



Sheria na Haki Human Institute v Pine Tree Holdings Limited & 8 others; Ethics and Anti-Corruption Commission & 3 others (Interested Parties) (Environment & Land Petition E001 of 2023) [2024] KEELC 298 (KLR) (30 January 2024) (Ruling)

Neutral citation: [2024] KEELC 298 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION E001 OF 2023
NA MATHEKA, J
JANUARY 30, 2024**

BETWEEN

SHERIA NA HAKI HUMAN INSTITUTE PETITIONER

AND

PINE TREE HOLDINGS LIMITED 1ST RESPONDENT

WAMBUI NGUNYA 2ND RESPONDENT

REGISTRAR OF TITLES MOMBASA 3RD RESPONDENT

NATIONAL LAND COMMISSION 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

DIRECTOR LANDS AND ADMINISTRATION 6TH RESPONDENT

CS MINISTRY OF LANDS AND URBAN DEVELOPMENT .. 7TH RESPONDENT

COUNTY GOVERNMENT OF MOMBASA 8TH RESPONDENT

AND

HANIFA SHERBAS ALIAS KAKA INTENDED RESPONDENT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY

DIRECTOR OF CRIMINAL INVESTIGATION INTERESTED PARTY

BENJAMIN KARIUKI INTERESTED PARTY

ELIZABETH KAMALA MAKANGE INTERESTED PARTY



RULING

1. The application is dated July 26, 2023 and is brought under Articles 40, 47 and 159 of the Constitution of Kenya 2010, Section 1A, 1B and 3A of the Civil Procedure Act, Cap. 21, Order 40 Rules 1, 2, 3 and 4, Order 51 Rule 1 of the Civil Procedure Rules (2010) of the Laws of Kenya, Rule 18 of the Constitution of Kenya (Protection of Kenya of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, Section 7, 17, 37 and 38 of the Limitations Act seeking the following orders;
 1. That this application be certified as urgent and service thereof be dispensed within the first instance;
 2. That this Honourable court be pleased to issue conservatory orders restraining all Respondents either by their servants, agents, and/or any other person claiming under them from conducting a survey, subdividing, evicting, alienating, dispossessing the plaintiff from the suit land Cr No. 1007 LR MN/11/400 or in any other way interfering with the occupants quiet possession thereof pending the hearing and determination of this application.
 3. That this Honourable court be pleased to issue conservatory orders restraining the Respondents by their servants, agents, and/or any other person claiming under them from conducting a survey, subdividing, evicting, alienating, dispossessing the current occupants from the suit land Cr No. 1007 LR MN Il 400 or in any other way interfering with the Plaintiff current occupants' quiet possession thereof pending the hearing and determination of this petition.
 4. That costs of this Application be provided for.
2. It is supported by the annexed Affidavit of Etoke John Akaran and on the grounds that the Petitioner/Applicant has commenced a suit against the 1st and 2nd Respondents whom in a well-orchestrated plan have managed to get title to the suit property which title is a product of a provisional title allegedly issued on the Saturday March 4, 1978 a clear indication of a forgery, fraud and/or deceit. The Petitioner/Applicant shall be demonstrating to the Honorable court that the 1st and 2nd Respondents are hiding under the veil of indivisibility of title to the suit property which procedure of acquisition of the title is marred with illegalities, and a product of a forgery and which ought to be revoked on the ground that the same is dead upon arrival. The 1st and 2nd Respondents have issued threats of eviction of the occupants of the suit property claiming ownership and indefeasibility of title. The 1st and 2nd Respondents have at several times and diverse dates used the security officers and goons to illegally and/or unlawfully evict the occupants of the suit properties. That in the several instances that the evictions done, the exercises were fatal and resulted into death of the occupants, gross violation of fundamental rights and freedoms and as a result some of the occupants would be rendered destitute and homeless. That the certificate of title in the name of the 1st Respondent is marred with illegalities being a fruit of an irregular processes and having been executed by the 3rd Respondent on a Saturday the March 4, 1978 a clear indication that the same was done irregularly. There are several families the suit property comprising of women and school going children and who are likely to suffer an irreparable loss where this Application and petition are not heard urgently and on a priority basis.
3. The 2nd Respondent submitted that the Petitioner has no cause of action against them while the 3rd, 5th, 6th and 7th Respondents opted not to participate in this application.



4. This court has considered the application and the submissions therein. In Petition E408 of 2020 *Okiya Omtatah Okiiti vs Judicial Service Commission; Philomena Mbete Mwilu & another (Interested Parties)* (2021) eKLR, the Court stated as follows;

" In Civil Application No. 5 of 2014 *Gatirau Peter Munya -v- Dickson Mwenda Kitbinji & 2 Others* (2014) eKLR, the Supreme Court discussed, at paragraph 86, the nature of conservatory orders as follows: -

(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, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the Applicant's case for orders of stay."

