



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC PET NO. E 001 OF 2021

WANJOHI MWAI

(Suing in his own capacity and the Administrator

of the Estate of Waruguru Githae)..... 1ST PETITIONER

WAMBUI MURAGURI MUCHIRI.....2ND PETITIONER

VERSUS

LAND REGISTRAR, KIRINYAGA COUNTY.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. For determination is the Petitioners' Notice of Motion dated 12th January, 2021 and filed on 14th January, 2021 whereby they are seeking the following prayers: -

i. Spent

ii. That the Honourable Court does grant conservation orders as follows:

a. Spent

b. That pending hearing and determination of this petition or further orders of this Honourable Court does issue an order of inhibition against L.R Mutithi/Strip/688, Mutithi/Strip 690, Mutithi/Strip 691.

2. The applicant set out the following grounds on the face of his application: -

a) That the petitioner were plaintiffs in Kerugoya ELC Case No. 78 of 2014 which on 27th June, 2018, the court after hearing the case ordered they be registered as proprietor of 2.4 Ha out of L.R Mutithi/Strip/688, Mutithi/Strip 690, Mutithi/Strip 691.

b) That the Deputy Registrar was to execute all relevant documents for the said transfer to be effected an order which the Deputy Registrar Kerugoya Law Court complied with on various dates by executing the following:

(i) Application and seeking for land control boards' consents.

(ii) Executing transfers in favor of the petitioners which were registered on 4th July, 2019 at the District Land office at Kerugoya and stamp duty was also paid for on the same date through sidian Bank limited.

(iii) On 4th July, 2019 the petitioners were registered as proprietor of the above-named parcels of land totaling to 2.4 Ha. as ordered in the decree.

c) That on various dates unknown to the petitioner the 1st respondent went ahead and cancelled the petitioners' registration without cause.

d) That the said cancellation is illegal, unprocedural, unconstitutional null and void as it purports that the 1st respondent can purport to deprive a person his property as she wishes or at her own violation of constitution, and sanctity of the title.

e) That the balance of convenience is in favour of granting orders sought to prevent further or any other illegal transfer of the suit properties to 3rd parties which the petitioners are in occupation.

PETITIONERS'/APPLICANTS' CASE

3. The instant application was supported by the affidavit of the 1st Petitioner which was filed on 12th January, 2021.

4. They stated that they together with their deceased mother were plaintiffs in Kerugoya High Court ELC Case no. 78 of 2014 whereby they had sued their elder brother Isaac Ruriga and judgment of the same was delivered in their favor that they be registered as proprietors of a total of 2.4 Ha out of L.R Mutithi/Strip/688, Mutithi/Strip 690 and Mutithi/Strip 691.

5. They further stated that the Deputy registrar executed all relevant documents to facilitate the transfer and were registered on 4th July 2019 as proprietors as follows: -

a. Wanjohi Mwai – 0.81 Ha of Mutithi/Strip 691

b. Waruguru Gitae – 0.81 Ha of Mutithi/Strip 691

c. Wambui Muraguri Muchiri – 0.78 Ha of Mutithi/Strip/688

6. They also stated that they discovered in late 2020 that on unknown dates the land registrar Kirinyaga illegally, unprocedurally and without cause cancelled their proprietorship of the said parcels of land and reverted them back to Isaac RurigaGithae.

7. They stated that the said cancellations violate their rights to property having been done by the court and purporting to revoke their proprietorship.

8. They prayed that the court allows the orders sought as the balance of convenience is in their favor since they are in occupation, have a court decree that has never been overturned and have a viable petition.

RESPONDENTS' CASE

9. The respondents opposed the application by filing grounds of opposition dated 2nd February, 2021 on 4th February, 2021.

10. They prayed that the whole Notice of Motion dated 12th January, 2021 be dismissed with costs on the following grounds: -

a. That the present Notice of Motion as drawn and filed is fatally defective, bad in law as it does not disclose any cause of action capable of being litigated and determined as a Constitutional Petition against the Respondents.

b. That the said Notice of Motion Application as drawn and filed is otherwise incompetent, misconceived, misplaced and therefore an abuse of the Court process.

c. That the said Notice of Motion Application as drawn and filed is frivolous, vexatious and a complete waste of the precious time of the Court.

d. That the said notice of Motion Application as drawn and filed is omnibus, imprecise and therefore lacks sufficient details.

e. That the said Notice of Motion Application as drawn and filed is devoid of merit and the Respondents shall raise and argue a Preliminary Objection at the very earliest instance to challenge the legality of these proceedings.

f. That the said Notice of Motion Application as drawn and filed is based entire on conjecture, ill will and malice at least and the same ought to be dismissed with costs.

PARTIES SUBMISSIONS

11. When the instant application came up for hearing on 8th March, 2021 the parties through their advocates on record agreed to canvass it by way of written submissions.

12. The Petitioners filed their submissions on 9th March, 2021 while the Respondents filed on 23rd September, 2021.

PETITIONERS/APPLICANTS' SUBMISSIONS

13. The Petitioners submitted that they have a prima facie case as they have annexed the decree which has never been overturned, searches

and green cards showing the reverted proprietorship done without a court order.

14. They submitted that this was a clear case of fraud, constitutional violation, usurpation of duties by the Land Registrar and violation of the applicant's right to property and a challenge done to court orders clandestinely by a government official.
15. They submitted that they have a prima facie case with the probability of success and the court should take judicial notice that other than the general grounds of opposition, the petitioners' depositions have not been denied or contradicted.
16. They submitted that under Section 68 (1) of the Land Registrations Act, the court has power to issue an inhibition and are in the form of a prohibitory injunction.
17. They submitted that the balance of convenience are in favour of the applicants as they are in occupation and have a viable petition. They urged that the respondents had nothing to lose. They relied in the case of *Dorcas Muthoni & 2 others vs Michael Ileri Ngari (2016) e KLR*.
18. In conclusion, they prayed that their application be allowed with costs.

