



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

PETITION NO. 6 OF 2021

BETH WANJIKU KIURA.....PETITIONER

-VERSUS-

THE ATTORNEY GENERAL.....1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION.....2ND RESPONDENT

LAND REGISTRAR, KWALE.....3RD RESPONDENT

RULING

(Application seeking conservatory orders to stop the Ethics and Anticorruption Commission from inter alia conducting investigations over the applicant's title to land; applicant contending that she has good title; apparent that there is an investigation over the said title on possibility that it may be public land for the Fisheries Department; principles for the grant of conservatory orders; no demonstration of any loss that the applicant stands to suffer by a mere investigation of title; mandate of the EACC being to conduct investigations; public interest; not in public interest to stop the subject investigation of title; application dismissed)

1. The application before me is that dated and filed on 29 March 2021 by the petitioner. It seeks the following orders:-

a) Spent (Certification of urgency)

b) That this honourable court be pleased to issue an interim conservatory order restraining the 2nd respondent by itself, its commissioners, directors, investigators, servants, agents or otherwise howsoever from dealing with, interfering and or conducting unilateral investigations over the petitioners land parcel Kwale/Shimoni Village Squatter Scheme/87 pending the hearing and determination of the petition.

c) That pending the hearing and determination of this petition, this honourable court be pleased to issue an interim conservatory order maintaining the status quo and restraining the respondents from interfering with the petitioner's quiet possession of the land parcel Kwale/Shimoni Village Squatter Scheme/87.

d) That cost of this application be provided for.

2. To put matters into context, this suit was commenced by way of a constitutional petition filed on 18 February 2021. It is the case of the petitioner that she is the legal owner of the parcel of land known as Kwale/Shimoni Village Squatter Scheme/87 (hereinafter referred to as "the suit land") which she purchased from one Omar Makame Vuae. She avers that by a letter dated 17 December 2020 she was summoned by the 2nd respondent (the Ethics and Anticorruption Commission) to appear at its offices to make a statement on how she acquired the suit land. The letter stated that 2nd respondent was investigating allegations of irregular alienation of several parcel of lands belonging to the State Department for Fisheries in Kwale. The petitioner states that she resides in Switzerland and she instructed her advocate to respond to the letter. She avers that in her response, she stated that she was willing to cooperate in the investigations, but due to COVID-19 travel restrictions, she could not avail herself at the 2nd respondent's offices. She has pleaded that the 2nd respondent did not respond to the letter. On 22 January 2021, she was informed by her employees that the agents of the 2nd respondent, police and government surveyors, forced their way into the suit land. The petitioner claims that her rights inter alia under Article 40 of the Constitution (right to property) have been infringed through the actions of the 2nd respondent.

3. She has elaborated how she got the suit property. She has stated that the suit property neighbours her other land parcel Kwale/Shimoni/634 to the west and the land of the Department of Fisheries to the east. She avers that she was approached by the Committee

of Shimoni Village in the year 2000 with an offer to sell to her the suit property. She states that the land was then registered in the name of Omar Makame Vuue, a member of the Committee, and that the Committee decided to sell the suit land to the petitioner in order to raise survey fees for their other properties in the area. She has pleaded that in the year 2017, the suit property was surveyed by a team of Government surveyors. She states that the Fisheries Department personnel had started agitating over the acquisition of the suit land by the petitioner, but the Shimoni Village Committee wrote a letter confirming the legality of her transaction. She also approached the Deputy County Commissioner, who upon examination, confirmed the correctness of her ownership. She was soon thereafter issued with a title deed over the suit land.

4. It will be noted that in this application, the petitioner seeks to restrain the Ethics and Anticorruption Commission from inter alia investigating the title to the suit land. She also wants an order to stop any interference with the land and for status quo to be maintained pending hearing of the case. She is basically asserting that she is the one with good title to the suit land. In her supporting affidavit, she has annexed her title deed which I note was issued on 7 July 2017. The size on that land is 0.085 Ha. She has also annexed documents to demonstrate how the land was transferred to her including consent from the Land Control Board.

