



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELC PETITION NO. 2 OF 2020

IN THE MATTER OF ARTICLES 10, 20, 21, 22 23, 40, 43 47, 159 (2), 162(2) (b)

AND 165 OF THE CONSTITUTION OF KENYA, 2010

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL
FREEDOMS UNDER ARTICLES 28, 40, 43 &47 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010 (PROTECTION
OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

PAMELLAH KEMUNTO

KEENGWE MAINA.....APPLICANT/PETITIONER

VERSUS

COUNTY GOVERNMENT OF KISII.....1ST RESPONDENT

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

RULING

INTRODUCTION

1. By an application dated 19th March, 2020 20th March, 2020, the Petitioner/Applicant sought conservatory orders against the 1st Respondent to bar its agents and/or servants from demolishing, further demolishing or in any other way interfering with the on-going construction works on Kisii Municipality Block 111/593 pending the hearing and determination of the Petition dated 19 March, 2020.
2. In support of the Application, the Petitioner/Applicant, averred that she had a leasehold interest over the suit property having paid all rates and rent to the 1st Respondent. She also averred that she was desirous of constructing a perimeter wall around it before she could commence actual developments thereon.
3. She further averred that she did get the necessary approvals from the 1st Respondent before commencing the construction of the Perimeter wall around the suit property.
4. It was her averments that before the said approvals were granted, the Works Officer from the 1st Respondent visited the suit property and prepared a site inspection report whereby she was required to pay development fees and charges amounting to Kshs. 37,660.
5. She averred that before she could complete the construction of the perimeter wall, the 1st Respondent through hired goons destroyed part of it.
6. It was also her averment that after meeting all the requirements set by the 1st Respondent, it was only fair that she be given an opportunity to develop and earn a livelihood from her property. She contended that the actions of the 1st Respondent were a demonstration of a culture of irrationality which required judicial intervention. She complained that she never received any information or notice that the 1st Respondent intended to demolish the perimeter wall.

7. She contended that the actions by the 1st Respondent were in gross violation or of her rights to fair administrative action guaranteed under Article 10, 47 as read with Section 3 and 4 of the Fair Administrative Actions Act, 2015, Article 50 of the Constitution and Section 72 of the Physical Planning Act, 2019 Cap 286 and her right to protection of her property guaranteed under Article 40 of the Constitution.

8. She further averred that she had an indefeasible title to the suit property and the 1st Respondent had no authority to demolish her perimeter wall without an order of the court and its action therefore amounted to breach of Article 40 and 64 of the Constitution and Section 26 of The Land Registration Act of 2012.

9. The 1st Respondent through the Chief Officer Department of Lands, Physical Planning and Urban Development, Nicodemus Osoro Okondo swore a Replying affidavit on 27th April 2020 in opposition to the application dated 19th March, 2020.

10. He averred that the Petition did not bear any documents to support the Petitioner's claim of ownership of suit property. He also averred the Rent Clearance Certificate attached to the affidavit of the Petitioner/Applicant; bore the names of Abel Moranga Ongwacho And Samwel Kennani Omwando as the Registered owners and not the Petitioner.

11. He further referred to the Part Development Plan of 1971 which was attached to his affidavit and marked as annexure 'N00I' and stated that the area where the Petitioner/Applicant claimed to own land was and still is an open public space and the area has not been re-planned.

12. It was also his averment that the document labeled as PPA II attached by the Petitioner and marked as annexure 'PKK 2' in her efforts to prove her ownership of the property was a forgery and the same was under investigation by the police since it was never issued by the Director of Physical Planning, Kisii County.

13. He averred that notwithstanding the illegality of annexure PKK 2, the Petitioner did not meet the requirements enlisted in the Trust Land Act for her to claim acquisition of Government land.

14. It was the contention of the 1st Respondent that the Petitioner/Applicant in his application did not meet the requirements for grant of conservatory orders set out in the celebrated case of **Giella Vs Casman Brown** and thus his application should be dismissed with costs.

15. In response to the averments by the Respondent, the Petitioner/Applicant sought and was granted leave to file a Further Affidavit. He did file a Further Affidavit dated 7th December, 2020 sworn by one, Abel Moranga Ongwacho.

16. By consent of the parties, the court on 3rd November, 2020 directed that the application dated 19th March, 2020 be canvassed by way of written submissions. The Petitioners filed written submissions on 16th December, 2020 while the 1st Respondent filed its written submissions on 15th March, 2021.

