Kiptum & 7 others v Elgeyo Marakwet County & another (Environment & Land Petition E003 of 2024) [2025] KEELC 156 (KLR) (16 January 2025) (Ruling)

Neutral citation: [2025] KEELC 156 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ITEN

ENVIRONMENT & LAND PETITION E003 OF 2024

L WAITHAKA, J

JANUARY 16, 2025

IN THE MATTER OF CONSTITUTION OF KENYA

ARTICLES 2, 10, 19, 21, 22, 23, 27, 28, 31, 40, 47, 50,

60 AND 64

AND THE ATTORNEY GENERAL.....3RD RESPONDENT

NATIONAL LAND COMMISSION.....INTERESTED PARTY

IN THE MATTER OF BREACH OF FUNDAMENTAL

RIGHTS AND FREEDOMS CONTRARY TO ARTICLE 40

CHAPTER 4 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF CONTRAVENTION OF RIGHT TO

PROPERTY CONTRARY TO ARTICLE 40 OF THE

CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF REGISTERED LAND ACT 2012

AND

ITEN ELCL PET NO. E003 OF 2024 (RULING) PAGE 1

IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS

ACT NO.4 OF 2015

BETWEEN

SAMSON KIMELI KIPTUM & 7 OTHERS ..... PETITIONER

AND

ELGEYO MARAKWET COUNTY ..... 1ST RESPONDENT

LAND REGISTRAR ELGEYO MARAKWET COUNTY ..... 2ND RESPONDENT

RULING

Introduction

1. The petitioners herein who have described themselves as the registered owners of the parcels of land known as Iron/Iten/2421, 2422, 2423, 2424, 2426, 2427, 2428 and 2429 (suit properties) filed the instant suit seeking judgment against the respondents jointly and severally for: -

    1. A Declaration that the suit properties lawfully belong to them;

    2. A declaration that the respondents are violating or have threatened violation of their rights, particularly their right to property enshrined in Article 40 of the *Constitution*;

    3. An order of prohibition prohibiting the respondents, their servants, agents, representatives and/or any other person acting under their name or howsoever from conducting inquiry into, revoking their titles, interferring with their quiet possession of the suit properties or in any other manner dealing adversely with their ownership of the suit properties.

    4. An order of certiorari removing into this court notices dated 26th March 2024 and 8th April 2024 issued by the 2nd respondent for purposes of being quashed by this court;

    5. Any other writ that this court may deem just and appropriate to grant.

    6. Costs of the petition.

2. As can be discerned from the averments on the face of the petition and the affidavit sworn in support thereof, the petitioners were allocated the suit properties by the predecessor of the County Government of Marakwet, Keiyo County Council. The suit properties were created from the parcel of land known as Iron/Iten/492 which belonged to the County Council of Keiyo.

3. Claiming that they lawfully obtained their titles to the suit properties, effected developments thereon and have been meeting their legal obligations arising out of the allocation and issuance of leases and certificates of lease (paying land rent and rates) to the County Government of Elgeyo Marakwet, the petitioners complain that sometime in the months of March and April 2024, the 2nd respondent (Land Registrar Elgeyo Marakwet County) issued them with a notice dated 26th March 2024 purporting to rectify the land register in respect of the suit properties on the ground that the titles were issued erroneously as the mother title was reserved for a workshop (public use). Lamenting that the notice prohibited them from dealing with the suit properties until the registers were rectified, the petitioners aver that through the notice, the 2nd respondent required them to appear before him on 8th April 2024 with such documents and/or representation as may be deemed necessary in the rectification of the register.

4. The petitioners have further averred that they heeded the invite by the 2nd respondent but objected the hearing on the ground that they had not been given ample time to prepare for hearing and to seek legal advice.

5. Terming the actions of the respondents complained of a violation of their constitutional right to property and the right to a fair administrative action among other constitutional rights, the petitioners instituted the instant petition seeking the reliefs listed herein above.

6. Simultaneously with the petition, the petitioners filed the notice of motion application dated 6th May 2024 seeking a conservatory order restraining the respondents, their agents, servants or any other person claiming under the respondents from conducting hearing into ownership or purported rectification of the registers of the suit properties pending the hearing and determination of the application and the petition.

7. The application is supported by the grounds on the face of the application which are in pari materia to those given in the petition.

8. Pursuant to directions given on 1st October 2024, the application was disposed off by way of written submissions.

Applicant Submissions

9. In their written submissions filed on 4th October 2024, the applicants have given an overview of the issues raised in their application and the response thereto by the 1st respondent and framed three issues for the court's determination. These are:-

    i. Whether the 2nd respondent has power to rectify the registers to the suit properties in the manner he purported to do;

    ii. Whether the petitioners/applicants have demonstrated sufficient ground to warrant grant of conservatory orders;

    iii. who should bear the cost of the application?