5. The 2nd respondent entered appearance on 21 April 2021 but did not file anything towards the application. Neither was counsel for the 2nd respondent present when the application came up for hearing inter partes. Mr. Kazungu, learned counsel for the applicant fully relied on the material presented in the application.

6. I have considered the application. In as much as nothing was filed to oppose it, it does not mean that the application must be allowed. This court must be convinced that it is just for the orders sought to be granted.

7. The applicant of course asserts ownership of the suit land and wishes to have conservatory orders to stop the 2nd respondent from interfering with the same. The principles to be satisfied in granting of a conservatory order were expressed by Onguto J. in the case of *Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others [2015] eKLR*. He held that an applicant needs to demonstrate a prima facie case and demonstrate that the case is arguable with a likelihood of success. In addition, the court held as follows :-

“Once the applicant has established to the court’s satisfaction a prima facie case with a likelihood of success the court is then to decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights... Thirdly, flowing from the first two principles, is whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is indeed the business of the court to ensure and secure so far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice...The fourth principle...is that the court must consider conservatory orders also in the face of the public interest dogma. Finally, the court is to exercise its discretion in deciding whether to grant or deny a conservatory order. The court must consequently consider all relevant material facts and avoid immaterial matters. The court will consider the applicants credentials, the prima facie correctness of the availed information, whether the grievances are genuine legitimate and deserving and finally whether the grievances and allegations are grave and serious or merely vague and reckless...” (emphasis mine).

8. The Supreme Court of Kenya in the Case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others eKLR* defined conservatory orders and the conditions to be met before the grant of the said orders. It was stated as follows:-

[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 supplicant’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.”

9. I am well guided by the above decisions which I believe well set out the principles that a court ought to take into consideration when faced with an application for conservatory orders.

10. In the matter at hand, the applicant wants restraining orders against the 2nd respondent. We need to remember that the 2nd respondent is established pursuant to the decree in Article 79 of the Constitution which mandated Parliament to enact legislation to establish an independent ethics and anti-corruption commission. Being a Commission it is vested with the powers granted to Commissions under Article 252 of the Constitution. Under Article 252 (1) (a), Commissions may conduct investigations on their own initiative or on a complaint made by a member of the public. The specific powers given to the Ethics and Anti-Corruption Commission are in Section 13 of the Ethics and Anti-corruption Commission Act, Act No. 22 of 2011. It states as follows:-

“(1) The Commission shall have all powers generally necessary for the execution of its functions under the Constitution, this Act, and any other written law.

(2) Without prejudice to the generality of subsection (1), the Commission shall have the power to—

(a) educate and create awareness on any matter within the Commission’s mandate;

(b) undertake preventive measures against unethical and corrupt practices;

(c) conduct investigations on its own initiative or on a complaint made by any person;

(d) conduct mediation, conciliation and negotiation; and

(e) hire such experts as may be necessary for the performance of any of its functions.”

11. It will be seen from the above that the 2nd respondent is vested by the Constitution, and statute, with investigatory powers, which it can undertake by its own initiative or on a complaint. It is apparent that in this suit, the petitioner is aggrieved by the decision of the 2nd respondent to investigate her title. I do not see the basis of her complaint. The 2nd respondent has the mandate of Kenyans to undertake investigations if it deems it fit and just to do so. I have not been shown anything within this application which convinces me that the investigation of the title of the petitioner is being undertaken maliciously. From the petitioner's own narrative, there appears to be some questions as to whether the suit land is properly private land, or whether it is public land assigned to the Fisheries Department. I think only an investigation can unravel that issue. It will not be in the public interest to stop the 2nd respondent from undertaking investigations to determine whether or not the suit land is public land. I wonder why the petitioner is afraid of an investigation. I also do not see any harm that will be occasioned to the petitioner by a mere investigation for if the investigation is adverse to her, she can always contest the findings thereof.

12. From the foregoing, it will be seen that I am not persuaded as to the merits of this application and it is hereby dismissed. Since it was not opposed, I make no orders as to costs.

13. Orders accordingly.

DATED AND DELIVERED THIS 7TH DAY OF OCTOBER 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA