



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kishoyian v Kishoyian & another (Petition 2 of 2022)  
[2023] KEHC 20737 (KLR) (19 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20737 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
PETITION 2 OF 2022  
F GIKONYO, J  
JULY 19, 2023**

**BETWEEN**

**AGNES NALOTUESHA KISHOYIAN ..... PETITIONER**

**AND**

**DANIEL LETOWUON KISHOYIAN ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH ERICKSON NKUITO ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The petitioner herein approached the court through an application dated 2/3/2022 in which she sought an injunction to restrain the respondents herein from subdividing the suit property Cismara/ Olokurto /1769 for it was her matrimonial property.
2. On 3/3/2022, upon consideration of application dated 2.3.22, on the basis of prima facie evidence adduced, the court issued temporary order restraining the respondents from subdividing, selling or charging or transferring or doing anything or dealing in any manner detrimental to the suit property herein pending the determination of the said application. The court was clear the order was meant to preserve the matrimonial property.
3. On 22/3/2022, counsel for the respondents informed the court that the respondents had been served on 18.3.22 with the application and therefore required more time to file replies. The court allowed the respondents 14 days to file their replies to the application.
4. On 23/5/2022, when the matter came up for mention, legal counsel for the respondents informed the court that the respondents are yet to comply with the earlier orders of the court, and that they will comply in 7 days. Again, the court allowed the respondents to file replies within 7 days. The matter was also scheduled for mention on 15.6.2022.
5. Eventually, the respondents filed their replies.



6. Subsequently, an application dated 27.10.22 was filed and directions were given to the effect that it be served on the respondents. The application was seeking among other things, citing the respondents for contempt of court, surrender of title obtained in contravention of the court orders and cancellation of those titles and entries in the land register. The application and notice of hearing the application on 14.11.22 were duly served upon the respondents. An affidavit of service was filed on 10.11.2022.
7. On 14.11.22 the matter was called out for hearing but the respondents as well as their legal counsel were absent. The court after being satisfied of service heard the application.
8. The foregoing background will become necessary in the ultimate decision herein.
9. The court subsequently delivered a ruling in respect of the application dated 27/10/2022 on 16/11/2022 and ordered that: -
  - i. 'Summons to issue to the contemnors to attend court during the next appointed date. If they fail to so attend, the court will not hesitate to issue a warrant of arrest to bring them to court under compulsion of the law'.
  - ii. 'I defer the decision on the request for committal to civil jail of the contemnors until they appear as directed'.
  - iii. 'I hereby nullify and revoke the subdivision of land known as Cismara /Olokurto/1769 and subsequent transfer to the 2<sup>nd</sup> respondent which was in total violation and disregard of a valid court order'.
  - iv. 'The 2<sup>nd</sup> respondent to surrender to the deputy registrar, Narok high court within 14 days, the original title curved out of the matrimonial property herein in violation of a valid court order'.
  - v. 'The 1<sup>st</sup> respondent to surrender to the deputy registrar, Narok high court within 14 days, a copy of the resultant original title deed of the matrimonial land following the illegal curving out of a portion thereof'.
  - vi. 'I hereby issue a summon to the land registrar, Narok North to appear before the court in person on the next appointed date and explain the circumstances in which the property Cismara / Olokurto/ 1769 was subdivided and transferred to the 2<sup>nd</sup> respondent in violation of the orders of the court and in spite of a caution registered on the parcel'.
  - vii. 'The next appointed date is 16/1/2023'.
  - viii. 'The cost of the application to be borne by the respondents'.
10. It is these orders issued on 16/11/2022 that the respondents, in the application dated 21/11/2022, seek to be stayed, varied or set aside. Or alternatively, the court to order status quo to be maintained.
11. The application is based on the grounds set out in the application, and the supporting affidavit of Joseph Erickson Nkuito sworn on 21/11/2022.

#### **Directions of the court**

12. The application was canvassed by way of written submissions.

#### **Respondents/Applicants' case**

13. The respondents averred that this court issued two ex parte orders against them on 16/11/2022. That the 1<sup>st</sup> order would appear final and would render the applicants' application dated 16/9/2022 futile.



