



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. PETITION NO. 1 OF 2020

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL AS UNDER
THE BILL OF**

RIGHTS OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES
19, 20, 21, 22 (1), (2), (4), 23,**

24, 28, 29 (C), 40, 43 (B) AND 63 OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLES 22(5), 6 OF THE CONSTITUTION

AND

**IN THE MATTER OF ARTICLES 1, 8(2) (B), 9, 10, 18, 26, 28, 33, 37, 42, 43 AND 46 OF THE UNITED NATIONS
DECLARATION ON THE RIGHT**

OF INDIGENOUS PEOPLE (UNDRIP)

AND

**IN THE MATTER OF HISTORICAL AND CURRENT INFRINGEMENT OF THE CULTURAL AND ECONOMIC RIGHTS OF
THE KATHI CLAN MEMBERS**

AS INDIGENOUS PEOPLE WITHIN THE MEANING OF THE

UNITED NATIONS DECLARATION ON THE RIGHTS OF

INDIGENOUS PEOPLE (UNDRIP)

AND

IN THE MATTER OF THE COMMUNITY LAND ACT NO. 27 OF 2016

AND

IN THE MATTER OF LAND ADJUDICATION ACT

AND

IN THE MATTER OF PROTECTION FROM DEPRIVATION OF PROPERTY

AND ANCESTRAL LAND

BETWEEN

MURIITHI NJAGI AND 50 OTHERS..... PETITIONER

VERSUS

KATHI GROUP RANCH THRO'

IVARA CUE.....1ST RESPONDENT

E. KENNETH N. WAMAI.....2ND RESPONDENT

JASON NAYAGA.....3RD RESPONDENT

NDARU BARAGU.....4TH RESPONDENT

RULING

A. INTRODUCTION

1. By a notice of motion dated 12th February 2020 expressed to be brought under **Articles 23(3) (b) & (c), Articles 40 (1), 60, 63** of the **Constitution of Kenya, 2010, Section 68** of the **Land Registration Act 2012** and all enabling provisions of the law, the Petitioners sought the following orders:

a) Spent

b) That this honourable court be pleased to issue conservatory orders in the nature of an inhibition against the respondents by themselves, their agents, servants, transferees, purchasers or anyone acting in their behest restraining them from any further dealings with the registers of land parcels Nos. Mbeti/Gachuriri/613 to 666 (all being subdivisions of Mbeti/Gachuriri/170 pending the hearing and determination of the application herein and the main suit.

c) That this honourable court be pleased to issue orders of temporary injunction against the respondents by themselves, their agents, servants, transferees, purchasers or anyone acting in their behest restraining them from surveying, erecting boundaries, evicting or in any other way interfering with the Applicants use and occupation of land parcels Nos. Mbeti/Gachuriri/613 to 666 (all being subdivisions of Mbeti/Gachuriri/170 pending the hearing and determination of the application herein and the main suit.

d) That the orders of inhibition herein be served upon the The Land Registrar, Siakago, Embu County and The Gachoka Land Control Board for compliance.

e) That costs of this application be provided for.

B. THE PETITIONERS' CASE

2. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Muriithi Njagi Kiura on 12th February 2020 and the annexures thereto. The Petitioners contended that at all material times *Title No. Mbeti/Gachuriri/170 (parcel 170)* measuring about 271 ha was clan land belonging to Kathi clan and that they were members of the clan. They further pleaded that the Respondents had wrongfully and fraudulently caused parcel 170 to be registered in the name of an entity known as Kathi Group Ranch after which they sub-divided it into *Title Nos. Mbeti/Gachuriri 613-666* (collectively known as *the suit properties*). It was contended that the Respondents had sold and transferred some of the suit properties to their close family members, purchasers and outsiders.

3. The Petitioners contended about 100 Kathi clan members and their families had settled on the suit properties and developed them extensively since the 1960s and 1970s. They further contended that the Respondents had recently engaged a surveyor to place beacons on the suit property and that they were using the police service and other state agencies to harass them with a view to evicting them from the suit properties. They, therefore, sought conservatory orders to prevent their eviction and to preserve the suit properties pending the hearing and determination of the petition.

C. THE RESPONDENTS' RESPONSE

4. The Respondents filed a replying affidavit sworn by Ivara Cue (the 1st Respondent) on 13th July 2020 in opposition to the said application. He swore the said affidavit on his own behalf and on behalf of his co-respondents. The Respondents disputed the Petitioners' factual allegations and contended that Kathi Group Ranch was lawfully incorporated in 1975 under **Land (Group Representative) Act** whose membership was not confined to members of Kathi clan but all persons who were interested in joining.

5. The Respondents further contended that parcel 170 was lawfully registered in the name of Kathi Group Ranch after due process was followed under the **Land Adjudication Act**. The Respondents contended that the Petitioners were not members of the Group and parcel 170 never belonged to Kathi clan in the first place.

6. In further response to the application, the Respondents stated that the application was *res judicata* since there were similar proceedings in the past whereby some of the Petitioners herein had sought legal redress. The Respondents referred to *Embu ELC No. 170 of 2014* and *Embu PMCC No. 128 of 1990* in that regard. However, the Respondents did not annex copies of the relevant pleadings to their affidavit.

