



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC PETITION NO. 4 OF 2017

IN THE MATTER OF ARTICLE 22 (1) OF THE CONSTITUTION OF KENYA 2010

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND OR FUNDAMENTAL FREEDOMS UNDER
ARTICLE 28, 40 AND 47 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS FUNDAMENTAL FREEDOMS AND
ENFORCEMENT OF THE CONSTITUTION) PRACTICE & PROCEDURE RULES, 2012**

BETWEEN

HEZEKIAH MAVISI ONDEGO

GEORGE ONDEGO MAVISI

PHILIP ODARI

EVANS LUMBASIO MAVISI

VIOLET ALIVITSA

DANIEL CHOGO

KEFA ONDEGO

JOSEPHINE NYANGASI

EVANS IDIYI MWANZI.....PETITIONERS

VERSUS

COUNTY GOVERNMENT OF VIHIGA.....1ST RESPONDENT

THE EXECUTIVE MEMBER DEP. LAND HOUSING &

URBAN DEVELOPMENT.....2ND RESPONDENT

RULING

The application is dated 17th march 2017 and is brought under rules 21 & 22 of the Constitution of Kenya seeking the following orders;

1. That this application be certified as urgent and be heard ex-parte in accordance with Rule 22 stated herein above.
2. That a conservatory order or interim order of injunction be issued restraining the respondents and or their servants or agents from

threatening and trespassing into the petitioners respective land parcels S. Maragoli/Bugonda/3216, 3197, 3198, 3199, 3200 and 3201 with a view to demolishing any house structures, fences and evicting the petitioners herein until proper procedures as prescribed by law are complied with.

3. The costs of this application be provided for.

The application is supported by the affidavit of HEZEKIAH MAVISI ONDEGO grounds that notice has ever been issued to the applicants by the National Land Commission as required by law. The purported Notice to vacate issued by the 1st respondent is irregular hence null and void for all purposes. The applicants/petitioners land parcels have never been acquired by the respondent or any Government agency for public use as alleged. The petitioners respective land parcels remain private properties hence need to be protected. The petitioners land parcels have never been gazetted for acquisition by the National Land Commission on behalf of the respondents herein as required by law nor are there any agreements between the parties herein. No adequate compensation has ever been made to the petitioners by the respondents or by the National Land Commission.

The first petitioner reiterated the averments in the petition herein and the affidavit in support thereof and plead them in support of the Notice of Motion for conservatory/Interim injunction thereto. That he also pray that an order hereby issue restraining the respondents and or their servants from demolishing the petitioners fences and or issuing any eviction threats against the petitioners herein from their respective land parcels S. Maragoli/Bugonda/3216, 3197, 3198, 3199, 3200 and 3201. That the respondents should also be restrained from trespassing into the applicants land parcels or acting in any manner likely to interfere with the applicant's right to use the said land parcels till this matter is fully heard and determined. That the respondents have since been issuing verbal threat Notices to demolish and evict the applicants. That the applicants live and utilizes their respective land parcels and if evicted, they will be left landless.

The petitioners being the registered owners of their respective land parcels as stated herein above are aggrieved with the manner the respondents want to unlawfully deprive them their respective land parcels without following the due process as provided by law. If the respondents want to acquire by compulsory acquisition, then they must follow the due process and adequately compensate the petitioners or otherwise give them alternative land where they can settle.

The purported Notice to vacate dated 20th August, 2015 are therefore irregular and illegal as such notice can only be issued by the National Land Commission as it is the only Commission mandated to give such notices for purposes of acquiring land for the National Government and or for any County Government as per section 5 of the National Land Commission Act 2012 and provisions of part VIII of the Land Act compulsory acquisition of interests in land.

The petitioners submit that their private land parcels have never been acquired by the respondents or any government agency for any public use as alleged from the purported illegal Notice and hence the respondents acts of threatening to evict the petitioners is an act of impunity to forcefully deprive the applicants their fundamental right to own property as provided under section 40 of the Constitution of Kenya 2010.