That the applicants' application dated 16/9/2022 seek to protect the interests of the respondents in the suit land. That the 2<sup>nd</sup> ex parte order when enforced would subject the respondents to punishment by the court without having had a chance to defend themselves.

14. The respondents contend that the petitioner obtained the said orders through misrepresentation of facts and material non-disclosure.
15. The respondents argued that the petitioner has not demonstrated any legal or equitable right, which requires protection by the orders granted by the court.
16. The respondents argued that they are unable to enjoy proprietary rights despite being the legitimate registered owners of the suit land.
17. The respondents contend that their right to a fair hearing has been greatly threatened and risk being cited for contempt if the orders are not stayed, varied, discharged, and/ or set aside.
18. The respondents argued that the petitioner will not be prejudiced in any way if the orders herein are granted.
19. The respondents contend that they stand to suffer prejudice and great injustice/irreparable damage if the orders are not vacated.

#### **The petitioner/respondent's case**

20. The petitioner filed a replying affidavit sworn by Agnes Nalotuesha Kishoyian on 13/03/2023.
21. The petitioner averred that the purpose of the orders sought to be varied was to restore the substratum of the suit. That the substratum of the suit had been threatened by illegal subdivision of the suit property by the respondents.
22. The petitioner contends that the respondents are seeking an avenue to justify a criminal act.
23. The petitioner argued that if the application for sub-division of the suit property and the title issued to the 2<sup>nd</sup> respondent. The entire petition stands determined without hearing of the parties.
24. The petitioner contends that the application is overtaken by events as the land registrar has since complied with the orders of this court and revoked the illegal titles.
25. The petitioner contends that the respondents have not made a prima facie case for grant of orders sought.

#### **Respondents/applicants' submissions.**

26. The respondents/applicants submitted that their right to a fair hearing has been infringed upon. The respondents/applicants argued that they were only made aware of the application dated 27/10/2022 on 10/11/2022. They forwarded the pleadings to their advocates on record on 11/11/2022. The matter was coming up for hearing on 14/11/2022. The advocates for the respondents/applicants were logged in to address the court to seek leave to file a response out of time. The matter was not called out.
27. In further pursuit by the said advocates of the status of the matter, they proceeded to the registry. They were informed that the matter had been fixed for mention on 16/1/2023. That the petitioner only served the respondents with the mention notice for 16/11/2022 on 15/11/2022. They were shocked to learn that the matter was coming up for a ruling and not directions as indicated in the mention notice.
28. The respondents/applicants argued that had they been granted an opportunity to be heard they would have been offered significant guidance to this court. That this court would have arrived at a different