APPLICANT'S SUBMISSIONS

17. Learned Counsel for the Applicant, in his submission submitted extensively on the single issue of whether or not the Petitioner had satisfied the criteria to grant of conservatory orders. Counsel underscored the three requirements for grant of temporary injunction orders established in the locus classicus case of **Giella vs Casman Brown** which are as follows:-

- a) Whether a prima facie case with a probability of success has been established by the Applicant.
- b) whether the Applicant was likely to suffer irreparable injury which could not adequately be compensated by an award of damages.
- c) if the court is in doubt, it will decide an application on the balance of convenience.

18. On the issue of *whether the Petitioner had established a prima facie case with probability of success*, learned counsel submitted that the Petitioner/Applicant has established a prima facie case with chances of success since she demonstrated that she was the registered proprietor of the suit property.

19. Counsel argued that the Petitioner/Applicant had also demonstrated that she had a prima facie case since she had shown by way of evidence that she obtained all the relevant approvals from the 1st Respondent to construct a fence round the suit property.

20. It was counsel's submission that the Petitioner/Applicant had also been able to show that she had a prima facie case given that she demonstrated through photographs that the 1st Respondent demolished a section of the fence without any notice being issued before the demolition was carried out.

21. The Counsel further submitted that the Petitioner/Applicant had in her application shown that her rights under Articles 10, 47 and 50 of the Constitution and Section 72 of the Physical Planning Act, 2019 had been violated. It was also the learned counsel's contention that the Applicant had demonstrated that she was being threatened with more violations, hence the need for this court's protection to preserve the suit property and development thereon.

22. On the issue of whether the Petitioner is likely to suffer irreparable loss which cannot be compensated by way of damages if the conservatory orders are not issued in her favor, the counsel submitted that since the Petitioner/Applicant had established that she had a prima facie case with probability of success, she is likely to suffer injury which may not be repaired by damages, if an injunction is not granted in her favor.

23. He also argued that the substratum of the Petition stands to be rendered nugatory if conservatory orders are not granted. Counsel further argued that the Petitioner/Applicant has established that the 1st Respondent has caused a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights, to which the Petitioner/Applicant is rightly entitled. He added that the Petitioner has suffered much loss and the Respondent will continue causing her more loss and injury which cannot be repaired by damages.

24. On the final condition, of balance of convenience, it was the Petitioner's submission that the Court should issue an injunction where the balance of convenience is in favor of the Petitioner and not where the balance is in favor of the Respondent.

25. he Learned counsel further submitted that the Applicant/Petitioner will be highly inconvenienced more than the Respondent if an injunction was not granted since she established a prima facie case against the Defendant and thus urged the court to find that the balance of inconvenience tilts in favor of the Petitioner and allow the application with costs to the Petitioner.

26. He relied on the cases of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR**, **Panari Enterprises Limited v Lijoodi & 2 others (2014) eKLR**, **Abigail Ayako v Kenyatta International Convention Centre [2018] eKLR**, **Okiya Omtata Okiiti vs The Hon Attorney General & Another, Constitutional Petition No. 385 of 2019**, **Kenya Airways Plc v Kenya Airline Pilots [2020] eKLR**, and **Dinah Jemelly Kirwa v National Hospital Insurance Fund Board of Management** and urged the court to consider them in its determination.

RESPONDENT'S SUBMISSIONS

27. Learned counsel for the Respondent on his part submitted on the three requirements for grant of the orders of injunction.

28. On the requirement that the Applicant establishes a prima facie case, counsel submitted that the Petitioner/Applicant did not establish a prima facie case with high chances of success. He submitted that the Petitioner/ Applicant did not demonstrate in any way that she is in occupation of the suit property.

29. Counsel further submitted that the application and the Petition were bare without any documents to support the Petitioner's claim to ownership of the of the suit property.

30. Counsel underscored the fact that the Petitioner failed to demonstrate to the court that she indeed had developments on the suit property. It was his submission that the Petitioner/ Applicant's evidence specifically annexure PKK3 only showed that she was attempting to enter the suit property by erecting a fence around it.

31. Counsel argued that the Petitioner's Annexure PRK2 she relied on to prove her ownership of the property was issued on 13th December, 2019 after having been approved on diverse dates in December 2012. Counsel argued the difference between the issuance and the approval demonstrated that the document could only be a forgery.

32. Counsel referred to annexure PPK2 especially condition 2 which states "do not encroach on public and private property" and submitted that the Petitioner/Applicant did not attempt to state in her affidavit whether she did due diligence to know if indeed the parcel she was fencing was her land.

33. It was counsel's submission that the Petitioner's/Applicant's annexure PKK 4 (the clearance certificate for rates, ground rent and other charges) clearly showed that the suit property was registered in the names of Samwel Kenani O. & Abel Morang'a and not the Petitioner/Applicant. He contended that there was no explanation by the Petitioner/Applicant on the glaring discrepancy.

