



REPUBLIC OF KENYA

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IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 128 OF 2016

(FORMERLY PETITION NO. 2 OF 2015)

PHILIP KIPCHIRCHIR.....PETITIONER

-VS-

CABINET SECRETARY FOR LANDS

THE LAND REGISTRAR

DISTRICT LAND REGISTRAR, MOMBASA

DIRECTOR OF SURVEYS

DIRECTOR OF PHYSICAL PLANNING

ATTORNEY GENERAL.....RESPONDENTS

RULING

1. This ruling is in respect of the Notice of Motion dated 31st December, 2014 which was filed by the Petitioner together with the petition. The application was canvassed by way of written submissions. In his submissions dated 8th November, 2019 and filed on even date, the Petitioner abandoned prayers 1, 7, 8 and 9 and sought for the following orders.

a. That this honourable court do grant the petitioner a conservatory order staying all and any registration of any contemplated dealings, to wit, all surveys, adjudications, allocations, allotments, transfers, charges, cautions, transmissions by the respondents by themselves, their officers, employees, servants and/or agents in respect of the petitioner's parcels of land known as LR NO. MN/1/6748/(CR.2165) pending the hearing and determination of this application inter-partes and after the inter-partes hearing, pending the hearing and determination of the petition filed herein.

b. That this honourable court do grant the petitioner a conservatory order staying all and registration of any contemplated dealings, to wit all surveys, adjudications, allocations, allotments, transfers, charges, cautions, transmissions by the respondents by themselves their officers, employees, servants and/or agents or otherwise howsoever in respect of the parcels of land known as plot Nos.962, 940, 946, 945/1398, 987, 989, 990, 955, 994, 996, 997, 993, 992, 991, 999/1016, 1015/1000, 1013/1001, 1012/1002, 1011/1001, 1029/1010, 1030/1017, 1031/1018, 1019/1032, 1004/997, 1026/1004, 1027/1007, 958, 1021, 985, 1003, 1005, 949/1038, 104043, 1037/936, 937/1047, 933/1048, 932/1049, 1056, 1035, 1020, 1034, 1024/1033, 935/1036, 1053/913, 1052/921, 1051, 1062, 1063, 1056, 1156, 1197, 922/1067, 923, 925/1079, 107/927, 926, 930, 937, 975, 970, 973, 1002, 965, 963, 977, 964, 979, 978, 971, 972, 980, 973, 976, 974, 998, 952, 983, 981, 949134, 989, 982, 97982, 975, 913, 949, 916/1197, 1077, 9115, 935, 948, 987, 984, 988, 986, 774, 947/1400 at the Ziwa la Ng'ombe Settlement Scheme.

c. That a mandatory injunction before the hearing and determination of this application and the petition filed herein compelling the respondents and any person subsequently holding those offices to gather all the Kalamazoo registers, folders, copies of titles, parcel files and all other documents and to deliver the Kalamazoos, the registers, the folders, copies of titles, parcel files and such other documents relating to the parcel of land known as LR NO. MN/1/6748(CR. 2165) howsoever registered and/or described and deliver them to the Deputy Registrar of the High Court of Kenya Mombasa forthwith, to be kept and maintained in such secure custody as the court may direct.

d. That a mandatory injunction be issued before the hearing and determination of this application and the petition filed

herein compelling the present District Land Registrar Mombasa or any subsequent District Land Registrar Mombasa to gather all the Kalamazoos, registers, folders, copies of titles, parcel files and all other documents and such other documents and all documents relating to the plot nos. 962, 940, 946, 945/1398, 987, 989, 990, 955, 994, 996, 997, 993, 992, 991, 999/1016, 1015/1000, 1013/1001, 1012/1002, 1011/1001, 1029/1010, 1030/1017, 1031/1018, 1019/1032, 1004/997, 1026/1004, 1027/1007, 958, 1021, 985, 1003, 1005, 949/1038, 104043, 1037/936, 937/1047, 933/1048, 932/1049, 1056, 1035, 1020, 1034, 1024/1033, 935/1036, 1053/913, 1052/921, 1051, 1062, 1063, 1056, 1156, 1197, 922/1067, 923, 925/1079, 107/927, 926, 930, 937, 975, 970, 973, 1002, 965, 963, 977, 964, 979, 978, 971, 972, 980, 973, 976, 974, 998, 952, 983, 981, 949134, 989, 982, 97982, 975, 913, 949, 916/1197, 1077, 9115, 935, 948, 987, 984, 988, 986, 774, 947/1400 at the Ziwa la Ng'ombe Settlement Scheme.

e. That the costs of this application be provided for.

