



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

PETITION No. 9 OF 2019

JOSEPH KARATINA TORRIS 1ST PETITIONER

GEOFFREY TUMANKA SANKUI 2ND PETITIONER

KOIKAI OLE MASIONTO 3RD PETITIONER

SENKEIT ENE KOOKI 4TH PETITIONER

MORIASO OLE KINDI 5TH PETITIONER

SHOKORET OLE SETABAU 6TH PETITIONER

SIMON KIPOYPOY OLE NKAI 7TH PETITIONER

MUTUTUA OLE KUYA KITUKUI 8TH PETITIONER

KUPEL ENE KAITETI 9TH PETITIONER

SIPOI OLE SIIRI 10TH PETITIONER

SITELU KITUKUI 11TH PETITIONER

LANKISA OLE MERUMU KASI 12TH PETITIONER

KAGOMBE OLE LUKUME 13TH PETITIONER

SANUA KITUKUI KUSERO 14TH PETITIONER

ISAAC LENKINA MERUMU 15TH PETITIONER

SANTITO OLE SAITABAU 16TH PETITIONER

MOYIALE OLE MULUKUK 17TH PETITIONER

RESIROKE OLE KITUKUI 18TH PETITIONER

KOSEUR OLE PARSINANTE KINDI 19TH PETITIONER

NTETE OLE KIPOLONKA 20TH PETITIONER

YIATUM OLE MAISIDO 21ST PETITIONER

DICKSON YIALE SITEI 22ND PETITIONER

TETO OLE SALATON 23RD PETITIONER
LENGUTUTI OLE LESIRI 24TH PETITIONER
KASHOI OLE KILELU 25TH PETITIONER

(Suing on their own behalf and on behalf of their families and all the members of the Maasai Kitet Community living on Land Reference No. 8395 situate in Suswa Kitet)

VERSUS

THE CHIEF LAND REGISTRAR 1ST RESPONDENT
THE CABINET SECRETARY, THE MINISTRY OF LANDS,
URBAN AND PHYSICAL PLANNING 2ND RESPONDENT
THE HONOURABLE ATTORNEY GENERAL 3RD RESPONDENT
THE NATIONAL LAND COMMISSION 4TH RESPONDENT
KEDONG NG'OMBE RANCH LIMITED 5TH RESPONDENT
SELBY FALLS DEVELOPMENT COMPANY LIMITED 6TH RESPONDENT
MBUKOE INVESTMENTS 7TH RESPONDENT

RULING

1. This ruling is in respect of petitioners' Notice of Motion dated 14th February 2019. The following orders are sought in the application:

A. ...

B. ...

C. THAT pending the hearing and determination of the Petition herein this Honourable Court be pleased to grant an Order restraining the 1st, 2nd and 4th Respondents, their agents, servants, employees and/ or anyone acting under their instructions respectively from registering any title document, transfer, alienate, lease and/ or charge instrument in favour of any person, disposing of and/ or howsoever dealing with all that property known LR. No. 8395.

D. THAT costs of this application be provided for

2. The application is supported by an affidavit sworn by Joseph Karatina Torris. He deposed that Kitet Maasai Community comprises 25 families who are the beneficial ancestral owners of the parcel of land known as L.R. No. 8395. That their ancestors settled on the property during pre-colonial and colonial times and that currently the petitioners and their families fully occupy the land and use it for grazing and rearing of livestock. In addition, the petitioners have permanent structures thereon such as houses, water tanks, graves, cattle dips, churches, slaughterhouses and schools. He further deposed that the petitioners have learnt that L.R. No. 8395 was subdivided into 22 parcels being parcel numbers 8395/2 to 8395/23 in the year 2006. That the petitioners were not made aware of the subdivisions despite the fact that they have been in continuous occupation of the land "since time immemorial". He further stated that the petitioners have tried to seek redress from the respondents and even the national assembly but without success. That they also learnt that an allotment letter dated 8th July 1998 was issued to the 6th and 7th respondents in respect of L.R. No. 8395 and that the 5th respondent had lodged a lease instrument with the 1st respondent for registration of a lease for a term of 99 years commencing from 1st July 1998.

