



REPUBLIC OF KENYA



KENYA LAW

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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

PETITION NO. E001 OF 2021

BETWEEN

OKIYA OMTATAH OKOITI.....PETITIONER

= VERSUS =

JAMES KURIA WAIRAGU.....1ST RESPONDENT

JOSEPH G. NDUNGU GITU.....2ND RESPONDENT

MILLICENT MULICAH WAKONYO.....3RD RESPONDENT

MARY WANJIRU JOSEPH.....4TH RESPONDENT

SAMWEL NJENGA NDUNGU.....5TH RESPONDENT

DUNCAN GITU NDUNGU.....6TH RESPONDENT

JOHN GIBSON MWANGI KIMARI.....7TH RESPONDENT

STEPHEN MAINA KANJURU.....8TH RESPONDENT

TERESA WAMBUI MAINA.....9TH RESPONDENT

ESTHER MUTHONI GITHAKWA.....10TH RESPONDENT

PATRICK WAIRAGU GITHAKWA.....11TH RESPONDENT

JOSEPH WANYIRI GITHAKWA.....12TH RESPONDENT

MOSES BARASA OSABIR.....13TH RESPONDENT

DAMIAN WANDERA OUMA.....14TH RESPONDENT

PASCAL OUNDO WERE.....15TH RESPONDENT

JACINTA WANJIRA MWAURA.....16TH RESPONDENT

LUKA GITONGA WANYAGA.....17TH RESPONDENT

SOFIA GATHONI WANYAGA.....18TH RESPONDENT

FREDRICK AFWANDE NANGIRA.....19TH RESPONDENT

REDEMITA NAFULA MAKIMBI.....20TH RESPONDENT

CHARLES OKOTH ODUOR.....21ST RESPONDENT

RAYMOND OLENDO.....22ND RESPONDENT

= AND =

NATIONAL LAND COMMISSION.....1ST INTERESTED PARTY

KENYA AIRPORTS AUTHORITY.....2ND INTERESTED PARTY

KENYA CIVIL AVIATION AUTHORITY.....3RD INTERESTED PARTY

HON. ATTORNEY GENERAL.....4TH INTERESTED PARTY

INSPECTOR GENERAL OF POLICE.....5TH INTERESTED PARTY

LAND REGISTRAR BUSIA.....6TH INTERESTED PARTY

MINISTRY OF LANDS & PHYSICAL PLANNING.....7TH INTERESTED PARTY

MINISTRY OF FINANCE & NATIONAL TREASURY..8TH INTERESTED PARTY

MINISTRY OF TRANSPORT, INFRASTRUCTURE, HOUSING,

URBAN DEVELOPMENT & PUBLIC WORKS.....9TH INTERESTED PARTY

COUNTY GOVERNMENT OF BUSIA.....10TH INTERESTED PARTY

COUNTY LANDS SURVEYOR BUSIA.....11TH INTERESTED PARTY

R U L I N G

1. The petitioner brought an application dated 24th May 2021 under Articles 20, 22, 23(3), 50(1), 159(2)(d), 162(2)(b), 165(5) and 258 of the Constitution of Kenya 2010, the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and all other enabling provisions of the Law seeking for the following orders;

i) Spent.

ii) That pending the inter-partes hearing and determination of the application and/or the petition herein, this Honourable Court be pleased to suspend the hearing and determination of Busia ELC Civil Case No. 32 of 2013, James Kuria Wairagu & 11 others v Transition Authority & Another.

iii) That pending the hearing and determination of the application and/or the petition herein, this Honourable Court be pleased to issue a conservatory order in the interim to restrain the respondents, whether by themselves or their servants or agents or advocates or otherwise howsoever, from occupying, causing any damage, cultivating, developing, converting or using, transferring or alienating Busia Airstrip land, including land registered as private property under the following title deeds or their subdivisions;