34. Counsel argued that 1st Respondent had demonstrated by way of an authenticated Part Development Plan of 1971 that suit property was and is still an open public space and has never been re-planned. He argued that 1st Respondent had clearly shown by way of annexure (NOO2) that the alleged PPA II (PKK 2) if at all it existed required re-planning before the Petitioner/Applicant could commence any development which was never carried out. He therefore argued that the PKK 2 could only be a forgery.

35. Counsel contended that by dint of the provisions the 4th schedule the constitution of Kenya 2010, the 1st Respondent is in charge of the Planning Development and protection of open spaces within the county including the suit property. He contended that this Responsibility has squarely lied with the 1st Respondent since 1971 when the area was designated as a public open space.

36. On the issue of Irreparable Loss, counsel submitted that in as much the Petitioner/Applicant alleged to have a Certificate of Lease over the suit property, she did not have any evidence to show that she was in occupation of the same. He contended that it was the Petitioner/Applicant's own admission through her annexures especially PKK3 that she was actually attempting to fence the suit property using iron sheets before she could commence some developments thereon hence she did not have possession of the suit property.

37. Counsel submitted that the 1st Respondent had clearly demonstrated through annexure NOO1 (Part Development Plan of 1971) that the entire area is still a public open space which has never been converted for private acquisition and thus it is still the 1st Respondent who has custody of the same.

38. He therefore concluded that since it was evident that the Petitioner/Applicant has never been in possession of the suit property, it was clear that no injury or damages would be occasioned to her if injunctive orders are not granted.

39. On the issue of balance of convenience, the counsel pointed the court to one of the Applicant's prayers where she sought a conservatory order against the 1st Respondent "barring its agents and or servants from demolishing, further demolishing or in any other way interfering

with the ongoing construction work on Kisii Municipality Block III 593 pending the hearing and determination of this application. Counsel submitted that despite seeking grant of such a prayer against the 1st Respondent, the Petitioner/ Applicant did not file any evidence by way of photographs to show any kind of construction that was going on in the place she claims to own land. He therefore contended that the Petitioner/ Applicant only sought the injunctive orders as a way of entering and grabbing public land through the backdoor.

40. He argued that the balance of convenience obviously tilted in favor of the Respondent since it was still in possession of the land in question.

41. Counsel urged the court to be persuaded by the decision in case of **Elizabeth Mutoni Hussfin -Vs Vikesh Jinitshah [2018] eKLR**.

42. With regard to the Petitioner's Further Affidavit sworn by one Abel Moranga Ongwacho on 7th December, 2020., counsel submitted that the said Abel Morang'a Ongwacho and Samuel Kenani Omwando were not parties to the proceedings and therefore the 1st Respondent was unable to respond to the depositions in the said Affidavit.

43. Counsel also submitted that the said Abel Morang'a Ongwacho did not file any authority to prove that he had authority from the Petitioner to act on her behalf in the proceedings and that if such authority existed, the 1st Respondent was not aware nor was he served with same.

44. Counsel further reiterated that the authority which the said Abel Morang'a Ongwacho annexed to his further affidavit is purported to have been given by one Samuel Kenani Omwando who was also not a party to the proceedings.

45. Counsel thus urged the court to strike out and expunge the affidavit from the proceedings of the case since it was a stray document which is contrary to the provisions of Order 1 Rule 13 of the Civil Procedure Rules.

46. In conclusion counsel submitted that the 1st Respondent had put up a strong case against the grant of injunctive orders and thus prayed that the Notice of Motion application dated 19th March, 2020 be dismissed with costs to the 1st Respondent.

ISSUES FOR DETERMINATION

47. Having considered the Notice of Motion, affidavits and rival submissions filed by the parties, I deduce only one issue for determination which is whether the Applicant in his application met the requirement for grant of conservatory orders.

ANALYSIS AND DETERMINATION

48. Since at this juncture the Applicant is seeking injunctive orders, the court is only called upon to determine whether the Applicant is deserving of injunctive orders based on the usual criteria laid down in the case of **Giella -Vs- Casman Brown & Co. Ltd 1973 EA 358**. The said requirements are;

a) the Applicant must show a prima facie case with a probability of success.

b) an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award of damages.

c) if the Court is in doubt, it will decide an application on the balance of convenience.

49. The first question I therefore must answer is whether the Petitioner has established a *prima facie* case. A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR** as follows:

“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

50. There is no doubt that the Applicant herein is seeking injunctive orders in respect of KISII Municipality Block 111/593 on allegation that the said suit land belongs to her. She attached a Certificate of Lease in her name which was issued to her on 5th November 2019.