10. On whether 2nd respondent has power to rectify the registers of the petitioners parcels of land in the manner he intended to do, reference is made to the notice issued by the 2nd respondent and to the decision in the case of *Mbiiri Kamau Representing ACK Kitharaini Church, the Church Commissioners for Kenya Trustees of the Anglican Church of Kenya v Munyangia Njoka*-Kerugoya ELC Case No 144 of 2013 (unreported) where in underscoring the question as to whether Land Registrars have power to rectify registers of registered land, the court referred with approval to the decisions in the cases of *Republic v Registrar of titles mombasa & 4 others ex parte AK Abdulgani Ltd* (2018) eKLR and the case of *Republic v Registrar of Titles Mombasa & 2 others ex parte Emfill Ltd* (2012) eKLR and submitted that the 2nd respondent engaged in an illegal process of issuing notices and hearing the petitioners/applicants with a view of cancellation of their titles.

11. As to whether the petitioners/applicants have demonstrated sufficient ground for being granted the orders sought, reference is made to the case of *Mrao Ltd v First American Bank of Kenya Ltd* (2003) eKLR and submitted that for the petitioners/applicants to be granted the orders sought, they are required to demonstrate a *prima facie* case, which they have done by demonstrating that 2nd respondent does not have power to rectify the register of registered land as he threatened to do.

12. Based on the fact that the petitioners/applicants are the registered owners of the parcels of land in question, the petitioners/applicants submit that unless the orders sought are granted, they may illegally/unlawfully be deprived of their right to the suit properties.

13. On costs, the petitioners/applicants have submitted that they follow the event unless there is good reason for the court to depart from the principle. In the instant case/application, the petitioners/applicants urge the court to grant them costs of the application.

Respondents Submissions

14. In their submissions filed on 11th October 2024, the 1st respondent contends that the suit properties were illegally acquired by the petitioners/applicants hence the petitioners/applicants are not entitled to the orders sought and that because it is the one currently in possesion and control of the suit properties, it would not be in public interest to grant the conservatory orders sought.

15. Terming the titles held by the petitioners products of irregularity, fraud and illegality hence void ab initio, the 1st respondent submits that the titles held by the petitioners are incapable of protection by law. In that regard, the 1st respondent makes reference to the case of *Chemey Investment Ltd v Attorney General & 2 others* (2018) eKLR where it was held that under Article 40(6) of the *Constitution* of Kenya, title to property obtained illegally does not enjoy constitutional protection and that those who illegally acquire property cannot take refuge under the right to property that the *Constitution* guarantees.

16. It is the 1st respondent's case that the affidavit evidence it has presented in court discloses fraud and illegality on the part of the petitioners/applicants on how they acquired the suit properties.

17. For the foregoing reasons, the 1st respondent submits that the petitioners have not demonstrated that they have a prima facie case with probability of success.

18. On whether the applicants were innocent purchasers for value, the 1st respondent submits that they were not as the parcel of land from which the suit properties was hived off was being used as a public utility. Based on the decision in the case of Chemey Investment Ltd supra, the 1st respondent submits that the defence of being innocent purchasers for value without notice is not available to the petitioners/applicants.

19. According to the 1st respondent, denial of the orders sought would not render the petitioners/applicants' petition nugatory.

Analysis and determination

20. The application before me being one for conservatory reliefs pending the hearing and determination of the petition, in determining whether the applicants have made up a case for being granted conservatory reliefs/orders the court considers the following principles:-

    i. The applicant ought to demonstrate an arguable prima facie case with likelihood of success and that in absence of conservatory orders, he/she is likely to suffer prejudice

    ii. The court to consider whether a grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the bill of rights;

    iii. The court to consider whether if an interim conservatory order is not granted, the petition or its substratum is rendered nugatory;

    iv. The court should consider the public interest and relevant material facts in exercising its discretion.

21. In that regard, see the case of *Board of Management of Uhuru Secondary School v City Council Director of Education & 2 others* (2015) eKLR where it was observed/held:-

> " I state without vacillation that the path to be followed by a court seized with an application under Article 23 (3) (d) is now relatively clear.
>
> 25. Foremost, the applicant ought to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. As was stated by Musinga J (as he then was) in the case of *Centre for Rights Education and Awareness and 7 others v The Attorney General* [HCCP No 16 of 2011]:
>
> > " [Arguments] in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the Petitioner's application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. 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 the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the *Constitution*".
>
> 26. It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis. In these respects, I would quickly make reference to M. Ibrahim J (as he then was) in the case of *Muslims for Human Rights [MUHURI] & others v Attorney General & others* CP No 7 of 2011, who whilst agreeing with Musinga J's statement in *Centre for Rights Education and Awareness [CREAW] and 7 others v The Attorney General* (Supra) stated as follows:-
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> > " I would agree with my brother that an applicant seeking conservatory orders in a Constitutional case must demonstrate that he has a prima facie case with a likelihood of success" (emphasis).
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> 27. Recently the same pertinent observations were made by Ngugi J and Muriithi J sitting separately in *Jimaldin Adan Ahmed & 10 others v Ali Ibrahim Roba and 2 others* [2015] eKLR and *Micro Small Enterprises Association of Kenya (Mombasa Branch) v Mombasa County Government* [2014] eKLR respectively.
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> 28. Once the applicant has established to the court's satisfaction a prima facie case with a likelihood of success the court is then to decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights:
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> see *Patrick Musimba v The National Land Commission & 4 others* HCCP 613 of 2014 (No 1) [2015] eKLR and also *Satrose Ayuma & 11 others v Registered Trustees of Kenya Railways Staff Retirements Benefits Scheme* [2011] eKLR.

