



**Oucho & 2 others v Opiyo & 4 others (Environment and Land Petition
E028 of 2024) [2025] KEELC 5306 (KLR) (16 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5306 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND PETITION E028 OF 2024**

SM KIBUNJA, J

JULY 16, 2025

BETWEEN

**JOHN ABURA OUCHO 1ST PETITIONER
MRIMA YOUTH GROUP 2ND PETITIONER
COMMISSIONER FOR HUMAN RIGHTS AND JUSTICE 3RD PETITIONER**

AND

**PATRICK OMONDI OPIYO 1ST RESPONDENT
COUNTY LAND REGISTRAR MOMBASA 2ND RESPONDENT
BERNAND GICHUKI MWANGI T/A SURE AUCTIONEERS 3RD
RESPONDENT
TOM ODHIAMBO ONYANGO 4TH RESPONDENT
JOSEPH KARISA MWARANDU T/A MWARANDU & CO
ADVOCATES 5TH RESPONDENT**

RULING

1. The petitioners moved the court through the notice of motion dated 13th December 2024, seeking for inter alia:
 - a. “Spent.
 - b. Spent.
 - c. That pending hearing and determination of this petition, this honourable court be pleased to issue conservatory orders restraining the respondents by themselves, their servants, agents, employees, proxies and any other person acting on their behalf from selling, advertising for



sale, disposing off, transferring, developing and or carrying any developments thereat, charging, committing any other acts of waste and or generally interfering with the 1st petitioner's ownership, use, possession, occupation and or quiet enjoyment of comprising of plot No. 1960 Ex-Waitiki Likoni-Mombasa.

- d. That pending the hearing and determination of this petition the court be pleased to issue prohibitory order and caution on any disposition on the said parcel of land.
- e. That the 3rd respondent be restrained from selling and or advertising for sale the 1st petitioner's belongings and household goods until the matter has been heard and determined.
- f. That this honourable court do grant the petitioners a conservatory order, direction and or as it may be necessary to safeguard and prevent the petitioners fundamental rights and freedoms under the Constitution of Kenya.
- g. That the officer commanding Shelly Beach Police Station to enforce compliance of the orders.
- h. That this honourable court give further orders and or directions as maybe necessary herein.
- i. That the costs of this application be provided for.”

The application is predicated on the nine (9) grounds on its face marked (1) to (9) respectively, and supported by the affidavits of John Abura Oucho, the 1st petitioner, sworn on 13th December 2024, and 30th January 2025 respectively, inter alia deposing that he bought plot No. 1960, Ex-Waitiki Likoni-Mombasa, the suit property, measuring 100ft by 115ft at Kshs.450,000 from the 2nd petitioner in 2008; that he charged the suit property to Rafiki Microfinance Bank for Kshs.800,000 and developed residential houses that are complete and rented out; that in 2009, the 1st respondent started trespassing on the said property and he sued him in Mombasa CMC Suit No. E2921 of 2009 and obtained restraining orders; that his advocate withdrew the suit without his authority and the 1st respondent prosecuted his counterclaim ex-parte through the 5th respondent, and obtained adverse orders, necessitating him to file an appeal; that the 1st respondent advertised to sell his properties and he moved to court and obtained orders against the 1st and 3rd respondents in Mombasa CMC Suit No. E006 of 2023; that the 1st respondent then secretly filed originating summons and obtained vesting orders in Mombasa ELC No. E121 of 2022; that he applied to be joined in that suit and orders were issued to have it heard denovo, and was pending for judgement on 11th December 2024; that while that matter was pending judgement, the 1st respondent colluded to have him evicted with his tenants from the suit property, relying on a court order that directed eviction from plot No. 160, while his plot is 1960.

2. The application is opposed by the 1st, 3rd, 4th and 5th respondents through their replying affidavits sworn on the 10th January 2025, 16th January 2025, 16th January 2025, and 15th January 2025 respectively, inter alia deposing that the 1st respondent is the legal owner of the suit property; that the 1st respondent and 1st petitioner had a loan agreement secured by the suit property's title and cunningly the 1st petitioner filed ELC No. 2921 of 2009 claiming he had purchased the land from him; that the 1st petitioner withdrew the suit and the 1st respondent's counterclaim was heard and 1st petitioner was ordered to return the original title document and pay him Kshs.500,000 as undertaking for damages; that 1st petitioner filed ELCA No. 24 of 2021 and partially succeeded with the award of Kshs.500,000 being set aside, and in place the 1st respondent was directed to move the trial court for an inquiry of damages; that the 1st petitioner through proxies filed SCCCOMM No. E411 of 2023 seeking refund of the money relating to the sale of the suit property but it was dismissed on 26th July 2023; that the 1st respondent



moved the trial court inquiry of damages vide application dated 22nd September 2023 and was awarded Kshs.4million, and 1st petitioner was directed to voluntarily vacate in 45 days or be forcefully evicted from the suit property; that he moved the court in ELCC No. E121 of 2022 for vesting order over the suit property, and that the 1st petitioner applied to be joined; that the vesting order was granted through the consent of 13th June 2023, and the 1st petitioner has filed an application dated 13th December 2023 to set aside the said consent that was coming for hearing on 16th January 2025; that the 1st petitioner then filed this application and petition with the sole aim of attacking the Justice Munyao Sila's orders in ELCA No. 24 of 2021 and the ruling of 11th December 2024 by Justice Matheka in ELCC No. E121 of 2022; that the 1st respondent was represented by the 5th respondent's firm of advocates, and the application is an abuse of court process and should be dismissed with costs.

