



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C. PETITION NO. 7 OF 2018

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS OF
INDIVIDUALS 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 2(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 RIGHTS OF INDIGENOUS PEOPLE (UNDRIP)**

AND

**IN THE MATTER OF HISTORICAL AND CURRENT INFRINGEMENT OF THE
CULTURAL AND ECONOMIC RIGHTS OF THE GEKARA 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 (GROUP REPRESENTATIVES) ACT, 1968

AND

IN THE MATTER OF LAND ADJUDICATION ACT

AND

**IN THE MATTER OF PROTECTION FROM DEPRIVATION
OF PROPERTY AND THEIR ANCESTRAL LAND**

BETWEEN

BEDAN MUNYI,

JOSHUA NJERU MUGO & 76 OTHERS.....PETITIONERS

VERSUS

GEKARA GROUP RANCH THROUGH

HERBERT NTHIRI.....1ST RESPONDENT

ANDERSON MWATHI.....2ND RESPONDENT

GIBSON KIFUTI.....3RD RESPONDENT

NJIRU KANUTHU.....4TH RESPONDENT

ADRIANO KITHAKA.....5TH RESPONDENT

KARANI NJOKA & 47 OTHERS.....6TH RESPONDENT

RULING

1. By a petition dated 9th October 2018 the Petitioners sought various reliefs amongst them declarations, permanent injunction, and order of cancellation of titles issued upon sub-division of *Title No. Mbeti/Gachuriri/172* (hereinafter *parcel 172*) on account of alleged violations of the Constitution, an international convention and other relevant laws in the process of land adjudication with respect to parcel 172.

2. Simultaneously with the filing of the petition they filed a notice of motion dated 9.10.18 brought under **Articles 23(3) (b), 40(1), 60, 63, of the Constitution of Kenya 2010, and PART VII section 68 of the Land Registration Act 2012 and any other enabling provisions of the law** seeking 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/426 to 4490 (all being sub divisions of Mbeti/Gachuriri/172) pending the hearing and determination of the application herein and the main suit.

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

d. That costs of this application be provided for.

3. The said application was based upon the several grounds set out on the face of the motion. It was contended that the petitioners and their respective families estimated at 400 families had settled on parcel No. 172 which was held communally as clan land. They claimed to have been in occupation thereof since the 1960s or 1970s. It was contended that the said parcel 172 had been illegally, irregularly and fraudulently sub-divided and allocated to the Respondents most of whom were said to be close relatives of the 1st – 6th Respondents or purchasers who were not members of Gekara clan.

4. It was further contended that even though there was a previous civil suit, that is, *Embu ELC No. 224 of 2015* concerning parcel 172, the petitioners were not party thereto. It was further contended that following delivery of judgement in the said suit, the Respondents had embarked upon sub-division, transfer, and disposition of the various sub-divisions of parcel 172 to the detriment of the Petitioners and their families. It was, finally, contended that unless a conservatory order was granted the Petitioners and other members of Gekara clan may not be able to recover their respective entitlements of parcel 172.

5. The said application was supported by the affidavit of Bedan Munyi sworn on 9th October 2018. The deponent claimed to be the secretary of Gekara clan. The affidavit gave a history of parcel 172 and expounded upon the grounds set out on the face of the notice of motion. The 1st -6th Respondents were said to be the architects of the scheme to deprive members of Gekara clan their ancestral land. They were said to have registered a group known as Gekara Group Ranch in whose name parcel 172 was initially registered.

6. The firm of Wandugi & Co. Advocates filed grounds of opposition dated 19th November 2018 on behalf of the 2nd, 3rd, 4th, 5th, 6th, 8th, 9th, 20th and 41st Respondents in opposition to the said application. The firm of C.K. Kioko & Co. Advocates filed grounds of opposition dated 20th November 2018 on behalf of the 12th, 15th, 18th, 19th, 20th, 23rd, 36th, 37th, 44th, 47th, 48th, & 50th Respondents in opposition to the said application. The firm of Onyoni Opini & Gachuba Advocates filed a replying affidavit sworn by the 52nd Respondent on 8th March 2019 together with a notice of preliminary objection dated 6th March 2019.