29. Thirdly, flowing from the first two principles, is whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is indeed the business of the court to ensure and secure so far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice. In these respects the case of *Martin Nyaga Wambora v Speaker of the County Assembly of Embu & 3 others* CP No 7 of 2014, is relevant, especially paragraphs [59] [60] and [61] thereof.

30. The fourth principle which emerges from the various cases and is well captured by the Supreme Court of Kenya in the case of *Gatirau Peter Munya v Dickson Mwenda Githinji & 2 others* [2014] eKLR is that the court must consider conservatory orders also in the face of the public interest dogma.

31. Finally, the court is to exercise its discretion in deciding whether to grant or deny a conservatory order. The court must consequently consider all relevant material facts and avoid immaterial matters. The court will consider the applicants credentials, the prima facie correctness of the availed information, whether the grievances are genuine legitimate and deserving and finally whether the grievances and allegations are grave and serious or merely vague and reckless: see *Centre for Human Rights and Democracy & 2 others v Judges and Magistrates Vetting Board & 2 others* CP No 11 of 2012 as well as *Suleiman v Amboseli Resort Ltd* [2004] 2 KLR 589."

22. In applying the above principles to the circumstances of this case, it is not in dispute that the 2nd respondent at the instance of the 1st respondent, started a process that may lead to cancellation of the titles held by the petitioners/applicants on the ground that they were irregularly issued hence null and void.

23. The question that arises from the uncontroverted facts of this case is whether the 2nd respondent has power to cancel the titles issued to the petitioners? The courts have on numerous occasions, held that Land Registrars have no power to cancel title to land. For instance in the case of *Republic v Registrar of Titles Mombasa & 4 others Ex parte A.K Abdulgani Limited* (2018) eKLR cited by the applicants in their submissions, the court held/stated:-

> "In a recent decision, *Franns Investments Limited v The Registrar of Titles, Mombasa & 2 others*, Mombasa Petition No 63 of 2012 this Court has ruled on the issue as follows:
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> 18. It is clear that it is now settled that Registrar of Tiles or the Land Registrar as the case may be does not have power to revoke title to land. In the case of *Republic v Land Registrar Taita Taveta District & another* [2015] eKLR, I made this observation and gave the way forward in the event that the Government through its agencies wished to challenge the title to land considered to have been unlawfully obtained, as follows:
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> 34. The Court must therefore uphold the Rule of Law with regard to the applicant's rights, as a registered proprietor, under sections 27 and 28 of the *Registered Land Act* as then applicable to the suit property (now section 25 of the *Land Registration Act*, 2012), until fraud shall have been established

in accordance with section 26 (1) of the *Land Registration Act* 2012 which provides as follows:

> "26. Certificate of title to be held as conclusive evidence of proprietorship
>
> (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
>
> (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
>
> (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

35. Before any order may be made in terms of Article 40 (6) of the *Constitution* of Kenya 2010 and section 26 (1) (a) of the *Land Registration Act* 2012 that the title to land was acquired by fraud, misrepresentation and or illegally and it is therefore not protected by the *Constitution*, the fraud, misrepresentation and illegality in the acquisition of property must be proved to the required standard. The case of fraud and illegality in the acquisition of the suit property herein must, therefore, be proved in proceedings brought by the Government in that behalf under the civil procedure relating to filing of actions before the Court. The Government may, of course, in accordance with the law, as it may be advised, acquire the suit property for the purposes of use by the public school, the Interested Party herein."

24. Arising from the foregoing legal position, the order that comments itself in the circumstances of this case is an order prohibiting the 2nd respondent from conducting the proceedings intended to be conducted pursuant to the notice issued. The 2nd respondent is also restrained from interferring with the registers of the suit properties either by way of cancellation or in any other manner whatsoever pending the hearing and determination of the petition.

25. The costs of the application shall abide the outcome of the petition.

26. Orders accordingly.

DATED, SIGNED AND DELIVERED AT ITEN THIS 16TH DAY OF JANUARY 2025.

L. N. WAITHAKA

JUDGE

Ruling delivered virtually in the absence of;-

N/A for the Petitioner

Mr. Wafula for the 1st Respondent

Ms. Odeyo for the 2nd & 3rd Respondents

Court Assistant: Alex