5. The Court in Nairobi Civil Appeal 151 of 2011 *Invesco Assurance Co. Ltd vs MW (Minor suing thro' next friend and mother (HW))* (2016) eKLR defined a conservatory order as follows: -

" 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."

6. In *Judicial Service Commission vs Speaker of the National Assembly & Another* (2013) eKLR the Court had the following to say about the nature of conservatory orders;

" Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the *Constitution*, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute *in situ*. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person."

7. Given the nature of conservatory orders, it is argued, that there is need for a Court to exercise caution when dealing with any request for such prayers. I find that with that proposition for the reason that matters which are the preserve of the main Petition ought not to be dealt with finality at the interlocutory stage.

8. In the case of *Muslim for Human Rights (Milimani) & 2 Others vs Attorney General & 2 Others* (2011) eKLR. The court stated as follows;

" The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-a vis the case of either parties. The principle is similar to that in temporary or interlocutory injunctive in civil matters. This is a cardinal principle and happily makes my functions and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side."



9. A Court, therefore, dealing with an application for conservatory orders must maintain the delicate balance of ensuring that it does not delve into issues which are in the realm of the main Petition. In this discourse, I will, therefore, restrain myself from dealing with such issues.
10. In *Board of Management of Uburu Secondary School vs. City County Director of Education & 2 Others* (2015) eKLR, the Court summarized the principles for grant of conservatory orders as;
- (i) The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.
 - (ii) The second principle is whether the 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) Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.

(i) Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.

11. Being guided by the principles above the court will now consider the facts in the instant case. A *prima facie case* was defined in *Mrao vs First American Bank of Kenya Limited & 2 Others* (2003) KLR 125 to mean;

" In a civil application includes but is not confined to a 'genuine and arguable case'. It is a case which, on the material presented to the court, a 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 later."

12. What constitutes a *prima facie case* was further dealt with by the Court of Appeal in *Mirugi Kariuki vs Attorney General* Civil Appeal No. 70 of 1991 (1990-1994) EA 156, (1992) KLR 8. The Court, in an appeal against refusal to grant leave to institute judicial review proceedings by the High Court, stated as follows;

" It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant's interests without regard to the nature of his complaint. If he fails to show..... that there has been a failure of public duty, this court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables this court to prevent abuse by busy-bodies, cranks and other mischief-makers... In this appeal, the issue is whether the applicant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of this Act was brought into question. Without a rebuttal to these allegations, this appellant certainly disclosed a prima-facie case. For that, he should have been granted leave to apply for the orders sought."

13. This second requirement for the granting of conservatory orders dictates that an Applicant must demonstrate that if the application is not allowed, the substratum of the Petition will be lost and as such the main claim will be rendered nugatory. In other words, the Applicant will suffer prejudice.



14. The Petitioners state that the certificate of title in the name of the 1st Respondent is marred with illegalities being a fruit of an irregular processes and having been executed the 3rd Respondent on a Saturday the March 4, 1978 a clear indication that the same was done irregularly. There are several families the suit property comprising of women and school going children and who are likely to suffer an irreparable loss. They state that sometime in 2022 the 1st and 2nd Respondents invaded the occupants therein and demolished their houses. The photos annexed EJA 4, 5 and 6 show demolished houses. It does not give a clear status as to what is on the ground. The Petitioner avers that the occupants of the suit property are approximately two hundred people who are vulnerable people hence the public interest claim. I have perused the undated letter of authority appointing the Petitioner to act on their behalf (EJA-7) and find that the list contains only 21 names. Indeed, the Petitioner states that the occupants have filed various claims of adverse possession but the particulars have not been given. I find that the Petitioners have failed to establish a prima facie case and/or that they would suffer irreparable loss if the orders are not granted.
15. On the issue of public interest, the same cannot be determined given the facts before me. ‘Public interest’ is defined by the *Black’s Law Dictionary* 10th Edition at page 1425 as;
- " The general welfare of a populace considered as warranting recognition and protection. Something in which the public as a whole has stake especially in something that justifies government regulation."
16. Constitutions and laws are passed for the orderly governance of the people. As such, the laws are always presumed to be constitutional until the contrary is proved. In a matter, therefore, where the *Constitution* is alleged to be violated or is threatened with violation, the Court must tread carefully since the allegation is yet to be subjected to legal scrutiny. Is this a public interest case or one of forgery or adverse possession which is a normal civil suit. In the absence of a ground report and full disclosure this court cannot give conservatory orders. I find this application is unmerited and is dismissed. Parties are advised to take a date for the hearing of the main petition. Costs of this application to be in the cause.
17. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 30TH DAY OF JANUARY 2024.

N.A. MATHEKA

JUDGE