a) L.R. No. Bukhayo/Bugengi/3420

b) L.R. No. Bukhayo/ Bugengi/3081

c) L.R. No. Bukhayo/Bugengi/3078

d) L.R. No. Bukhayo/Bugengi/3977

e) L.R. No. Bukhayo/Bugengi/3079

f) L.R. No. Bukhayo/Bugengi/3080

g) L.R. No. Bukhayo/Bugengi/2556

- h) L.R. No. Bukhayo/Bugengi/1604
- i) L.R. No. Bukhayo/Bugengi/2789
- j) L.R. No. Bukhayo/Bugengi/3146
- k) L.R.No. Bukhayo/Bugengi/3685
- l) L.R. No. Bukhayo/Bugengi/5930
- m) L.R. No. Bukhayo/Bugengi/6183
- n) L.R. No. Bukhayo/Bugengi/1311
- o) L.R. No. Bukhayo/Bugengi/1530
- p) L.R. No. Bukhayo/Bugengi/5055
- q) L.R. No. Bukhayo/Bugengi/5056
- r) L.R. No. Bukhayo/Bugengi/2512
- s) L.R. No. Bukhayo/Bugengi/2989
- t) L.R. No. Bukhayo/Bugengi/3420
- u) L.R. No. Bukhayo/Bugengi/3146
- v) L.R. No. Bukhayo/Bugengi/3592

iv) Spent.

v) Spent.

vi) Spent.

vii) That consequent to the grant of the prayers above the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.

viii) That costs be in the cause.

2. The application was supported by the grounds on the face of it and the affidavit of OKIYA OMTATAH OKOITI *inter alia*;

- a) That the constitutional rights of the Petitioner and of other Kenyans have been gravely compromised and violated through the illegal and unconstitutional acts of the respondents regarding the ownership by the public of Busia Airstrip land.*
- b) That the application is extremely urgent because an entity which does not identify itself placed an advert in the Daily Nation of Friday, 21st March 2021, putting Busia Airstrip land on sale.*
- c) That the matter is also urgent since part of Busia Airstrip land, the subject matter in the instant petition, is the suit property in **Busia ELC Civil Case No. 32 of 2013, James Kuria Wairagu & 11 others vs Transition Authority & Another**, scheduled to be mentioned in this Court on 6th June 2021.*
- d) That unlike Busia ELC Civil case No. 32 of 2013, which concerns ownership of only a section of the airstrip and has not enjoined most of the relevant parties, this petition covers the entire parcel of land known as Busia Airstrip and brings on board all known entities with a claim or interest on the land.*
- e) That it will save judicial time and other important and limited public resources for this Honourable Court to dispose of the question of the rightful ownership of the Busia Airstrip land in this single petition than wait to do so in a multiplicity of suits, including in Busia ELC Civil Case No. 32 of 2013.*
- f) That the instant petition will benefit the court in the pursuit of justice since it presents a more comprehensive history of the suit property as public land than does Busia Civil Case No. 32 of 2013.*
- g) That the applicant/petitioner herein has carried out extensive research which has brought to the fore holistic historical*

information on the ownership of the suit land by the public which information is lacking in Busia Civil Case No. 32 of 2013 yet it is critical for the just determination of the dispute therein on the merits.

h) That there is absolutely no way that the dispute in Busia Civil Case No. 32 of 2013 or any other dispute concerning the ownership of Busia Airstrip land in its entirety, or of any part thereof, can be determined justly on merits without the involvement of the 1st to the 9th Respondents herein.

i) That in the circumstances, it is in the overriding and overwhelming interests of justice that the instant petition which has a much wider and far reaching scope is disposed of first, to determine whether or not the Busia Airstrip land in its entirety is public property, before the claim on isolated parts of the property by the 1st to the 12th Respondents, who are private entities pursuing peripheral parties in Busia Civil Case No. 32 of 2013 is heard and determined.

j) That to fraudulently lay claim to the Busia Airstrip land, the respondents have uttered false following land title deeds or their subdivisions;

k) That the textual authority that justifies the grant of conservatory orders and temporary injunctions is to protect and enforce the rights and fundamental freedoms in the Bill of Rights. The fountainhead of the orders sought herein is Article 23(3) of the Constitution, on the authority of this court to uphold and enforce the Bill of Rights.

l) That by providing that in any proceedings brought under Article 22, a court may grant appropriate relief, including a declaration of rights, injunction, conservatory order, or order of judicial review, Article 23(3) gives meaning to Article 22 which grants individuals (including groups) the right to redress in the event of a denial, infringement, violation or threat to rights and freedoms.

m) That the Applicant/Petitioner has a right of access to Honourable Court to protect the Constitution and to safeguard his rights and those of other Kenyans under Article 40 of the Constitution which have been, are being, and are in danger of further infringement.

n) That granting the orders will not prejudice the respondents in any way under the law since all the parties in Busia Civil Case No. 32 of 2013 have been enjoined to these proceedings.