2. The case of the petitioner as elaborated in the petition is that he is the registered owner and entitled to absolute possession of the parcel of land known as LR. NO. MN/1/6748 (CR.2165). That the property is registered under and governed by the provisions of the Registration of Titles Act (now repealed) for a term of 99 years from 1988. It is averred that on a date unknown to the petitioner, the respondents and their officers unlawfully created a settlement scheme which covers the petitioner's land and have since sub-divided the land and issued letters of allocation in breach of the constitution of Kenya and the Land Act, 2012. The petitioner averred that since the issuance of the said allotment letters, strangers have trespassed on the said piece of land and have thereafter cleared bushes, erected beacons, put up structures and dealt with the land in a manner that is offensive and injurious to the petitioner. The petitioner states that as the legal owner of the suit property, he has been denied access to the land and as such cannot develop it. It is contended that unless the application herein is heard expeditiously, the respondents, their servants, agents and the said strangers may dispose, lease and/or deal with the suit land in a manner that infringes the proprietary interest of the petitioner. It is further contended that there is real threat and/or danger that the respondents may fraudulently transfer the suit property to third parties who may be unaware of the alleged fraud. It is the petitioner's case that unless the orders sought are granted, he will suffer substantial financial loss and interference with the title and possession of his property by the respondents.

3. The application is supported by the affidavit of Philip Kipchirchir, the petitioner filed on 6th January, 2015. He has annexed a copy of the certificate of lease and deed plan as well as a copy of the map of Ziwa la Ng'ombe Settlement Scheme. He deposed that he acquired proprietary rights over the property in 1988 through a proper and lawful grant from the government of Kenya and the Respondents had no powers under the law to demand the surrender of the suit property and or to sub-divide the same, issue letters of allotment or title deeds to any person over the same without following due process as provided under the constitution of Kenya 2010 and the Land Act, 2012. The petitioner averred that by virtue of the use of non-existent powers to revoke the titles to his property, the illegal and unconstitutional allocations, issuance of illegal titles and subdivisions and invasion of the suit property with the help and active participation of state agents, he is reasonably apprehensive that the registers, folders, Kalamazoos, parcel files and all other documents relating to the titles described above together with subdivisions thereto as well as the petitioners properties, will be destroyed, altered, concealed or otherwise criminally and fraudulently dealt with before the determination of the petition, hence this application.

4. The petitioner filed a further affidavit sworn by Bwire Okano advocate on 6th May, 2016 in which he has annexed a copy of a letter dated 18th February, 2015 to the Land Registrar, Mombasa requesting for registers and copies of titles of all the parcels of land forming the subject matter of this petition and copies of applications for official searches at the Mombasa District Land Registry. He has deposed that the said letter elicited no response and the applications for official searches were equally declined without comments. It is averred that in the absence of an express order directing the Registrar of Titles to provide in court copies of Kalamazoo registers, the petitioner cannot obtain information on the persons who were allocated his property.

5. The respondents have opposed the application through grounds of oppositions dated 21st November, 2016 and the replying affidavit of Sammy Arome Mchombo, the County Land Adjudication and Settlement Officer, Mombasa sworn on 22nd July, 2020. He has deposed that the orders being sought are directed to the wrong parties as the respondents herein are not the ones on the ground, the suit property herein. That the petitioner ought to have enjoined the concerned parties who are on the ground and obtain orders against them preferably through a main suit where both parties produce their evidence in court. He deposed that the Scheme Number 793 Ziwa La Ng'ombe being LR. NO MN/1/464/R measuring 78 Ha, the suit property herein, is part of the land preserved for squatter settlement and slum upgrading program within Mombasa County. He has contended that the government followed the right procedure and channel in preserving the land and there was nothing whatsoever that indicated that the suit property had an existing owner holding its title. He has annexed minutes/reports taken on different dates by the committees as extracted from their records. He deposed that the scheme is already surveyed and letters of Allotment issued to the beneficiaries most of whom already have been issued with titles. He has annexed list of the beneficiaries. He has deposed that records from survey office state that PARCEL NO.6748/I MN is a result of new grant by the Commissioner of Lands in the year 1988 and its survey was authenticated in the year 1990. That Ziwa la Ng'ombe Scheme was planned and surveyed as per existing human settlement. That the land had been predominantly a slum before and during the settlement exercise. That the petitioner herein was not present on the ground at the time of creating the scheme. He has deposed that the PDP of the suit property was prepared and approved on the 14th December, 2002 which thereafter resulted to the issuance of letters of offer in 2002 and the petitioner did not raise any objection to the approval of the PDP as required. Further, that during verification of the squatters in 2013, claims were recorded and the petitioner was not on the ground to record his interest or to raise any concern on his alleged ownership of the suit property. That survey and resultant parcels for the scheme appear to have included Parcel No.6748 as per the Registry Index Maps published in 2013 upon conclusion and titling of the scheme. However, that there was no objection whatsoever from the petitioner or any other party specifically to PLOT 6748 was raised at that time during the settlement of the scheme. He has annexed copies of the maps. He has contended that it is not clear how the petitioner was allocated the suit property herein that had squatters already living in it. That the petitioner obtained a title over land which already had individuals settled on it. He has contended that the fact that the petitioner did not raise any concerns during the whole titling only indicate that the suit herein is an afterthought and has been brought way after the settlement had been established and individuals already living on the land. He has further contended that the concerned Government offices followed the right process and that any errors ought to have been raised during the adjudication and settlement process.

