the knowledge of its members hence the petitioners collected titles in violation of the court order. Further, that the titles in issue are already cancelled awaiting issuance of new titles thus cannot be reversed. He annexed a copy of the gazette notice and letter by the Chief Land Registrar. That the petitioners' application is an abuse of the court process as the subject matter of the petition had previously been adjudicated by court hence *res judicata* and that they could have instead applied for review or appeal against the orders issued by the tribunal. He further deposed that cancellation of the titles is not a deprivation of any rightful owners but to pave way for new subdivisions with each member proving his purchase of land shares by way of receipts and share certificate.

9. That the petitioners are simply jumping the gun as properties acquired legally and procedurally in accordance with the by-laws of the society shall not be taken away or interfered with but those acquired illegally are the ones to be challenged. Further, that the issues in dispute are essentially between members of the 2nd respondent against the officials of the society which is to be addressed in accordance with the by-laws of the Society. He finally deposed that the petitioners have not established a prima facie case to warrant grant of conservatory orders and further that the interim orders granted on 5th November, 2019 ordering cancellation of the suit property Mau Summit/Sachangwan Block 10/1-200 have been overtaken by events as the titles have already been cancelled and the Chief Land Registrar is in the process of issuing new titles hence an order cannot issue to restrain what has already happened. The 1st respondent also filed grounds of opposition reiterating the contents of his replying affidavit while citing various authorities in support of the same.

10. The petitioners filed a further affidavit sworn by Joshua K. Tanui. He deposed that the current officials of the 1st respondent that processed the petitioners' titles and the same followed due process. He went on to state that their titles have never been challenged and that they are indeed members of the society who were allotted the suit properties by the 1st respondent. He annexed copies of allotment letters, membership receipts and purchase receipts.

11. The 1st respondent also filed a further affidavit sworn by John K. Rotich. He deposed that through their special meeting they resolved that no titles were to be issued and/or processed. That the 1st petitioner's title and receipt initially belonged to one of the members Joseah Ngeny who had reported the receipt lost hence the said member has since not acquired land. He annexed a copy of a share complaint. He further deposed that the acquisition of the suit land was fraudulently done and that the receipts provided by the petitioners are not complete. He emphasized that disputes arising out of business of the society are to be dealt with under the Society's by-laws and that the petitioners have failed to prove their acquisition of the suit land. He added that the 1st respondent is only interested in transparency, accountability and fairness.

12. The application was canvassed through written submissions. The 2nd and 3rd respondents failed to file submissions despite being given numerous opportunities to do so. The petitioners cited the case of **Mohansons (Kenya) Limited v Registrar of Titles & 2 others [2017] eKLR** regarding the test for granting conservatory orders in a constitutional petition. They also relied on section 25 of the Land Registration Act 2012 and Article 40 of the Constitution and argued that no court has cancelled or annulled their titles and therefore the 2nd respondent did not have a basis to purport to issue the gazette notice cancelling or annulling the titles.

13. The petitioners further argued that this is the only court bestowed with jurisdiction to annul or cancel a title to land and not the tribunal. They relied on the case of **Republic v Gathaite Farmers Co-operative Society Ltd & another ex-parte Richard Nganga Kamiro [2013] eKLR** and argued that they are the registered proprietors to the suit properties and that they have established a prima facie case. They urged the court to allow their application with costs.

14. The 1st respondent on the other hand argued that the petitioners are seeking to restrain what has already occurred as the title deeds to the suit property have already been cancelled by the Land Registrar. He placed reliance on the case of **Mavoloni Company Ltd vs Standard Chartered Estate Management Ltd Civil Application No. 266 of 1997** and submitted the petitioners are dangling before the court titles which have not only been cancelled but which the petitioners have failed to demonstrate to have been acquired legally and free from any encumbrance. He further submitted that he is only interested in streamlining the affairs of Borop Multipurpose Cooperative Society Ltd and in so doing requires that the petitioners who are alleging ownership of the property provide all documentary evidence to demonstrate acquisition thereof.

15. The 1st respondent went on to submit that for the certificate of title to be held as an indefeasible title and conclusive evidence to ownership, that concept is limited to the extent that the title was not unlawfully acquired. Further, that Article 40 of the Constitution in respect to protection of property is also limited if the property is found to have been unlawfully acquired. He relied on the case of **Willis Gitau Njoroge v Monica Wanjiku Gachie & another [2019] eKLR**. Finally, the 1st respondent submitted that the petitioners have not shown a prima facie case with a probability of success and have also not met the test set out for granting of an injunction. He urged the court to dismiss the application with costs.

16. I have considered the application, the affidavits and the submissions. The principles on which the court will grant conservatory orders are fairly well settled. The applicant must demonstrate a *prima facie* case with a likelihood of success and that unless the order is granted, he will suffer prejudice as a result of the violation or threatened violation of the Constitution.

17. Conservatory orders are public law remedies aimed at preserving the subject matter of a dispute pending hearing and determination of the main petition. In **Judicial Service Commission v. Speaker of the National Assembly & Another [2013] eKLR**, Odunga J stated as follows:

Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.

18. The Supreme Court emphasised the public law aspect of conservatory orders in the case of **Gitirau Peter Munya –v- Dickson Mwenda Kithinji & 2 Others (supra)**, when it stated as follows:

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 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 magnitude, and priority levels attributed to the relevant causes....

19. The question then is, whether in the present case, the petitioners have met the criteria enunciated above. At the centre of the dispute between the parties is whether the cancellation of titles or alleged cancellation of titles was proper and lawful. That is a matter that can only be resolved upon hearing and determination of the petition.

20. It is clear from the proceedings of 6th November 2019 before this court that counsel for the 1st respondent informed the court that despite publication of the gazette notice, the titles had yet to be cancelled as at that date. As a result, this court granted an order staying the intended annulment and cancellation of title deeds numbers Mau Summit/Sachangwan Block 10/1 – 200 pending the inter parte hearing of the present application.

21. It is therefore surprising for the 1st respondent to claim that the titles have already been cancelled yet the said orders are still in force. In the circumstances, I am persuaded that the petitioners risk losing titles to the suit properties thereby exposing them to a real threat of infringement of their constitutional right to own property under Article 40 of the Constitution. They have established a *prima facie* case with a possibility of success.

22. The petitioners may be prejudiced as a result of the threatened violation of the Constitution. It is in the interest of justice to preserve the suit properties which are the substratum of the petition herein.

23. In view of the foregoing, I am persuaded that the petitioners have made a case for a conservatory order. I therefore make the following orders:

a) A conservatory order is hereby granted restraining the respondents herein either by themselves, their agents, employees and/or servants from trespassing, entering, subdividing, allocating, occupying, selling, leasing, charging, transferring, subdividing, fencing, compulsorily acquiring, erecting any structures, cancelling the title deeds or dealing in any way with the petitioners pieces of land known as Mau Summit/Sachangwan Block 10/1-200 pending the hearing and determination of the petition herein.

b) Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 14TH DAY OF OCTOBER 2021.

D. O. OHUNGO

JUDGE

Delivered through Microsoft Teams video link in the presence of:

No appearance for the petitioners/applicants

No appearance for the 1st respondent

No appearance for the 2nd and 3rd respondents

Court Assistant: E. Juma