3. The 10th Interested Party filed their Replying Affidavit on 28th June 2021 deposed by EVERLYNE TERESIA MBINGI described as the Chief Officer of the 10th Interested Party herein, in-charge of the Department of Lands, Housing and Urban Development. Supporting the application, she deposed that by granting the Petitioner's application the Honourable Court will have the opportunity to alleviate an imminent multiplicity of vexatious suits. She stated that the Respondents herein have fraudulently and illegally obtained titles to the BUSIA AIRSTRIP land otherwise known as public land, consequently thereby putting selfish private interests that cannot override public interests. She further stated the actions of the Respondents are just another classic example of the fraud perpetrated affecting the land in issue, duly acquired, reserved and utilized by the Government of Kenya as Busia Airstrip land from 1960's. She lastly stated that the Respondents will not suffer prejudice should the Petitioner's application be allowed.

4. The 1st to 12th Respondents entered appearance and filed their Replying Affidavit dated 28th June 2021 sworn by JOSEPH G. NDUNGU GITU the 2nd Respondent and on behalf of the 1st-12th Respondent. He deposed that the application is bare and purely based on hearsay without any relevant documentary evidence and does not meet the conditions for granting an interim injunction or conservatory orders. Mr. GITU states that it is disputed that the 1st-12th Respondents are absolute registered proprietors of all those parcels of land L.R. BUKHAYO/BUGENGI/ 3420, 3081, 3078, 3077, 3079, 3080, 2556 and 3146. That parts of the lands in dispute that belong to the 1st Respondent are fully developed with a famous hotel known as Mulembe Hotel. He deposed further that the petitioner has not annexed any documentation to prove his allegations that the suit land is public land.

5. The 2nd Respondent stated that the Kenya Airport Authority through its letter dated 14/5/2019 indicated that they are not the owner of the suit land and that a decision was made to immediately relocate the airstrip to another location. He added that it is only when the 10th Interested Party wanted to turn their land into a trailer park that they filed Busia Civil Case No. 32 of 2013 and obtained injunction orders against them. He further stated that the suspension of Busia Civil Case No. 32 of 2013 shall be an infringement to their right to dispensation of justice enshrined in the Constitution and statutes and that the sole aim of the suspension is to further delay the suit to their detriment. The 1st – 12th Respondent contend that as the 10th Interested Party had attempted to enjoin the 1st, 5th, 6th, and 11th Interested Parties to its proceedings in Busia Civil Case No. 32 of 2013 which application was dismissed hence trying to enjoin the 1st Interested Parties to the current proceedings amounts to *res judicata* and or *sub-judice*. He urged the court to dismiss the application as granting it will trump upon their enshrined constitutional and legal rights.

6. The 22nd Respondent vide a Replying Affidavit in opposition to the Petitioner's application filed on 22nd September 2021 gave a narration on how he acquired his title. He deposed that the Land Registrar Busia conducted a hearing regarding the ownership of L.R.BUKHAYO/BUGENGI/2540 between Elly Nderema and the 2nd Respondent and found that the latter had fraudulently transferred and sub-divided the land giving rise to parcels 3075-3080. That the fraudulent transfers were revoked and the land was restored to the estate of the late David Oundo Nderema. He stated further that he bought the land from Elly Nderema after they were issued with a grant and sub-divided the land into parcels No. BUKHAYO/BUGENGI/14511-14514. He further stated that parcel 14515 was acquired from a purchaser who had bought it earlier from Elly Nderema. He argues that he is an innocent purchaser for value having purchased the said parcels of land with no encumbrances.

7. The 22nd Respondent deposed further that the petitioner has not exhibited any document to show that their parcels of land are public land as alleged and that he had not listed the particulars of fraud in the petition. He argues that the orders sought by the Petitioner seeking

cancellation of his title and repossession of the said parcels goes against the provisions of Article 40 of the Constitution. The 22nd Respondent pleaded that this court has no jurisdiction and or right to cancel and or initiate the process of cancelling his title and or repossessing the said parcels by dint of Article 68(c) (v) of the Constitution and Section 14(1) of the National Land Commission Act which limited the jurisdiction to challenge any grant and or disposition of public to a period of within 5 years.

