

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC PET. CASE NO. 4 OF 2019

GEORGE MILIMU SAHINI.....PETITIONER

VERSUS

ATTORNEY GENERAL

JOSEPH MUSOGA MUKALANI.....RESPONDENTS

RULING

The application is dated 4th February 2016 and is brought under rules 3, 21 & 22 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012) seeking the following orders;

1. That this application be certified urgent and heard ex parte on priority basis and service upon the respondents in the first instance be dispensed with.
2. That pending the hearing of the application herein inter parties, an ex parte temporary conservatory order do issue staying an order of the Honourable Chief Magistrate's Court given on 3/6/2015 directing and authorizing the Executive Officer to execute all relevant documents of transfer in respect of L.R. No. ISUKHA/SHITOCHI/3143 on behalf of the petitioner/applicant herein and to cause the said land to be transferred in the name of the 2nd respondent herein.
3. That upon the inter parties hearing hereof, and pending the hearing of the petition herein, the temporary conservatory orders issued hereinabove staying the order of the Honourable Chief Magistrate's Court given on 3/6/2015 directing and authorizing the Executive Officer to execute all relevant documents of transfer in respect of L.R. No. ISUKHA/SHITOCHI/3143 on behalf of the petitioner/applicant herein and to cause the said land to be transferred in the name of the 2nd respondent herein be confirmed.
4. That the costs of this application be provided for.

It is based on the annexed affidavit of George Milimu Sahini and on grounds that the petitioner/applicant herein is the registered proprietor of the whole of that parcel of land known as Isukha/Shitochi/3143 having acquired after succeeding his grandfather vide succession cause No. 617 of 2001 in the High Court of Kenya at Kakamega. That the petitioner/applicant has been the respondents in Kakamega CM Miscellaneous Application No. 226 of 2001 instituted by the 2nd respondent herein purporting to adopt the decision arising from the proceedings of the then Shinyalu Land Disputes Tribunal purporting to make determinations in favour of the said 2nd respondent. That the 1st respondent herein, on 10th day of October, 2011 and upon application on part of the 2nd respondent, without cogent, verifiable and or substantive justification whatsoever, purported to make orders appropriating and or otherwise allocating the petitioner's parcel of land known as Isukha/Shitochi/3143 as sought by the 2nd respondent in total disregard to both law, procedure and or jurisdiction. That the said orders of the 1st respondent herein were made without any formal and or substantive proceedings and or recognized claim before court, regard to law and or procedure whatsoever, with total disregard to all law and or jurisdiction. That the said order sought to be implemented was made in the absence of the requisite jurisdiction on the part of the honourable court in the said Kakamega CM Miscellaneous Application No. 226 of 2001 as the 1st respondent was neither seized of nor duly gazette to hear and or determine such disputes. That the said order was made on an application in a miscellaneous application without requisite procedural fairness as it was made in the absence of any substantive claim and or suit then pending before a court of competent jurisdiction. That the 1st respondent, in its absolute and total acquiescence to the adoption of a decision de facto and de jure illegal, improper and in total disregard to express legal provisions, demonstrated clear bias against the petitioner and infavour of the 2nd respondent herein. The petitioner avers that in view of the 1st respondent's illegal orders infavour of the 2nd respondent over the petitioner's property known as L.R. No. Isukha/Shitochi/3143, key provisions of the Constitution have been violated. That indeed the intended, planned and arranged implementation and execution of the said orders is poised to totally disregard the constitutional safeguards relating to private property, fair administrative action and fair hearing. That clearly all these transgressions on the part of the respondents, and against the property of the petitioner, are totally against the substance, spirit and interest of the said Constitution. That in the circumstances, the petitioner ought not to be a victim of the respondents' joint and or several acts that have resulted in the threatened constitutional violations against him. That no legislation expressly, impliedly and or otherwise authorizes the limitation and or contravention of the petitioner's right to equal protection and benefit of the law, fair administrative action, fair hearing, access to justice, right to property of any kind, description or at any place within the Republic of Kenya and for any lawful cause. That in the circumstances the principles of natural justice dictate that the prayers sought at this stage be granted to avert the impunity in violation and abuse of the express constitutional provisions and or safeguards. That unless the orders sought herein are granted the application and petition herein shall be rendered entirely nugatory and merely academic.

The 2nd respondent submitted that it is true that the petitioner is the registered proprietor of all that parcel of land known as Isukha Shitochi/3143 but under dubious means that he did not follow the legal/correct procedure for acquiring the land. That the case about this land which is the subject matter in this case has been in court since 2001 the matter started from the Tribunal then adopting the award vide KAK.CM. MISC. AWARD NO. 226 of 2001 which the petitioner herein never appealed to the Provincial Tribunal or any other court. That

during the pendency of this suit in court the petitioner used crude ways and got himself registered as the proprietor of this land in the year 2007 as exhibited from the official search his annexure marked as GMS1. That the petitioner herein has never at one time during the hearing of all this cases brought documents or supported his case to show how he succeeded his grandfather's and got registered the land to himself. That upon adoption the petitioner herein refused to sign transfer documents and he made an application vide application dated 19/4/2012 which application was granted and the orders of his application and the executive officer signed the transfer documents on behalf of the petitioner. See copies of the documents marked as JMM1. That upon presentation of the documents to the land documents for transfer they required surrender of the title deed which was in possession of the petitioner but he could not get it and he was advised to present to the land office an order for cancellation of the said title deed in respect for the said Isukha/Shitochi/3143 and he was forced to file a case in court on 16/12/2016 seeking for cancellation of the title vide KAKAMEGA E & L Case No. 315 of 2015 which case has not yet been heard and determined and the same is set for hearing on the 2nd day of May, 2016 (copies of the court documents marked as JMM2). That the petitioner is aware that the case is in the land and environment court for finalization and he has now rushed and filed this petition to frustrate the fruits of his case. That he has suffered great loss and he continues to suffer and the petitioner case is just to waste court's time since the petitioner cannot wake up at this juncture to set aside the orders which were made 10 months back. That the petitioner has only filed this suit to frustrate his efforts by now seeking for conservatory orders over the subject matter or the case that he never appealed against hence this suit is an abuse of the court process. That in any event the executive officer has already signed the documents accordingly and he has already presented the transfer documents to the land office and in the land and environment case he was only seeking for cancellation of the title which the petitioner is holding illegally because the court has already finalized the case and declared the land to be mine. That he prays that the orders being sought hold no water and should be dismissed with costs.

This court has considered the application and the submissions therein. In the instant application, the applicant seeks for orders that, pending the hearing of the petition herein, the temporary conservatory orders be issued staying the order of the Honourable Chief Magistrate's Court given on 3/6/2015 directing and authorizing the Executive Officer to execute all relevant documents of transfer in respect of L.R. No. ISUKHA/SHITOCHI/3143 on behalf of the petitioner/applicant herein and to cause the said land to be transferred in the name of the 2nd respondent herein be confirmed. A conservatory order was defined by the Supreme Court 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.”

In this application, the Applicant is only required to establish a *prima facie* case with a likelihood of success and the prejudice to be suffered if orders are not granted. Be that as it may, this application was filed way back in 2016 and it is now three years later. The applicant never followed up the matter and it cannot now be said to be urgent any more. Secondly the orders sought in the application are similar to the ones in the main petition and are final orders and cannot be granted at this stage. I find this application is not merited and parties are advised to take a hearing date for the main petition. This application is dismissed and the costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 24TH JULY 2019.

N.A. MATHEKA

JUDGE