



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. E051 OF 2021

CHARLES KIPKIRUI NGETICH.....APPLICANT/PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS...2ND RESPONDENT

RULING

1. The Applicant/Petitioner, Charles Kipkirui Ngetich, by way of a notice of motion application brought under certificate of urgency on 11th February, 2021 seek orders as follows:

a) This application be certified urgent and be heard ex-parte in the first instance.

b) Pending the hearing and determination of this application *inter partes*, a conservatory order do issue restraining the Respondents, their agents or any other person acting on their instructions howsoever from arresting, arraigning and prosecuting the Petitioner on account of his involvement as a Land Registration Officer in the registration and or documentation of interest over a property known as Kinango/Tsunza Settlement Scheme/18 and other sub-divisions in respect of the same property to which he participated in their conveyance in his official capacity.

c) Pending the hearing and determination of the petition herein, a conservatory order do issue restraining the Respondents, their agents or any other person acting on their instructions howsoever from arresting, arraigning and prosecuting the Petitioner on account of his involvement as a Land Registration Officer in the registration and or documentation of interest over the property known as Kinango/Tsunza Settlement Scheme/18 and other sub-divisions in respect of the same property to which he participated in their conveyance in his official capacity.

d) The costs of this application do abide the outcome of the petition.

2. The Applicant's case is that on 27th October, 2014 he received a letter of consent dated 17th September, 2014, a valuation report, and a mutation form from the District Surveyor in respect of the property known as Kinango/Tsunza Settlement Scheme/18 ("the property") which was being subdivided into two parcels namely Kinango/Tsunza Settlement Scheme/507 and Kinango/Tsunza Settlement Scheme/508 in favour of Saidi Salim Kodi and Rashid Piga Piga.

3. The Applicant avers that in his ordinary course of business and as per his job description he effected the registration of the sub-division by closing the register relating to the property and opening new registers in respect of the new parcels. The Applicant deposes that in carrying out his job he acted in good faith and verified that the due process was followed and that all the necessary documents were supplied.

4. It is the Applicant's averment that sometime after opening the new registers he became aware of a dispute in respect of the property by a party claiming an interest over it. He states that he accordingly invoked Section 79(2) of the Land Registration Act, 2012 to cancel the new registers until the complaint was addressed.

5. The Applicant claims that he was never summoned or visited by the Director of Public Prosecutions (1st Respondent) and the Director of NCriminal Investigations (2nd Respondent) regarding investigations into the sub-division and opening of the new registries. He further avers that the respondents have not recorded the statement of the District Surveyor who did the mutation for the sub-division of the property.

6. It is the Applicant's deposition that arresting and prosecuting him for acts done in his official capacity and in good faith without conducting proper investigations and according an opportunity to all the relevant parties involved in the chain of the process to record their statements will violate Article 236 of the Constitution and Section 14(5) of the Land Registration Act, 2012.

7. It is the Applicant's averment that there is a real risk that he may be apprehended by the 2nd Respondent and prosecuted by the 1st Respondent in violation of the law and to his detriment and unless the orders sought are granted he stands to suffer substantial and irreparable loss.

8. The Applicant swore an affidavit on 11th February, 2021 in support of the application.

9. The respondents, despite service, did not file a response to the application.

10. The Applicant also supported his application through written submissions dated 19th February, 2021.

11. The Applicant submits that in an application brought under Article 22 of the Constitution, the Court has jurisdiction to grant conservatory orders under Article 23(3)(c). This statement is supported by reference to the case of **Centre for Rights Education and Awareness (CREAW) & 7 other v Attorney-General [2011] eKLR**.

12. The Applicant further submits that his rights to dignity, and to hold and continue holding office, and security and freedom of movement are threatened with infringement by his intended arrest and prosecution for acting in his official capacity to close the register of the property and open new registers in respect of the new parcels. According to the Applicant, the threatened arrest and prosecution is being carried out before proper investigations are conducted by the 2nd Respondent.

13. The Applicant claims that he is in real danger of being arrested and prosecuted for discharging his official duties as per his job description as a land registration officer and he runs the risk of being removed from office and his remuneration affected.

14. It is the Applicant's case that there exists a real danger to him and to his career in the public service in general as he stands to be interdicted from office unjustifiably. According to the Applicant, he suffers imminent danger of violation of his rights and deserves orders as was held in **Martin Nyaga Wambora v Speaker of the County of Assembly of Embu & 3 others [2014] eKLR**.

15. Additionally, reliance is placed on the case of **Hasit Shah & 2 others v Attorney General & another [2012] eKLR** where the Court stopped the arrest and prosecution of the applicants in respect of a land conveyance pending the hearing and determination of the petition.

16. The Applicant submits that if conservatory orders are not granted the respondents will proceed to arrest and prosecute him thereby infringing his safeguarded rights and fundamental freedoms.

17. The Applicant additionally cites the decision in **Richard Mungai Kagiri suing as a member and in the interest of Kiambu Liquor Welfare Group v County Government of Kiambu & 2 others [2018] eKLR** in support of his application.

18. The issue to be determined herein is whether the Applicant has met the conditions for grant of conservatory orders.

19. Courts have postulated on applications for conservatory orders and the requisite conditions to be met by those who seek them. In the case of **V/D Berg Roses Kenya Limited & another v Attorney General & 2 others [2012] eKLR** it was stated 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. The applicant must further demonstrate that unless the conservatory order is granted there is real danger which may be prejudicial to him.”

20. Additionally, I rely on the decision in **Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General [2011] eKLR** where it was held 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.”

21. The Applicant claims that he was “reliably informed” of his imminent arrest but in the same breath admit that he has not been summoned or visited by the respondents regarding the investigations, if any, on how the sub-division of the property and the opening of the new registers came to be. Moreover, the Applicant admits that the respondents have not recorded the statement of the District Surveyor who did the mutation for the property.

22. The Applicant has therefore not demonstrated in any concrete way that the respondents seek to arrest and prosecute him as he admits that they have not even approached him for a statement on the property in question. Therefore, this Court has no reason to believe that the respondents have any interest in pursuing the Applicant at this particular moment.

23. Moreover, the Applicant claims that in opening the new registers for the new parcels of the sub-divided property, he followed all the legal procedures required of him. Further, that upon discovering the complaint about the property, he cancelled the newly created registers awaiting the determination of the complaint. The Applicant has averred that he followed the procedure required of him under the Land Registration Act, 2012. He therefore has nothing to fear.

24. I am therefore not convinced that the Applicant has established that the respondents seek to arrest and prosecute him. Furthermore, I do not believe that the Applicant is in danger of suffering any prejudice if conservatory orders are not granted.

25. Additionally, it must be remembered that the respondents are creatures of the Constitution and the laws of this country. They have mandates to execute. Unless it is demonstrated that they have overstepped their boundaries, conservatory orders will not issue. Issuance of undeserved orders will result in stoppage and delay of the functions of the respondents to the detriment of the public good. In this case the Applicant has not shown that the respondents have violated the Constitution.

26. I, therefore, decline to grant the Applicant conservatory orders as sought in the application dated 11th February, 2021. The Applicant's application is therefore dismissed. Costs for the application shall abide the outcome of the petition.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 4TH DAY OF MARCH, 2021.

W. KORIR,

JUDGE OF THE HIGH COURT