- determination altogether. The respondents relied on Article 50 of *the Constitution*, *Giella v Cassman Brown* [1973] EA 358, *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [20003] eKLR, *Pinnacle Projects Limited Vs Presbyterian Church of East Africa, and Ngong Parish & Another* [2018] eKLR.
29. The respondents submitted that the petitioner did not disclose material facts showing that she was aware of the circumstances under which the subdivision of the suit property Cismara/Olokurto/1769 occurred. The respondents argued that the petitioner appended her signature to an agreement to verify her consent to turn over 3 acres out of Cismara/Olokurto/1769 to the 2<sup>nd</sup> respondent. That the said agreement is before this court. That the transfer was necessary after the petitioner failed to refund to the 2<sup>nd</sup> respondent the sum of Kshs. 542,000/= . Further that the agreement was executed in the presence of the area chief, Mr. Richard Mayone. The respondents placed reliance on the case of *Wachira Karani Vs Bildad Wachira* [2016] eKLR, *David Bundi v Timothy Mwenda Muthee* [2022] eKLR, *Philip Chemowolo & Another V Augustine Kubende* [1986]KLR.
  30. The respondents/applicants submitted that the 2<sup>nd</sup> respondent stands to suffer irreparable harm should the prayers sought not be granted. The respondents argued that the petitioner has shown mala fides by concealing material facts from the court. That she was present at the meeting to resolve to transfer the suit land to the 2<sup>nd</sup> respondent. The petitioner later turned around and made an application to hold the respondents in contempt of court for subdividing the land. The respondents are apprehensive that the petitioner may damage the suit property or otherwise engage in actions to undermine the 2<sup>nd</sup> respondent's rights over the 3 acres out of Cismara/Olokurto/1769. That she has already shown a proclivity for operating in deliberate bad faith. The respondents relied on *Halsbury's law of England*, 3<sup>rd</sup> edition volume 21 paragraph 739 page 352, *Marple Brooks Projects Company Limited & Another V I & M Bank Limited* [2019] eKLR, and *Nguruman Limited* Case [2014]eKLR.
  31. The respondents submitted that should the temporary injunction be denied the 2<sup>nd</sup> respondent will have his rights to own property infringed upon. The respondents will be highly inconvenienced if the injunctions are not granted. The respondents relied on the case of *Margaret Njambi Kamau v John Mwachia Kamau & Another* [2019] eKLR.
  32. The respondents submitted that the award of costs is a matter of discretion of this court and costs follow the event unless there is a good reason to otherwise direct. The respondents argued that the petitioner occasioned to need for this application. That this application is merited. Therefore, therefore, the application dated 21/11/2022 should be allowed with costs to the respondents. The respondents relied on section 27 *Civil Procedure Act* and *Republic v Rosemary Wairimu Munene, and Ex Parte Applicant v Ibururu Dairy Farmers Co-Operative Society Ltd.*

### **The petitioner/respondent's submissions**

33. The petitioner/respondent submitted that the respondent/applicants have not cited any rights affected by the preservation of the matrimonial suit until the issues are determined on merit at the hearing of the petition. That the rights of the applicant to use the matrimonial suit property precedes the right of a third party claiming a purchaser interest. Therefore, a tribunal cannot find it proper at the interlocutory stage to allow for subdivision of the suit land and registration of the same in the name of a third party leading to the eviction of the petitioner. She relied on the case of *Mrao Ltd*(supra), and *Nguruman Limited*(supra)
34. The petitioner/ respondent submitted that it is the duty of the application to demonstrate that they meet the test set out in *Giella V Cassman* (supra) for the grant of an interlocutory injunction.



35. The petitioner/respondent submitted that the applicants will not suffer any irreparable harm if the matrimonial home is kept in a safe state until the matter is determined. The petitioner/respondent argued that the applicants wish to carve out a portion of land occupied by the petitioner. That should that if she eventually succeeds in her claim. She stands to suffer irreparable damage. That the purchase can be compensated against the purchase price hence stands to lose nothing. She relied on the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR.
36. The petitioner/respondent submitted that the respondents/applicants would not suffer any inconvenience if the suit property is kept in its original status. Since they do not occupy it or use it to eke a living. That on the other hand she will be greatly inconvenience if she is evicted from the suit land by virtue of being registered in the name of a 3<sup>rd</sup> party.
37. In the end, the petitioner/respondent submitted that the respondents do not have a good case for the grant of orders sought. She urged this court to dismiss the respondents' application with costs.

### **Analysis and Determination**

#### **Issue**

38. Whether the court should review, set aside or review the conservatory orders issued by the court on 16/11/2022 pending the hearing and determination of the main Petition?
39. And, who bears the costs of this application?

#### **Matrimonial property rights**

40. Before evaluating the merits of the application, the court settles the respondents' argument which tend to suggest that the petitioner has not any legal or equitable right, which requires protection by the orders granted by the court, to be indefensible. The petitioner's claim is founded on matrimonial property rights which are property rights and enjoy protection under article 40 of *the Constitution* and the *Matrimonial Property Act*. Notably, *the Constitution* mandated Parliament to '...enact legislation to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage;' (Article 68(c)(ii) of *the Constitution*).

