



Muthee v Damah Alliance Limited & 7 others; Law Society of Kenya & another (Interested Parties) (Environment and Land Constitutional Petition E012 of 2023) [2024] KEELC 438 (KLR) (31 January 2024) (Ruling)

Neutral citation: [2024] KEELC 438 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E012 OF 2023

EK WABWOTO, J

JANUARY 31, 2024

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS AND IN THE MATTER OF THE PRINCIPLES OF NATURAL JUSTICE, OPENNESS & JUST COMPENSATION

AND

DEMOLITION OF BUILDINGS ERECTED ON L.R NO. 36/V11/275 SITUATE IN EASTLEIGH

IN THE MATTER OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 22, 28, 40, 43(1)(B), 47, 48, 50 (1), OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF THE CONTRAVENTION AND THREATENED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOM UNDER ARTICLES 40(2) AND (3), 43(1)(B), 47, 48, 50 (1), OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF THE LAND ACT AND LAND REGISTRATION ACT IN THE MATTER OF ILLEGAL EVICTION AND UNLAWFUL DEMOLITION OF BUILDINGS ERECTED ON L.R. NO. 36/VII/275 SITUATE IN EASTLEIGH

BETWEEN

DAVID MUTHAMI MUTHEE PETITIONER

AND

DAMAH ALLIANCE LIMITED 1ST RESPONDENT



MOHAMED KER MOHAMED 2ND RESPONDENT
DAWID SHEIKH ABDULRAHMAN 3RD RESPONDENT
INSPECTOR GENERAL OF POLICE 4TH RESPONDENT
NAIROBI CITY COUNTY 5TH RESPONDENT
CECM, BUILT ENVIRONMENTAL AND URBAN PLANNING, NAIROBI CITY
COUNTY 6TH RESPONDENT
CHIEF LAND REGISTRAR 7TH RESPONDENT
ATTORNEY GENERAL 8TH RESPONDENT

AND

LAW SOCIETY OF KENYA INTERESTED PARTY
KENYA NATIONAL HUMAN RIGHTS COMMISSION ... INTERESTED PARTY

RULING

1. This ruling is in respect to the Petitioner’ application dated 6th September, 2023 and the 5th and 6th Respondent’s Preliminary Objection dated 22nd September, 2023.
2. The Petitioner sought the following orders in his application:
 - i. ... Spent.
 - ii. That pending the hearing and determination of this Application inter-parties, this Honourable court be pleased to grant a conservatory order restraining the 1st, 2nd, 3rd & 4th Respondents from further demolishing, destroying, digging, excavating, constructing, disposing, transferring or in way interfering with the suit property known as Land Reference Number Eastleigh 36/VII/275.
 - iii. That pending the hearing and determination of this Application inter-parties, this Honourable court be pleased to grant a conservatory order restraining the 1st, 2nd, 3rd & 5th & 6th from obtaining or issuing any permits, license or approval whether for the purposes of hoarding, excavating and/or constructing the suit property known as Land Reference Number Eastleigh 36/v11/275.
 - iv. That pending the hearing and determination of this Application inter-parties, this Honourable court be pleased to grant an interim order directed at the Land Registrar to place and restore the caveat over the property known as Land Reference Number Eastleigh 36/V11/275.
 - v. That pending the hearing and determination of this Petition, this Honourable court be pleased to grant a conservatory order restraining the 1st, 2nd, 3rd & 5th & 6th from obtaining or issuing any permits, license or approval whether for the purposes of hoarding, excavating and/or constructing the suit property known as Land Reference Number Eastleigh 36/VII/275.
 - vi. That pending the hearing and determination of the Petition, the Honourable court be pleased to grant conservatory orders restraining the 1st, 2nd, 3rd & 4th Respondents, their servants,



agents, and/or workmen from further demolishing, destroying, digging, constructing or in way interfering with the suit property known Land Reference Number Eastleigh 36/VIII/275.