6. The petitioner submitted that it is not in dispute that he is the registered owner of the suit property known as LR NO. MN/1/6748 (CR. 2165) and was issued with title on 24th July 1991 under the provisions of the Registration of Titles Act (now repealed) over the suit property for a term of 99 years from 1.8.1988. That the said title has remained in the petitioner's custody and possession and that there has never been challenges lodged against the petitioner's title, and as such the petitioner remains the duly registered proprietor of the suit property. In urging

the court to grant conservatory orders, the petitioner submitted that being the registered owner of the suit property, his right to use and enjoy the suit property was violated when the respondent unlawfully acquired his property by creating a settlement scheme over the said property and subsequently issuing allotment letters and titles to third parties without following the due process and further without compensation. That by so doing, the respondents effectively dispossessed the petitioner of his property in breach of the provisions of Article 40 (3) of the Constitution that no person shall be deprived of his property of any description unless the acquisition is for a public use and subject to prompt payment in full of just compensation. The petitioner submitted that he has demonstrated that he was deprived of the use and enjoyment of the suit property on account of the unlawful actions of the respondents, hence this case merits issuance of conservatory orders as prayed. The petitioner's counsel relied on the case of **Kenya Association of Manufacturers and 2 others –v- Cabinet Secretary- Ministry of Environment and Natural Resources & 3 others (2017)eKLR** where the judge referred to the Supreme Court decision in **Gatirau Peter Munya –v- Dickson Mwenda & 2 Others (2015)eKLR** where it was held that:

“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 applicants 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.”

7. The petitioner further submitted that he has established special circumstances in view of the peculiar nature of this matter and the actions of the respondents to warrant the issuance of mandatory injunction at this juncture. The petitioner relied on the High Court case of **Robai Kadili Agufa & Another –v- Kenya Power & Lighting Co. Ltd (2015)eKLR** where the court stated as follows in regard to mandatory injunctions:

“The considerations for granting interlocutory mandatory injunctions were well stated in the case of Kenya Breweries Ltd & Another –v- Washington. O. Okeyo (2002) eKLR where the court of appeal said:

“The test whether to grant a mandatory injunction or not is correctly stated in Vol 24 Halsbury’s Laws of England 4th Edition Paragraph 948 which read: -

‘A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a match on the plaintiffs....a mandatory injunction will be granted on an interlocutory application. ’

The court of appeal quoted with approval an English decision in the case of Locabail International Finance Ltd- vs- Agro export and Others (1986) I ALL ER 901 where it was stated:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly be granted, that being a different and higher standard than was required for a prohibitory injunction. ”

In the recent case of Nation Media Group & 2 Others –v- John Harun Mwau (2014)eKLR the court of appeal said:

“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstancesA different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”

8. The petitioner argued that the persons to whom allotment letters or titles were issued remain unknown to the petitioner and his efforts to get records from the respondent have not been fruitful, and thus the petitioner has no way of knowing who was allotted or owns the particular parcels of land hived from his property without being granted access to the records held by the respondents. In addition, that the respondents having failed to release the relevant records, the petitioner submitted that this is a clear case where this court can grant a mandatory injunction to have the records brought before court for safe keeping to avoid any further dealings on the property. The petitioner contended that he is unable to enjoin the unknown persons who have trespassed on his property as he does not have the details of the offending persons. The petitioner further submitted that having failed to adhere to the law and due process of compulsory acquisition of land, and having failed to produce the records sought, and having necessitated the filing of the current application and the petition in general, the respondents should bear the costs of this application.