#### **Variation or setting aside or review of conservatory orders**

41. Under rule 20(2) of the Matrimonial Property Rules, 2022: 'The court may, at any time it thinks fit, extend, vary, cancel, or discharge any interlocutory order made under paragraph (2), and may vary any terms or conditions upon or subject to which such order has been made'.
42. Similarly, since the application in issue was brought under *the Constitution*, under rule 25 of *the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (commonly known as "The Mutunga Rules"): 'An Order issued under rule 22 may be discharged, varied or set aside by the Court either on its own motion or an application by a party dissatisfied with the order'
43. Doubtless, the court has unfettered discretion in rule 20 (supra Matrimonial Rules) and 25 (ibid) which, however, is to be exercised judicially and in accordance with the circumstances and facts of each case.
44. Review is one of the remedies sought. The general remedy of review is governed by Section 80 of the *Civil Procedure Act*, Cap. 21, and order 45 (1) & (2) of the *Civil Procedure Rules, 2010*.



45. From the grounds stated in the application and the affidavit, the only suitable ground for review should be ‘sufficient cause’. The court will therefore consider whether, in all circumstances of the case, there is any or any sufficient cause to review, or vary or set aside the orders in question, or leave them in situ.

### **Relevant facts**

46. The respondents have alleged that the case was not called out on 14.11.2022, and that therefore, their right to a fair hearing has been infringed upon. The practice of this court, in open court or virtual court, is that; the court assistant calls out the matter, and the judge, upon receipt of the file, also calls out the matter and the specific legal counsel in the case. Thereafter, the judge records whether a party or legal counsel is present or absent. Accordingly, from the record, contrary to the submission by the legal counsel for the respondents, this matter was called out on 14/11/2022. But, the respondents as well as their legal counsel were absent despite being served with notice.
47. The respondents have alleged that they were served with a mention notice for 16/11/2022 when the matter was coming up for ruling. I have perused the said mention notice. I note that it was indicated the matter was coming up for directions, which was an error on the part of the petitioner but does not change the fact that the respondents and their counsel had notice to attend court but did not.
48. A borrowing from the case of *Shah vs. Mbogo & Another* (1976) EA, in the words of Harris J., that; discretion of the Court is only “Exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice”.
49. Is this a case where the court should exercise discretion in favour of the respondents?
50. The respondents were duly served with earlier court orders prohibiting any dealing in the suit property. They were acutely aware of the orders and the prohibition it entailed. But, chose to act in total disregard of the court order. Such fragrant and deliberate disobedience is always suppressed by a court when it raises its ugly head.
51. The respondents were also served with the application dated 27.10.2022. See affidavit of service filed on 10<sup>th</sup> November 2022. Again, they were aware of the nature of the application; to cite them for contempt; surrender of tile deed obtained in violation of court orders; and cancellation of those titles and relative entries in the register.
52. In these circumstances, it is difficult to believe their claim that their right to fair hearing will be prejudiced or that they will suffer prejudice unless orders issued on an application for which they had due notice are set aside, yet, the orders are founded upon their breach which they have not atoned. Despite the gallant effort by their legal counsel in putting forward explanations of their situation, their claim is merely crying wolf and most pretentious of the respondents. In any event, there is nothing which show that the petitioner will dissipate the suit property herein. It is just and fair the property to remain as is pending the hearing and determination of the petition than in the hands of the respondents herein.
53. The court finds there is not any sufficient cause to review, vary or set aside the orders herein.
54. In the upshot, the application by the respondents is dismissed with costs to the petitioner.
55. In light thereof, the court directs the petition to be fast-tracked. Directions on the hearing of the petition shall be accordingly issued by the court.



**Conclusions and orders.**

56. For the reasons stated above, the court makes the following findings and determinations;
- i. The Notice of Motion dated 21/11/ 2022 lacks merit and it is hereby dismissed;
  - ii. Granted the result of this decision and the circumstances of this case, each party shall bear its costs of the application herein.
57. Orders Accordingly.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 19<sup>TH</sup> DAY OF JULY, 2023.**

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**F.GIKONYO**  
**JUDGE**