3. The 2nd respondent also opposed the application through the replying affidavit of Segoo M. Mwanyarkiy, Mombasa County Land Registrar, sworn on the 27th February 2025, inter alia deposing that the dispute is over plot No. 1960, Mombasa-Likoni, Ex-Waitiki, that from the green card emanated from the County Government of Mombasa; that it was registered with 1st petitioner on 14th June 2017 as a lessee and on 21st September 2023, the County Land Adjudication and Settlement officer was directed to implement a court order on the suit property; that on 25th September 2023 the title documents relating to the suit property were surrendered to the National Titling Centre for amendment of the lease to reflect the 1st respondent; that on the 3rd October 2023 the Director, Land Adjudication and Settlement officer was directed to implement the court order and on 17th October 2023, the leasehold interest over the suit property was issued to the 1st respondent, in compliance with the vesting order issued by the Hon. Lady Justice Matheka on 13th June 2023 in ELCC No. 121 of 2022 (OS).
4. The court on 14th January 2025 issued an inhibition order in terms of section 68 of the [Land Registration Act](#) to be registered against the suit property's title and gave directions on among others filing and exchanging submissions. The learned counsel for the petitioners and 1st, 3rd to 5th respondents filed their submissions dated 6th February 2025 and 19th March 2025 respectively that the court has considered.
5. The issues for the determination by the court are as follows:
 - a. Whether the petitioners have met the threshold for conservatory and prohibition orders sought to be issued at this interlocutory stage.
 - b. Whether the application is an abuse of the court process.
 - c. Who pays the costs?
6. The court has carefully considered the grounds on the application, affidavit evidence by both sides, the submissions by the learned counsel and come to the following determinations:
 - a. The learned counsel for the petitioners has relied on the cases of Board of Management of Uhuru Secondary School versus City County Director of Education & 2 Others [2015] eKLR, and Centre For Rights Education and Awareness [CREAW] & 7 Others versus The Hon. Attorney General [2011] eKLR, on among others the principles to be satisfied before a conservatory order should be granted, and submitted that the petitioners have demonstrated a prima facie case with a likelihood of success, and unless the conservatory order sought is granted, they will suffer prejudice as a result of violation of their constitutional right to property. On their part, the learned counsel for the 1st, 3rd to 5th respondents submitted inter alia that in view of the previous litigations between the 1st respondent and the 1st petitioner over the same property that is subject matter of this petition and application, before this court and



the lower court, the issue of ownership of the suit property has been determined, and the filing of the petition and application herein are an abuse of court process and should be dismissed with costs.

- b. In the Supreme Court of Kenya case of Peter Gatirau Munya versus Dickson Mwenda Kithinji & 2 Others Civil Application No. 5 of 2014 [2014] eKLR, the court stated as follows on conservatory orders:

“(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, 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.”

The court proceeded to restate the three-factor test to be applied in determining whether to grant a conservatory order as follows:

- i. Firstly, the applicant should demonstrate an arguable prima facie case with a likelihood of success, and would be prejudiced if the order is not granted.
- ii. Secondly, the applicant must show that the petition or its substratum will be rendered nugatory if the conservatory order is not granted.
- iii. Thirdly, the applicant should establish that public interest will be served by granting the conservatory order.

Indeed, the court is not expected to make any final determinations on any matter of fact and or law at this interlocutory stage, as that has to await the hearing of the petition.

- c. It would however be amiss if I fail to acknowledge for posterity’s sake, that it is obvious the 1st petitioner and the 1st respondent have had several litigations before this court and the lower court over the suit property, subject matter of this petition and application. The petitioners have through their affidavit evidence and submissions blamed the respondents for evicting the 1st petitioner from Parcel 1960 on the strength of an eviction order in respect of parcel 160, thereby occasioning the commencement of this petition. The question that is left unanswered is why the petitioners did not move to the court that had issued the impugned eviction order for appropriate orders instead of resorting to an entirely new proceeding. That would have avoided a multiplicity of suits over the same subject matter and between the same parties, which would easily run afoul to the subjudice and res judicata provisions of sections 6 and 7 respectively, of the [Civil Procedure Act](#) chapter 21 of Laws of Kenya. Having applied the facts presented so far by both sides, the previous litigations between the parties and the superior courts decisions as summarized above, I find the petitioners have failed to establish the existence of a prima facie case with a likelihood of success. They have also failed to show that there is a likelihood of the substratum of the petition being rendered nugatory. This is because the impugned eviction was emanating from a court order obtained through a judicial process, and the petition and application filed herein are not an appeal from the trial court’s orders. It is therefore in the public interest not to issue the conservatory and prohibition orders sought herein as there exists other litigations between the parties through which any aggrieved party may move the court for the desired orders.



- d. As this petition and application are actually over private property rights, as opposed to public interest litigation, and as the petitioners have failed in their quests, they will pay the respondents' costs in the application.
 1. Flowing from the conclusions arrived at above on the petitioners notice of motion dated the 13th December 2024, the court finds and orders as follows:
 - a. That the application is without merit and is dismissed.
 - b. The petitioners to pay the respondents costs.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 16TH DAY OF JULY 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

IN THE PRESENCE OF:

Petitioners : Mr. Kamwendwa

Respondents : Mr Kahudi for Mwarandu for 1st Respondent

Shitemi-court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