51. However, by dint of the Part Development Plan of 1971 marked 'N001', the 1st Respondent averred that that suit property was and still is an open public space. The 1st Respondent further averred the 4th schedule of the constitution placed it in charge of the Planning Development and the protection of open public spaces from unscrupulous individuals with ill intent to deprive the public from using the same.

52. The Respondent also averred that the suit property has never been converted for private acquisition and thus it is still in custody of the 1st Respondent.

53. It is clear from the argument of the 1st Respondent that there is need for a determination as to whether the Applicant's Certificate of Lease is genuine or not. Secondly, it will be necessary to determine whether the suit property is still a public open space under the control of the 1st Respondent. These issues cannot be determined at this juncture without calling evidence at the main trial.

54. However, it is evident that the only thing the Petitioner has ever done is an attempt to erect a wall made of iron sheets around the suit property which wall she alleges has been demolished by the 1st Respondent. It also evident from the Petitioner's own averment's that the suit property was once a public open space which she claimed to have successfully acquired from the 1st Respondent in 2019. However, the 1st Respondent has challenged the authenticity of the Petitioner's documents and pointed out glaring gaps in them. On the face of it therefore, the 1st Respondent's control of the suit property is apparent given that the property is an open public space.

55. From the forgoing therefore, the Court finds that even if the Petitioner/Applicant has a Certificate of Lease in her favor over the suit property, the 1st Respondent has control over same as evidenced by the Part Development Plan of 1971 and as such, evidence has to be called at the main trial to determine whether the Petitioner's ownership is genuine and whether the 1st Respondent still retains ownership or control of the suit property.

56. For the above reasons, I am inclined to find that the Petitioner/Applicant has not established that she has a *prima-facie* case with probability of success.

57. I am persuaded by the holding in the case of **Elizabeth Muthoni Hussein v Vikesh Jinit Shah [2018] eKLR** highlighted by the learned counsel for the Respondent. The court in this case was confronted with a situation similar to the issues raised in this application wherein both parties were claiming ownership of the same parcel of and court proceeded to hold that;

*Therefore, the court finds that even if the **Plaintiff has a title deed in her favor over the property, the Defendant/Respondent too has a title favor over the suit property which was issued earlier and evidence has to be called at the main trial to determine which one of the title herein is genuine**" For the above reasons, the court finds that the Plaintiff Applicant has not established that she had a prima - facie case with probability of success*

58. On the second issue as to of whether the Applicant will suffer irreparable loss which cannot be adequately compensated by an award of damages, it is evident that the Plaintiff/Applicant has never been in possession of the suit property. As correctly pointed out by counsel for the Respondent, in as much the Petitioner's/Applicant alleged to have Certificate of Lease, she did not tender any evidence by way of photographs to show that she was in occupation of the suit property. In her annexures especially PKK3, the Applicant only demonstrated that she was attempting to fence the suit property using iron sheets for purposes of safeguarding the suit property before commencing development thereon. Thus, she did not have possession of the suit property. It goes without saying that there would be certainly no injury or damages that would be occasioned to her if injunctive orders are not granted.

59. The Court finds that damages alleged to have been occasioned by the 1st Respondent would adequately be compensated by damages in the event the Applicant turns out to be the successful litigant after the main trial.

60. In the case, **Wairimu Mureithi..Vs...City Council of Nairobi, Civil Appeal No.5 of 1979(1981) KLR 322**, the Court held that:-

"However strong the Plaintiff's case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them".

61. On the issue of the balance of convenience, the Court is not in doubt. However, if the court was to decide on the balance of convenience, the same would tilt in favor of maintaining the *status quo* and the *status quo* herein is that the 1st Respondent is in possession by virtue of the suit property being an open public space.

62. In the case **Virginia Edith Wambui-Vs- Joash Ochieng Ougo, Civil Appeal No.3 of 1987 (1987) eKLR**, the Court of Appeal held that: -

"The general principle which has been applied by this court is where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial".

63. I am also persuaded by the submissions of the 1st Respondent that the Petitioner's Further Affidavit sworn by one Abel Moranga Ongwacho on 7th December, 2020 having been sworn by a party who is not a party to the suit and did not demonstrate that he had authority from the petitioner to swear the same on her behalf is improperly on record and thus the same is disregarded.

CONCLUSION

64. In the final result, It is my finding the application by the Petitioner lacks merit and thus the same is dismissed with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 11TH DAY OF JUNE, 2021.

J.M ONYANGO

JUDGE