8. The parties agreed to dispense with the hearing of the application by way of written submissions which submissions the court has considered. In his submissions filed on 13th August 2021, the Petitioner submitted that he has demonstrated that the suit property was grabbed by the Respondents who are relying on fraudulently acquired documents to claim ownership of the land and which claim is barred by dint of Article 40(6) of the Constitution. He submits further that this court has the jurisdiction to grant conservatory orders by virtue of the provisions of Article 23(3)(b) of the Constitution as read with Articles 162(2)(b) and 165(5)(b), Section 13(7)(a) of the Environment and Land Court Act and Section 11 of the Fair Administrative Actions Act No. 4 of 2015. It is his contention that he has met all the conditions necessary to the granting of the conservatory orders. The Petitioner argues that the rights of the Kenyan public under Article 40 and Article 47 of the Constitution have been violated by the Respondents who irregularly purport to privatise the public land known as Busia Airstrip using title deeds that were issued recently in the 1980-1990 period yet the land has been used as a public facility since the 1960s.

9. The Petitioner submits that if the conservatory orders are not granted, the suit property will be interfered with as has been indicated by the advert published in the Daily Nation newspaper of 24/5/2021 purporting that the suit property was on sale. The Petitioner also submitted that it is absolutely necessary and in the overwhelming public interest that the constitutionality, legality and regularity of the process the respondents used to acquire title deeds to the suit property is determined on the merits by this Honourable Court. The Petitioner respectfully urged this court to exercise its authority under Article 23 of the Constitution and grant appropriate relief so as to promote the rights and fundamental freedoms that accrue to the public under Article 35(1) (3), 40, 46 and 47 as read together with Article 62 of the Constitution of Kenya. Finally, the petitioner submitted that the petition and the application are filed in the public interest and they seek to entrench constitutionalism and the national values and principles of governance, including the rule of law, integrity and good governance in the ownership of Busia Airstrip land.

10. The 10th Interested Party filed their submissions on 24th August 2021 and submitted that since the Busia plane crash accident in 2003, there has been no transfer of the suit parcels by the Government to the Respondents arguing that the Respondents took advantage of the suspension of the use of the Airstrip to illegally invade, occupy and possess the Airstrip land and which they currently unlawfully claim ownership of and have fraudulently obtained title to. The 10th Respondent further submitted that it would therefore be of necessity to establish the proper facts, law and history grounded on the broader constitutional issues surrounding ownership of the said parcels of land comprising of the Busia Airstrip, that the Petition herein and the Application thereto seek to elucidate, for the Honourable Court to be in a position to well appreciate and determine not only the Petition filed, but as well as several other similar cases including but not limited to Busia ELC Case No. 32 Of 2013, otherwise sought to be addressed by the instant Petition.

11. The 10th Respondent also submitted that the grant of stay of all other civil cases filed prior or in connection to the subject matter would be paramount in a bid to create a clear focus and concentrate on the main issue at hand which is whether or not Busia Airstrip land in its entirety is public property. The 10th Respondent asserts that this is key in curbing multiplicity of suits and saving on time, costs and ensuring expeditious determination of the matter in issue thereby alleviating the high chance of procuring varying court decisions over the same subject matter.

12. The remainder of the parties did not file any submissions. I have carefully considered the grounds upon which the application is based, parties' rival affidavits and submissions. The issue the court is called upon to decide at this point is whether the Applicant has met the conditions for the grant of conservatory orders pending hearing and determination of the petition.

13. The Constitution of Kenya in Article 23 provides the guiding framework for making findings on the granting of conservatory orders. This court is being called upon to make a decision by examining and evaluating the material placed before it and determine whether the petitioner has established a prima facie case to warrant the grant of conservatory orders. The court is also being called upon to determine whether the respondents would suffer prejudice should the orders be granted. The decision in the case of **Law Society of Kenya v Officer of the Attorney General & another; Judicial Service Commission (Interested Party) 2020 eKLR, J. A. MAKAU J.** broke down the principles to be fulfilled before granting conservatory orders as follows;

“From various authorities of the Courts the principles required to be satisfied before granting conservatory orders or interim conservatory orders comprises of the following: -

a) First, an Applicant must demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice.

b) The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.

c) Thirdly, the court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.

d) The final principle for consideration is whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.

14. Similarly, Musinga, J (as he then was) in the case of the **Centre for Rights Education and Awareness (CREAW) & 7 Others v Attorney General, Nairobi High Court Petition No. 16 of 2011; [2011] eKLR** stated 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.”

15. The gist of this petition is challenging the validity or otherwise of the titles held by the Respondents. The second issue at hand is whether or not to stay the proceedings in BSA ELC 32 of 2013.

In line with the first principle, the Petitioner has stated that he has established a *prima facie* case with high chances of success and that the orders sought herein will advance the cause of justice. He has also stated that the balance of convenience favours the granting of the orders sought.