7. The record also shows that the firm of P.N. Mugo & Co. Advocates filed a replying affidavit sworn on 21st November 2018 by the 11th Respondent in opposition to the said application whereas the firm of Mwenda Mwarania, Akwalu & Co. Advocates filed a replying affidavit sworn by the 13th Respondent on 20th November 2018. The firm of Fatuma Wanjiku & Co. Advocates filed a replying affidavit sworn on 11th December 2018 by the 34th Respondent and another one sworn by the 30th Respondent on the same date.

8. The record further shows that the firm of Njeru Ithiga & Co. Advocates filed a replying affidavit sworn by the 14th Respondent on 3rd January 2019 whereas the firm of J. Ngaii Gikonyo & Co. Advocates filed a replying affidavit sworn on 21st November 2018 in opposition to the said application. The firm of Kibicho & Co. Advocates also filed a replying affidavit on behalf of the 28th Respondent in opposition to the Petitioners' said application for a conservatory order.

9. When the said application was listed for hearing on 21st November 2018 the advocates present for the various parties agreed to canvass it through written submissions. All the Respondents who had not filed responses were granted 21 days to file and serve them. The Petitioners were granted 21 days upon the lapse of the period for filing responses to file and serve their submissions whereas the Respondents were to file and serve theirs 'within 21 days upon service of the Petitioners' submissions.

10. The court record shows that the Petitioners filed their submissions on 25th January 2019 whereas the firm of J.K. Kibicho & Co. Advocates filed theirs on 5th March 2019 on behalf of the 28 and 49th Respondents. The firm of Ithiga & Co. Advocates filed theirs on 27th February 2019 whereas the firm of K.K. Kioko & Co. Advocates filed theirs on 13th March 2019. There is no indication on record of the rest of the Respondents having filed their submissions by the time of preparation of this ruling.

11. The court has considered the Petitioners' said application, the grounds of opposition, and the various replying affidavits in opposition thereto. The court has also considered the respective written submissions of the parties which were on record at the time of preparation hereof. The main question for determination herein is whether or not the Petitioners have made out a case for the grant of the conservatory order sought in the application.

12. The court shall be guided by the pronouncement of the Supreme Court of Kenya in the case of **Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 Others [2014]eKLR**. The nature of a conservatory order was described 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 the case; or ‘high probability of success’ in the applicant’s case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes ...”

13. Similarly, in **Judicial Service Commission Vs Speaker of the National Assembly & Another (2013) eKLR**. It was held, *inter alia*, that;

“Conservatory orders are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute *in situ*. Therefore such remedies are remedies *in rem* as opposed to remedies *in personam*. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person”

14. Bearing in mind the above considerations, the nature of the petition and the nature of reliefs sought, and without delving into the merits of the petition, the court is satisfied that the Petitioners have made a case for the grant of a conservatory order. The court is satisfied that the petition is not frivolous or merely fanciful. It appears to be worthy of consideration at a full hearing. That calls for a conservatory order to preserve the property in dispute pending the hearing and determination of the petition. The court has a duty to prevent a barren result should the Petitioners ultimately succeed at the trial. The Respondents on the other hand, would still be assured of their property should the petition ultimately fail upon a full hearing.

15. The upshot of the foregoing is that the court finds merit in the Petitioners' notice of motion dated 9th October 2018 and the same is hereby allowed in terms of order Nos. 2 and 3 thereof. Costs of the application shall be costs in the cause.

16. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 16TH day of MAY, 2019.

In the presence of Ms Kioko holding brief for Mr. Mutuma for the Petitioners; Mr. Ithiga holding brief for Mr. Mwarania for 13th

Respondent; Ms Maina holding brief for Ms Fatuma for 30th – 34th Respondents; Ms Kioko for the 10th, 12th, 15th, 19th, 20th, 21st, 29th, 30th, 37th, 38th, 42nd, 44th, 47th, 48th and 50th Respondents; Mr. Gachuba for 52nd Respondent, Ms Njoki for the 28th Respondent; Mr. Ithiga for the 14th & 53rd Respondents and in the absence of the rest of the Respondents.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

16.05.19