



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

PETITION 9 OF 2019

IN THE MATTER OF: ARTICLES 22,48,50(1) 258 AND 259(1) CONSTITUTION OF KENYA

**IN THE MATTER OF: THE ALLGED VIOLATION OF RIGHTS AND FUNDMENTAL
FREEDOMS IN ARTICLES 24,35,40 AND 47 OF THE CONSTITUTION OF KENYA**

IN THE MATTER OF : THE ALLEGED VIOLATION OF ARTICLES 1,2,3,10,73

AND 259(1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF : THE OWNERSHIP OF THE 146.8878 HECTARES

PARCEL OF LAND WHICH THE UNDATED KENYA GAZETTE

NOTICE NO.12526 PUBLISHED ON 22ND DECEMBER 2017

IN THE KENYA GAZETTE VOL.CXIX-NO.19 REFERRED

TO AS “ KIAMBU WESTERN GRAZING AREA”.

BETWEEN

OKIYA OMTATAH OKOITI & 3 OTHERS.....PETITONERS

VERSUS

MINISTRY OF LANDS AND PHYSICAL PLANNING & 4 OTHERS...RESPONDENTS

HARUNANI & ASSOCIATES.....INTERESTED PARTY

RULING

1. This is a ruling in respect of a Notice of Motion dated 10th July 2019 in which the petitioners seek the following orders:-

1) Spent

2) That pending the hearing and determination of the application and/or the petition herein, this honourable court be pleased to halt all government development projects currently going on the suit property.

3) That pending the hearing and determination of the application and/or the petition herein, this honourable court be pleased to protect the integrity of these proceedings by issuing an interim order compelling Harunani and Associates (the interested party) to immediately deposit with the court certified copies of his original scheme plan sub division maps for Nachu/Ndacha, Nachu/Mikuyu-ni,Nguirubi/Thigio, and Nguirubi/Ndiuni.

4) That consequent to the grant of the prayers above the Honourable Court be pleased to issue such further directions and orders

as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.

5) That costs be in the cause.

2. The facts relating to this application are fairly simple. The 1st petitioner is a public spirited individual who is a member of Kenya for Justice and Development Trust. The 2nd, 3rd and 4th Petitioners are individuals who have brought the petition herein on behalf of Ndeiya land owners. The petitioners filed this petition against the respondents seeking the following orders;-

a. An order quashing the reference in the undated Kenya Gazette Notice No.12526 published on 22nd December 2017 in the Kenya Gazette Bol.CXIX-No.19 to the 146.8878 hectares parcels of land as” Kiambu Western Grazing Area”

b. An order compelling the NLC to issue a new gazette notice of the acquisition of the land indicating the individual owners of the parcels of land erroneously referred to collectively as “Kiambu western Grazing Area”.

c. An order compelling Kiambu County Government to within 7 days of the judgement release Ndeiya sub division maps and the scheme plans (maps) for Nachu/Ndacha, Nachu/ Mikunyuini , Ngwirubi/Thigio, and Ngwirubi/Ndiuni to survey of Kenya for the updating of National Land Maps.

d. An order compelling the NLC to make prompt, full fair and immediate compensation of all persons affected by the SGR Phase 2A.

e. The Honourable Court be pleased to issue any other or further remedy that the Honourable Court shall deem fit to grant.

3. The petitioners/applicants contend that the 2nd, 3rd and 4th petitioners together with other land owners collectively own land parcels in four schemes within Ndeiya in Kimabu County namely; Nachu/Mikuyuine, Nachu/Ndacha, Ngwirubi/Thigio and Ngwirubi/Ndiuni on 22nd December 2017; the National Land Commission (NLC) published an undated gazette Notice in which it expressed intention to acquire 146.8878 hectares of land parcels known as Kiambu Western Grazing Area for purposes of construction of phase 2 of the standard gauge railway.

4. The applicants contend that the land comprised in the four schemes which was described in the Gazette Notice as Kiambu West Grazing Area is actually private land belonging to individual land owners of Ndeiya who have title documents to the same. The applicants contend that the government has taken over their land and started undertaking government development projects on it without compensating them. It is on this basis that they are seeking a conservatory order to halt any government development projects on their land until their grievances are addressed.