The Petitioner has submitted that he has produced evidence to demonstrate that Busia Airstrip land was acquired by the State in the 1960s. He referred to the contents of a letter by Kenya Airport Authority dated 14/9/2019 which letter was also annexed by the 1st – 12th Respondents. By dint of the provisions of article 40(b) of the Constitution and section 26 of the Land Registration Act where a party questions the legality or otherwise of title of another can only be determined by taking of evidence. At this preliminary stage, the court cannot ascertain as being argued by the Respondents whether the claim before it is baseless or otherwise.

16. Secondly, the letter of 14th May 2019 drawn by the Kenya Airports Authority clearly set out the mandate of the Authority under paragraph one of that letter. It stated *inter alia* that the airstrip is under the Ministry of Transport Infrastructure, Housing and Urban Development thus it did not conclusively state that the disputed portion is not public land. It will be misleading at the interlocutory stage to use this letter as is being argued by the 1st – 12th Respondents to close the Petitioner from presenting his case. In my view and I so hold that the letter raises a triable issue and a basis of *prima facie* case that ought to proceed on merits.

17. The 1st – 12th Respondents pleaded that their titles were legally acquired and proceeded to annex copies of their titles. Besides the copies of their titles, these Respondents also annexed the Hansard that discussed the matter at hand and which according to them confirmed the authenticity of their title deeds. Without going into the details of the Hansards on the face of the then Minister for lands acknowledged the existence of the Busia Airstrip as well as the titles belonging to 1st – 12th Respondents. He further acknowledged a possibility of encroachment. The discussion of that day pointed out issues which can only be resolved by giving a hearing to both parties which were not part of those proceedings.

18. The second limb of the opposition by the 1st – 12th Respondents is that staying their case No. BSA ELC 32 of 2013 is pre-judicial and a violation of their rights to speedy dispensation of justice as provided for in article 159 of the Constitution. Indeed the right to a trial without undue delay is one of the tenets of fair trial that must be respected. I am alive to the status of the former case which still was at the stage of hearing of the plaintiffs’ case when the parties therein agreed to refer the matter to the County Land Registrar and County Surveyor Busia for determination of the boundaries. The matter is thus at a stage that either parties rights can be determined in this petition to avoid any delay. Further the petition has joined several parties to the petition that have an interest in the disputed portion of the land unlike the ELC case No. 32 of 2013. Its determination will have an effect of being a judgment in rem thus serving the principles of natural justice.

19. Besides the cure of prejudice to be occasioned to the 1st – 12th Respondents, the Petitioner has explained that hearing this petition in priority will help avoid multiplicity of suits and save time and costs to all parties concerned. The possibility of multiplicity of suits is also exemplified by the existence of BSA ELC cases No. 32 of 2013 and ELC No. 24 of 2015. Further the pleadings of the 22nd Respondent does show that any orders issued in 32 of 2013 was likely to affect him without giving him an opportunity to be heard just like the owners of the parcels of land that are touching the so-called Busia Airstrip land.

20. The last issue raised by the 22nd Respondent on the jurisdiction of this court in regards to the provisions of article 68(c) of the Constitution and section 14(1) of the National Land Commission. The 22nd Respondent did not elaborate by way of submissions the grounds of want of jurisdiction. The proposition that he is an innocent purchaser therefore protected by dint of section 14(1) of National Land Commission Act is a question of fact. I leave it to the parties to deal with it during the trial of the main petition. Probably, because his replying affidavit is indicated to be in response to both the application and the petition, therefore, I make no finding on the question of jurisdiction.

21. From the foregoing analysis, I reach a finding that the application dated 24/5/2021 is merited. I proceed to grant the following orders:

a) That pending the inter-partes hearing and determination of the petition herein, this Honourable Court suspends the hearing and determination of Busia ELC Civil Case No. 32 of 2013, James Kuria Wairagu & 11 others v Transition Authority & Another.

b) That pending the hearing and determination of the petition herein, this Honourable Court does issue a conservatory order to restrain the respondents, whether by themselves or their servants or agents or advocates or otherwise howsoever, from occupying, causing any damage, cultivating, developing, converting or using, transferring or alienating Busia Airstrip land, including land registered as private property under the following title deeds or their subdivisions of LR. BUKHAYO/BUGENGI/3420, 3081, 3078, 3977, 3079, 3080, 2556, 1604, 2789, 3146, 3685, 5930, 6183, 1311, 1530, 5055, 5056, 2512, 2989, 3420, 3146 and 3592.

c) That the costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 13TH DAY OF OCTOBER 2021.

A. OMOLLO

JUDGE