- vii. That pending the hearing and determination of this Petition, this Honourable court be pleased to grant a conservatory order restraining the 1st, 2nd, 3rd & 5th & 6th from obtaining or issuing any permits, license or approval whether for the purposes of hoarding, excavating and/or constructing the suit property known as Land Reference Number Eastleigh 36/VII/275.
 - viii. That pending the hearing and determination of this Petition, this Honourable court be pleased to grant an order directed at the Land Registrar to place and restore the caveat over the property known as Land Reference Number Eastleigh 36/VII/275.
 - ix. That the Inspector General of Police, Mr. Japheth Koome Nchebere, personally ensures enforcement and full compliance with the said orders.
 - x. That this Honourable court is pleased to grant any other orders and directions as it may deem fit and just to issue under the circumstances.
 - xi. That the costs of this Application be borne by the Respondents.
3. The 5th, 6th and 1st Respondents opposed the said application. The 5th and 6th Respondents filed a Notice of Preliminary Objection dated 22nd September, 2023. The 1st Respondent filed a Replying Affidavit sworn by David Sheikh Abdulrahman on the 15th day of September, 2023.
 4. The Petitioner's application and the 5th and 6th Respondent's application were heard together on the 27th November, 2023 pursuant to the directions issued by this Court.
 5. During the plenary hearing of the application and the preliminary objection, Counsel for the Petitioner submitted that the Petitioner entered the suit property sometimes in 1985 and that in 1997, he filed a suit for adverse possession which was settled by consent and he was granted title to the suit property. A caveat was later placed in the property through a report made by the Police. It was also submitted that there were other proceedings before Lady Justice Mogeni which fell short in cancelling the title of the suit property. Counsel also submitted that in respect to suit ELC No. 204 of 2023, the Court did not grant any eviction orders and that a similar suit had been filed in the lower Court where orders were issued. The Petitioner submitted that upon being made aware of the proceedings before the lower Court, he proceeded to file a preliminary objection which was considered and the lower Court granted status quo orders. It was also submitted that the Petitioner was evicted from the suit property. The Petitioner urged the Court to grant him the Conservatory orders sought. It was contended that the 1st Respondent was constructing on the suit property and that the suit property should be preserved.
 6. In respect to the preliminary objection, it was submitted that the doctrine of exhaustion, doesn't apply to this case since the 5th and 6th Respondents have not been sued in isolation. Counsel for the Petitioner also urged the Court to refer to the Petitioner's written submissions and authorities that had been filed in support of the Petitioner's application.
 7. The 1st Respondent filed a Replying Affidavit sworn by David Sheikh Abdulrahman, a Director of the 1st Respondent. The affidavit was sworn on 15th September, 2023. The 1st Respondent opposed the application and argued that the Petition before the Court is res judicata as the issues raised therein regarding property registered as Eastleigh 36/VII/275 by the Petitioner David Muthami Muthee were adjudicated upon in ELC No. 1234 of 2016 and exhaustively determined where the suit by the Petitioner seeking adverse possession was dismissed. It was also submitted that the orders sought by the Petitioner are incapable of being granted or enforced and are overtaken by events as the 1st Respondent acquired hoarding permits in May 2023 and that the property is now vacant and construction has



- already commenced. It was also argued that the Petition is based on non-existent and concocted adverse possession orders and further no reasonable cause of action has been disclosed as against the 1st and 3rd Respondents.
8. It was also contended that the 1st Respondent is the registered owner of the suit property and that he acquired the suit property in good faith. The Court was urged to dismiss the suit.
 9. The 5th and 6th Respondents in canvassing their preliminary objection relied on their written submissions and submitted that the Petitioner has not exhausted the alternative dispute resolution mechanism provided for under the *Physical and Land Use Planning Act*, 2019 before approaching this Court. The 5th and 6th Respondents urged this Court to dismiss the application and struck out the entire petition with costs.
 10. This Court has considered the application dated 6th September, 2023, the preliminary objection for 22nd September, 2023, the affidavits filed and written submissions on record.
 11. Having considered the same, this Court is of the view that the following are the pertinent issues for determination herein.
 - i. Whether this Court has jurisdiction to hear this petition
 - ii. Whether the petitioner has made out a case for grant of the orders sought in respect to his application dated 6th September, 2023.
 12. The 5th and 6th Respondent and the 1st Respondent argued that this Court lacks jurisdiction by dint of the suit being res judicata and further that the Petitioner has invoked the jurisdiction of this Court without exhausting available Statutory remedies provided for under Section 61 of the *Physical and Land Use Planning Act* No. 13 of 2019.
 13. On exhaustion of available statutory remedies, it is worth noting that while the court's jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute, the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. See also the decision of the Supreme Court in the case of *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023) [2023] KESC 113 (KLR) (28 December 2023) (Judgment)*. In the instant Petition, the Petitioner has sought several reliefs in the main petition which cannot be granted by the proposed alternative forum as submitted by the 5th and 6th Respondents.
 14. Having considered the petition in its entirety, it is evident that the reliefs sought therein cannot be granted by forum proposed by the 5th and 6th Respondents and in the circumstances, it is the finding of this Court that the preliminary objection lacks merit and the same is dismissed.
 15. On whether the petition has made out a case for grant of the Conservatory orders sought, it is trite law that a conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.
 16. In the instant case it is evident that from the affidavits that were filed herein that the Petitioner was evicted from the suit property before filing of this suit. It was also evident that the property is registered in the names of the 1st Respondent who is currently undertaking some excavation and construction works. Article 40 of *the Constitution* of Kenya 2010 protects the right to acquire and own property and Sections 24 and 25 of the *Land Registration Act* No. 6 of 2012 provide for absolute ownership as an interest conferred by registration, and the rights appurtenant to registration respectively, which



means that an owner of property ought not be limited in the enjoyment of their property without a clear lawful and justifiable basis.

17. The Prayers sought by the Petitioner in his application appear to have been overtaken by events. In the case of *Nadeem A. Kana -vs- Lucy Wambui Mwangi* [2021] eKLR, it was held that a matter overtaken by events cannot be triable and if it proceeds to success, the victory would be pyrrhic. In the circumstances, this Court is not persuaded to grant the Conservatory Orders sought by the Petitioner.
18. In Conclusion, the preliminary objection by the 5th and 6th Respondents dated 22nd September 2023 and the Petitioner's application dated 6th September, 2023 are determined in the following terms:
 - i. The preliminary objection dated 22nd September, 2023 is dismissed for lack of merit.
 - ii. The Petitioner's application dated 6th September, 2023 is equally dismissed for lack of merit.
 - iii. Each party to bear own costs of the application and preliminary objection.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF JANUARY, 2024.

E. K. WABWOTO

JUDGE