They submit therefore that the respondent's unlawful acts of threatening to evict the applicants is a clear case of violating the petitioners rights to a fair administrative action and without due process. The applicants will be deprived their respective land parcels unfairly and hence the need to issue conservatory orders to restrain the respondents acting illegally. Each of the petitioners/applicants is in occupation and use their respective land parcels with their families and if evicted they are likely to suffer irreparable loss and damage.

The applicants have in the circumstances laid a basis as set out in the case of *GIELLA VS. CASSMAN BROWN LTD (1993) E.A 358* and they pray that the application be allowed as prayed.

The respondents submitted that, the orders of injunction sought by the petitioners will be contrary to public policy law and order as they are aimed at frustrating the County Government's Development of infrastructure for public use. The title deeds which are the subject matter of the instant proceedings are fruits of fraud or unlawful acquisition of Government land thereby denying the petitioners the equitable remedy of injunction since all the petitioners are tainted. The petitioners are guilty of non disclosure of material facts to the case which are that the original parcel of land South Maragoli/Bugonda/2097 which gave birth to all other parcels had been exchanged with the land parcel Mautuma Central Settlement Scheme/1397 between the Nation Government as succeeded by the county government (respondents) and the 1st petitioner and by this lack of candor, the petitioners are disentitled to order of injunction. The motion is in abuse of court's process.

This court has carefully considered both the petitioner's and the respondent's submissions and the annexures therein. The principals governing the grant of interlocutory injunction are clear. As stated in the case of **Giella vs. Cassman Brown (1973) EA 358**.

"The conditions of granting an injunction are now, I think well settled in East Africa. First an applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

Furthermore, as elaborated in the case of **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 others (2003) Hon Bosire J.A.** held that:

"So what is a prima facie case? I would say that it is a case in which on the material presented to the court or tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter"

Further he goes on to state that "..... a prima facie case is more than an arguable case, it is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."

The application is supported by the affidavit of the 1st petitioner, Hezekiah Mavisi Ondego sworn on 17th March, 2017 and grounds set on the face of the Notice of motion. That the petitioners basically are the registered owners of the land parcels in question as follows:-

- S. MARAGOLI/BUGONDA/3216 - HEZEKIAH MAVISI ONDEGO
- S. MARAGOLI/BUGONDA/3297 - GEORGE W. ONDEGO MAVISI
- S. MARAGOLI/BUGONDA/3198 - PHILIP ODARI MAVISI
- S. MARAGOLI/BUGONDA/3200 - EVANS LUMBASIO MAVISI
- S. MARAGOLI/BUGONDA/3199 - JOSEPHINE NYANGA

SIMAVISI & VIOLET ALIVITSA

- S. MARAGOLI/BUGONDA/3201 - DANIEL CHOGO MAVISI

The petitioners have annexed a search and copies title deeds to the affidavit in support of the main petitions to prove ownership. The above titles are sub-divisions arising from original land parcels S. Maragoli/Bugonda/2097 now closed and was initially in the names of the 1st petitioner.

The respondents are trying to enforce Notice to vacate purported to have been issued on 20th August, 2015 annexed to the affidavit in support of the petition marked "HMO2". The application is brought under rules 21 and 22 of the constitution of Kenya (protection of rights and fundamental Freedoms and Enforcement of the constitution) Practice and Procedure 2012.

The respondents submit that the petitioners are guilty of non disclosure of material facts to the case which are that the original parcel of land South Maragoli/Bugonda/2097 which gave birth to all other parcels had been exchanged with the land parcel Mautuma Central Settlement Scheme/1397 between the Nation Government as succeeded by the county government (respondents). I find that the petitioners have failed to show a prima facie case with a probability of success. Secondly the petitioners have failed to show that if an interlocutory injunction/conservatory order is not granted they might otherwise suffer irreparable injury, which would not adequately compensated by an award of damages. I find this application has no merit and I dismiss the same with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 30TH DAY OF MAY 2018.

N.A. MATHEKA

JUDGE