9. The respondents did not file any submissions despite being granted several opportunities by the court to do so.

10. I have considered the application, the affidavits in support and against, the grounds of oppositions and the submission made. I have also taken into account the authorities by counsel for the applicant in support of their position in this matter. The first question to consider is whether the applicant has met the conditions for the grant of the conservatory orders sought. The Supreme Court in the aforementioned case of **Gatirau Peter Munya –v- Dickson Mwenda Kithinji & 2 Others (supra)**, stated that conservatory orders are not linked to private party issues as the prospects of irreparable harm occurring during the pendency of a case; or ‘high probability of success’ in the applicant’s case. To my mind, the applicant seeks the assistance of this court to stop the respondents from carrying out their obligations under the law in

favour of some unknown persons who are not parties to this case. The law, as I understand it, is that in considering an application for conservatory orders, the court is not called upon and is indeed not required to make any definitive finding either of fact or law as that is the province of the court that will ultimately hear the petition. The jurisdiction of the court at this point is limited to examining and evaluating the material placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of conservatory orders. The court is also required to evaluate the pleadings and determine whether denial of conservatory orders will prejudice the applicant.

11. As it has been held in various decisions, a prima facie case 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, an applicant has to show that he or she has a case which discloses arguable issues and in a case alleging violation of rights, arguable constitutional issues.

12. In this case, it is contended that the respondents illegally created a settlement scheme over the petitioner's property and proceeded to issue allotment letters and titles to persons unknown to the petitioner, effectively dispossessing the petitioner of his property and violating his property rights which are safeguarded in law in particular Article 40 of the Constitution. Without saying more, it is clear that this petition discloses arguable issues for trial. It cannot be said that the petition is frivolous or unarguable.

13. The next issue to consider is whether the petitioner has demonstrated that unless the court grants the conservatory orders, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the constitution. However, this must be weighed against the public interest.

14. The applicant has deposed that the respondents unlawfully created a settlement scheme which covers his land and have since sub-divided the land and issued letters of allotment and titles to strangers who have since taken possession of the land. It is important to note that the orders the applicant seeks, if granted at this stage, will affect third parties who are not parties to this case. It is my view that allowing the conservatory orders sought will infringe on innocent persons who are not parties to this case. I am not persuaded that the petitioner will suffer prejudice if the conservatory orders sought are not granted as there are still remedies available. For example the registration allegedly undertaken can still be nullified and cancelled should the petitioner's case succeed. I therefore decline to grant the conservatory orders sought.

15. The next issue is whether the petitioner has established a case for grant of mandatory injunction against the respondents to compel them to deliver records concerning the occupants of the suit property to this court. The standard of proof in interlocutory applications seeking mandatory injunctions is higher than the one for prohibitory injunctions. The courts have been reluctant to grant mandatory injunctions at the interlocutory stage. However, where it is prima facie established as per the standard spelt out in the law as stated above that the party against whom the mandatory injunctions is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.

16. In this case, the petitioner has stated that the respondents illegally created a settlement scheme over his property and proceed to issue allotment letters and titles to persons who are unknown to the petitioner. In addition, the petitioner avers that the respondents have failed to release the relevant records including refusing or ignoring to respond to the petitioner's applications for official search. The petitioner averred that he is unable to enjoin persons who have trespassed on this property because he does not have the details of those persons. It is obvious that such details could have been known through the searches if the applications were acted upon. In my view, the respondents have no justification to deny the petitioner the official searches. There is no dispute that the petitioner has title over the suit property. There is also no dispute that other persons hold titles over the same property, albeit under different registration regimes. The respondents refusal to issue official searches to the petitioner in my view, amounts to attempts to steal a march on the petitioner.

17. Having carefully considered the material before me, in my humble view a case of a mandatory injunction has been made out. I am therefore satisfied that the prayers of mandatory injunction can be granted.

18. The upshot is that the Notice of Motion dated 31st December 2014 is allowed in terms of prayers 5 and 6 thereof. Costs of the application is awarded to the petitioner.

19. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA electronically by email due to COVID-19 Pandemic this 16th day of September 2020

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C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Muthoka holding brief for Mutua for petitioner.

Mrs. Waswa for respondents.

Yumna Court Assistant

C.K. YANO

JUDGE