D. RESPONSE BY THE INTERESTED PARTIES

7. The Interested Parties did not enter appearance to the petition despite service and they did not file any response to the application.

E. DIRECTIONS ON SUBMISSIONS

8. When the said application was listed for hearing on 22nd July 2020, it was directed that the same shall be canvassed through written submissions. The Petitioners were granted 21 days to file and serve their submissions whereas the Respondents and the Interested Parties were granted 21 days upon the lapse of the Petitioners' period to file and serve their respective submissions. The record shows that the Petitioners filed their submissions on 22nd October 2020 whereas the Respondents' submissions were not on record by the time of preparation of the ruling. The Interested Parties did not file any submissions either.

F. THE ISSUES FOR DETERMINATION

9. The court has considered the Petitioners' application for conservatory orders, the Respondents' replying affidavit in opposition thereto as well as the submissions on record. The court is of the opinion that the following issues arise for determination herein:

- a) *Whether the Petitioners have made out a case for the grant of the conservatory order sought.*
- b) *Whether the Petitioners have made out a case for the grant of the temporary injunction sought.*
- c) *Who shall bear costs of the application.*

G. ANALYSIS AND DETERMINATIONS

a) Whether the Petitioners are entitled to a conservatory order

10. The court has considered the entire material and the submissions on record on this issue. Whereas the Petitioners claim that the suit properties initially belonged to Kathi clan as the legitimate owners, the Respondents contended otherwise. The Respondents contended that the land belonged to Kathi Group Ranch which was a different entity altogether. The principles which guide a court in an application for a conservatory order were set out in the case of **Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 others [2014] eKLR** as follows:

“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.”

11. The court is of the opinion that the purpose of the conservatory order sought herein is to preserve the suit properties pending the hearing and determination of the petition and resolution of the various issues raised therein. If the suit properties were to be alienated further before the issue of whether the property in dispute rightfully belonged to Kathi clan or Kathi Group Ranch the outcome of the petition may be rendered nugatory or just an academic exercise. The court is thus satisfied on the basis of the material on record that the Petitioners have made out a case for the grant of a conservatory order in terms of order No. 2 of the notice of motion dated 12th February 2020.

b) Whether the Petitioners have made out a case for the grant of a temporary injunction

12. The Petitioners are apprehensive that the Respondents and Interested Parties who have acquired the suit properties may take steps to evict them from their houses which they claim to have established since the 1960s and 1970s. They exhibited photographs of the developments they claimed to have undertaken thereon. The Respondents disputed that there were many families on the suit properties. They conceded that only 4 of the Petitioners were residing thereon. The court is aware that this being an interlocutory application the court should avoid delving into the matter in great detail or making any comments or conclusions which may prejudice the fair trial of the Petition. However, from a copy of the adjudication book exhibited by the Petitioners, it would appear that at some point in time parcel 170 was recorded as “Kathi clan land.”

13. Whether or not due process was followed in the conversion of parcel 170 from Kathi clan land to land belonging to Kathi Group Ranch is a matter to be investigated and conclusively determined by the trial court upon evidence being tendered at the trial. At this interlocutory stage, however, the court is satisfied that the Petitioners have demonstrated a *prima facie* case with a probability of success at the trial as enunciated in the case of **Giella V Cassman Brown & Co. Ltd [1973] EA. 358**.

14. The court has further considered the evidence on record against the second principle for the grant of an injunction, that is, whether the Petitioners might suffer irreparable injury which cannot be adequately compensated by an award of monetary damages. Since it would appear that some of the Petitioners are in occupation of the suit properties and that they have undertaken some developments thereon

including construction of dwelling houses, the court is of the opinion that they shall suffer serious hardship if they were to be evicted before their petition is heard and determined. The court is of the opinion that such damage cannot be adequately compensated by an award of monetary damages.

15. Even if the court were to consider the balance of convenience, the same would tilt in favour of the Petitioners who appear to be in possession. The court is of the opinion that it would cause greater hardship to the Petitioners if they were to be evicted from their houses compared to the inconvenience the Respondents and Interested Parties may suffer if the interim injunction were granted. Accordingly, the court is satisfied that the Petitioners are entitled to the interim injunction sought.

c) Who shall bear costs of the application

16. Although costs of an action or proceeding are at the discretion of the court the general rule is that costs shall follow the event in accordance with the proviso to **section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court has considered the fact that the constitutional petition is still pending hearing and determination. In the circumstances, the court is of the opinion that costs of the application should be in the cause.

H. CONCLUSION AND DISPOSAL ORDER

17. The upshot of the foregoing is that the court finds merit in the Petitioners' notice of motion dated 12th February 2020. Accordingly, the same is hereby granted in terms of order Nos. 2, 3, & 4 thereof. Costs of the application shall be in the cause. It is so ordered.

RULING DATED and **SIGNED** in Chambers at **EMBU** this **29TH DAY** of **OCTOBER 2020** and delivered via Microsoft Teams platform in the presence of Ms. Cherono holding brief for Mr. Mutuma for the Petitioner and in the absence of the Respondents and the Interested Parties.

Y.M. ANGIMA

JUDGE

29.10.2020