3. The 1st to 4th respondents did not file any response to the petition. However, counsel appearing on their behalf urged the court in oral submissions to maintain the status quo and added that the 1st to 4th respondents will give evidence at the hearing of the petition. He did not elaborate what, according to him, the status quo is.

4. The 5th respondent responded to the application through a replying affidavit sworn by its chairman Elijah Kibirir Ngaruiya. He deposed that the 5th respondent is the registered proprietor of L.R. No. 8395 and annexed a copy of a certificate of title dated 25th October 2018. He added that the Chief Land Registrar had confirmed the 5th respondent's ownership through letter dated 29th May 2019 and that as such, the 5th respondent is the indefeasible owner under sections 24, 25 and 26 of the Land Registration Act. He further deposed that the applicants have not resided on the suit property and that the national identity cards which they have annexed show that they are imposters.

5. Although served, the 6th and 7th respondents neither responded to the application nor attended court.

6. The applicants argued in their submissions that they are rightful owners of the suit land by virtue of it being their ancestral land and them having lived on it since time immemorial. Citing the case of **Republic v National Land Commission Ex-Parte Cecilia Chepkoech Leting & 3 others [2016] eKLR**, they argued that the 5th to 7th respondents' claim to the suit land is tainted by illegality and unprocedurality and that unless the orders sought are granted, they will suffer irreparable loss. On its part, the 5th respondent argued among others that the application is overtaken by events since title has already been issued in its favour.

7. I have considered the application, the affidavits filed as well as the submissions. The applicants seek a conservatory order. The Supreme Court stated in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** 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.

8. To succeed in their quest, the applicants must establish a *prima facie* case with a likelihood of success and also demonstrate the prejudice to be suffered if orders are not granted. As Musinga, J (as he then was) stated in **Centre for Rights Education and Awareness (CREAW) & 7 Others v Attorney General [2011] eKLR**:

... 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.

9. In **Obuya Bagaka v Kenya School of Government [2019] eKLR**, the Court of Appeal noted that there is more to be considered beyond the test in **Giella v Cassman Brown**. The court stated:

[24] There is, however, more to consider beyond the criteria in *Giella v Cassman Brown* when considering an application for conservatory orders. Applying the principles set by the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* (supra), considerations such as public interest should therefore be borne in mind by the court when considering whether to grant relief in the form of a conservatory order, whether at an interlocutory stage of the proceedings or upon full hearing.

10. To establish a *prima facie* case, the applicants need to show a right and a threat to that right. The Court of Appeal stated as follows in **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR**:

... The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...

11. The applicants claim that they have been in the suit property since pre-colonial times and that their claim is based on community land rights. A perusal of the documents exhibited by the applicants reveals that the suit land is located in Suswa, Nakuru County. Among the documents exhibited are copies of national identity cards of some of the applicants all of which indicated district of birth as Kajiado or Narok. None of them appears to have been born in Nakuru or even the nearby Naivasha districts. The applicants' claim that they have been on the suit property since pre-colonial times and that it is ancestral land requires cogent evidence. Perhaps more evidence will be availed at trial to shed more light on this contention. The affidavit evidence presented has not shown that the applicants have a clear and unmistakable right to the suit property.

12. On the other hand, the 5th respondent has demonstrated that it is the registered proprietor of the suit property. As such it is entitled to the privileges and benefits accorded by **Section 24** of the **Land Registration Act**. Under **Section 26** of the Act, the court is bound to accept the 5th respondent's certificate of title as conclusive evidence of proprietorship. The said sections provide as follows:

24. Interest conferred by registration

Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute

and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

13. Thus, a challenge on the 5th respondent's title will need to satisfy the requirements of **section 26** of the **Land Registration Act**. That of course is a matter that will be dealt with by the trial court. As matters stand now, the 5th respondent has title and I have not seen evidence that supports the applicants' claim that they have been on the suit property since pre-colonial times and that it is ancestral land. I am not persuaded that the applicants have demonstrated a *prima facie* case.

14. That being so, Notice of Motion dated 14th February 2019 is dismissed with costs to the 5th respondent.

Dated, signed and delivered in open court at Nakuru this 5th day of February 2020.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Hashi for the petitioners/applicants

No appearance for the 1st to 4th respondents

Mr Ocheing for the 5th respondent

No appearance for the 6th & 7th respondents

Court Assistants: Beatrice & Lotkomoi