5. The applicants contend that the interested party had been commissioned to undertake subdivision in the four schemes. The interested party carried out and completed the subdivision but the then Kiambu County Council could not pay their fees. The surveyor retained the survey maps pending payment of his fees. However in May 2018, the County Government of Kiambu paid their fees and they surrendered all the survey maps to the county. The Kiambu County Government has however declined to submit the maps to the survey of Kenya hence the prayer for conservatory orders.

6. The 1st and 2nd respondents opposed the applicants' application based on grounds of opposition filed in court on 30/7/2019 . The 1st and 2nd respondents contend that the applicants have not demonstrated that their properties fall within the gazetted Kiambu Western Grazing Area.; that the applicants have failed to demonstrate that the respondents have failed to discharge their constitutional mandate; that the applicants have failed to demonstrate which of their rights have been violated and that therefore the application is misconceived.

7. The 4th respondent opposed the application based on grounds of opposition filed on 6/8/2018 . The 4th respondent contends that the applicants have not demonstrated that they have proprietary interest in the property; that the applicants are busy bodies who want to reap where they have not sown; that the 4th respondent is not the one that acquires land compulsorily and that the application is misconceived.

8. The 5th respondents opposed the applicants' application based on grounds of opposition filed in court on 22/8/2019 . The 5th respondent contends that the application by the applicants is an abuse of the process of the court; that the application is defective and is an abuse of the process of court.

9. On the part of the interested party, a partner at the firm swore a replying affidavit in which he stated that he had been given the task of subdividing the four schemes by Kiambu County Council. He completed the task but he held on to the survey maps as a lien for his fees. However in 2018 , Kiambu County Government paid him his fees. He surrendered all documents to the County Government of Kiambu for onward transmission to survey of Kenya. He further deponed that Kiambu County Government were to submit the maps and process de-gazettment of the grazing area for further action. In view of this he stated that the application was misconceived and an abuse of the court process.

10. I have carefully considered the application by the applicant as well as the opposition to the same by the 1st, 2nd, 4th and 5th respondents as well as the interested party. I have also considered the oral submissions by the parties during the hearing of this application on 26th August 2019. The only issue for determination is whether the applicants have established that they have a prima facie case to warrant issuance of conservatory orders.

11. In ***petition No. 16 of 2011 Centre of Rights Education and Awareness (CREW) & 7 Others –vs- Attorney General*** Justice Musinga (as he then was) stated as follows:-

“ 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 conservatory order there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”

12. In the instant case, the applicants are generally saying that the government has taken over their land which has been wrongly described as Kiambu West Grazing Area. Whereas the applicants say that the land was surveyed and that the 5th respondent has the survey maps which it has refused to submit to the survey of Kenya, the applicants have exhibited copies of titles which they claim belong to some of Ndeiya Land Owners. One wonders then how these titles were obtained if the process of survey is yet to be completed and the grazing area degazetted as per the affidavit of the interested party.

13. The applicants have not demonstrated that any of the land parcels which they claim to be part of the gazetted land actually falls within the gazetted land. During the hearing of this application, Mr Okiya Okioti Omtatah spoke on behalf of the applicants. He submitted that the applicants were not refusing to move out of the gazetted land but were only concerned about compensation. He submitted that he only wanted prayer (2) to be granted. Of course it would have been an exercise in futility to pursue prayer (3) in view of the affidavit of the interested party which was clear that the survey maps had been surrendered to the County Government of Kiambu.

14. If the applicants main concern is on compensation, the question to be asked is if it will be in the interest of justice to halt the government development projects going on. If the projects go on and the applicants turn out to have been affected, they will always be compensated. There is therefore no danger that the applicants will suffer any prejudice. This being the case, I do not find any merit in this application which is dismissed with costs to the 1st, 2nd, 4th, 5th respondents and the interested party.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 30th day of August 2019.

E.O.OBAGA

JUDGE

In the presence of :-

Court Clerk : Hilda

E.O.OBAGA

JUDGE