RESPONDENTS' SUBMISSIONS: -

19. The respondents submitted that issues for determination were: -
 - a. Whether the petitioner's claim was proper in law and legally before court.
 - b. Whether the land registrar cancelled the deed as claimed by the petitioner.
20. They submitted that the applicants' case is not justified as the pleadings do not meet the principles set out in the civil procedure rules and in the case of **Anarita Karimi Njeru -vs- The Republic (1976 - 1980) KLR 1272**.
21. They submitted that the petitioners had not attached any single evidence of an instance when and how the respondents have breached, violated or threatened their fundamental rights. They relied on the case of ***Consortium for the Empowerment & Development of Marginalized Communities & 2 others v Chairman the Selection Panel for Appointment of Chairperson & Commissioners to Kenya National Human Rights Commission & 4 others (2013) e K.L.R.***
22. They submitted that the petitioners had an opportunity demonstrate that indeed the respondents did cancel the title deed by attaching copies of the green cards with proof of cancellation or any other record from the lands office and thus it is not possible to ascertain whether what they allege in the petition is the factual situation.
23. They prayed that the petitioners' petition be dismissed with costs.

ANALYSIS

24. I have considered the parties pleadings, annexures thereto, and rival submissions.
25. The Applicant is basically seeking a conservatory order in the form of an inhibition pending hearing and determination of the petition.
26. In determining whether the applicant is entitled to a conservatory order I am guided by the locus classicus case of ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] e K.L.R*** where the Supreme Court of Kenya held: -

"[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."

27. Further in the case of ***Kevin K Mwitii & others v 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."

28. In yet another case of *Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General [2011] Eklr the court* held:

“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.”

29. From the foregoing it is evident that for the petitioners to succeed in their application for conservatory orders, they ought to prove that: -

- a. They have a prima facie case with a likelihood of success; and
- b. They are likely to suffer prejudice as a result of the violation or threatened violation of the Constitution.

30. Firstly, the Petitioners are supposed to prove that they have a prima facie case with the likelihood of success.

31. The Respondents have raised an issue that the Petitioners Petition does not meet the prerequisites framed in the case of **Anarita Karimi Njeru -vs- The Republic (1976 - 1980) KLR 1272** as they only cited the relevant provisions of the law but did not go ahead to substantiate how the 1st Respondent infringed their right if at all.

32. Having carefully considered the supporting affidavit the annexures and the petition, I find that the violations have clearly and precisely been pleaded at paragraph 10 of the petition and thus the Petition meets the threshold laid out in the case of **Anarita Karimi Njeru** (supra).

33. The Petitioners further allege that they were plaintiffs together with their deceased mother in Kerugoya High Court ELC Case No. 78 of 2014 whereby they had sued their elder brother Isaac Ruriga and judgment in the case was delivered in their favor to the effect that they be registered as proprietors of a total of 2.4 Ha out of L.R Mutithi/Strip/688, Mutithi/Strip 690 and Mutithi/Strip 691.

34. They further stated that the Deputy registrar executed all relevant documents to facilitate the transfer and were registered on 4th July 2019 as proprietors of the said lands. However, in late 2020, they discovered that on unknown dates the land registrar Kirinyaga illegally, unprocedurally and without cause cancelled their proprietorship of the said parcels of land and reverted them back to Isaac Ruriga Githae.

35. I have looked at the annexures furnished by the Petitioners. From the decree furnished as annexure **WM2**, I am satisfied that indeed they were awarded the suit properties by this Honourable Court.

36. Further, I have looked at the green Cards and Certificates of official search. I also note that whereas the green cards indicate that the Petitioners are the registered owners of the Suit properties, the Certificates of Search indicate that the said Isaac Ruriga Githae is the registered proprietor.

37. The Respondents have submitted that the Petitioners have not furnished any material to show that their proprietorship of the said properties was cancelled. However, since the certificates of search still indicate the said Isaac Ruriga Githae as the proprietor, the issue on whether or not the petitioners’ title deeds were cancelled can only be determined upon full hearing of the petition.

38. From the green cards furnished, I am convinced that indeed the Petitioners were registered as proprietors of the suit properties pursuant to the decree abovementioned, and that their rights have either been infringed, violated and/or threatened and therefore entitled to the protection of the law as per **Articles 40 and 60 of the Constitution of Kenya, 2010**.

39. The Respondents have not proffered any explanation why the certificates of search reads the name of Isaac Ruriga Githae while the green card indicates that the Petitioners are the registered owners.

40. The upshot of my analysis is that the applicants have established a prima facie case with likelihood of success as they have framed legitimate constitutional issues that require rebuttal by the Respondents.

41. The Petitioners stated that they are in occupation of the suit properties. I thus find that they’ll suffer prejudice unless the orders sought are granted.

CONCLUSION: -

42. In the circumstances, I allow the the Petitioners’ Notice of Motion dated 12th January, 2021 as prayed. Costs in the cause.

RULING DATED, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 29TH DAY OF NOVEMBER, 2021.

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HON. E.C. CHERONO

ELC JUDGE

In the presence of:

1. *Mr. Kahigah holding brief for Muriuki for Petitioner*
2. *Respondent/Advocate – absent*
3. *Kabuta, Court clerk- present.*