



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

PETITION NO. 4 OF 2017

CHORLIM MULTIPURPOSE COOPERATIVE SOCIETY LIMITED &

3 OTHERS.....PETITIONERS

VERSUS

THE HON. ATTORNEY GENERAL & 9 OTHERS.....RESPONDENTS

RULING

1. The petitioners filed an application dated **2nd August, 2018** seeking the following orders:-

1. That this application be certified as urgent and same be heard ex-parte in the first instance.

2. That pending the hearing and determination of this application inter partes the honourable court be pleased to issue a temporary conservatory order restraining the respondents jointly and severally from evicting members of the 1st appellant from LR No. 6992/2 and/or alienating, acquiring claiming, allocating, moving into possession or dealing in any manner with LR. No. 6992/2 contrary to the interest of the appellants/applicants.

3. That pending the hearing and determination of the intended appeal the honourable court be pleased to issue a temporary conservatory order restraining the respondents jointly and severally from evicting members of the 1st applicant/appellant from LR No. 6992/2 and/or alienating, acquiring claiming, allocating, moving into possession or dealing in any manner with LR. No. 6992/2 contrary to the interest of the appellants/applicants.

4. That in the alternative and without prejudice to the foregoing the honourable court be pleased to issue an order for the maintenance of the status quo in LR No. 6992/2 pending the hearing and determination of this application and thereafter pending the hearing and determination of the appeal.

5. That costs of this application be in the cause.

2. The applicants' grounds for the application the applicants are aggrieved with the ruling and decision of honourable Justice Mwangi Njoroge delivered on **31st May, 2018** in **Kitale ELC Pet. No. 4 of 2017** and intend to prefer an appeal against the whole of the ruling and decision; that the 3rd and 4th respondents *have served* the appellants with a notice to vacate **LR. No. 6992/2** and in default they be forcibly evicted from the property; that honourable court in his ruling delivered on **31st May, 2018** strike out the appellants' petition; that the appellant have filed and served the notice of appeal and have applied for certified copies of the proceedings and ruling; that the court dismissed the appellants' application and their petition without allowing them an opportunity of presenting evidence in support of the petition; that the intended appeal raises weighty and triable issues which were raised in the appellants' petition; that the appellants contend that **LR. No. 6992/2** is private land having been allocated to them by the state in **1997**; that the earlier constitutional dispensation **Section 3** of the now repealed **Government Lands Act (Cap 280, Laws of Kenya)** had given power to the president acting through the Commissioner of Lands, to allocate land to any applicant and in the instant case the applicant; that it is the applicants case that upon the promulgation of the **Constitution of Kenya 2010** the National Land Commission was vested with the administration and management of public and private land and the Ministry of Forest and Natural Resources had no authority in **Gazetting LR. No. 6992/2** as Mt. Elgon Forest and that about **200** families who are members of the 1st applicant are resident of **LR. No. 6992/2** and they stand to suffer substantial loss if the 3rd and 4th respondents actualize their intention to evict them.

3. The application is supported by the affidavit of **John Kisa Ngeyo** the 2nd petitioner herein sworn on **2nd August, 2018**.

4. The 3rd and 4th respondent filed grounds of opposition dated **13/8/2018**. Those grounds stated that no conservatory orders within the proper definition of conservatory orders can be issued after the dismissal of a petition; that this court is *functus officio*; that the proper forum for the application is the court of appeal; that the application is defective having been brought under the civil procedure rules rather than

under the Mutunga rules and that in any case **Order 42 Rule 6** thereof does not apply to constitutional petitions and that there is nothing to be stayed the constitutional petition having been dismissed.

5. In a further reply to the application the 3rd respondent filed a replying affidavit sworn by **Augustine Owate** the ecosystems conservator **Trans Nzoia County** on **12/10/2018** and filed in court on the same date. He depones that the applicants have already been removed from the forest. And the application has been overtaken by events, is moot or merely academic; that the eviction was preceded by a notice dated **13/7/2018**; that the court in its last ruling in the matter had upheld an earlier finding by the court that the suit land is forest land that was not available for allocation; that conservatory orders and orders of status quo can only be issued while the petition is pending and that the petition has been dismissed and that therefore this court is *functus officio*.

6. The 3rd and 4th respondents filed their submissions on the Notice of Motion on 29/10/2018. I have perused through the record and I have not seen any submissions filed by the applicants.

7. The main issue that arises from the Notice of Motion is whether this court should issue a temporary conservatory order restraining the respondents jointly and severally from evicting members of the 1st applicant/appellant from **LR. No. 6992/2** and/or alienating, acquiring, claiming, allocating, moving into possession or dealing in any manner with **LR. No. 6992/2** contrary to the interest of the appellants/applicants; the alternative prayer of the applicants is for an order for the maintenance of the status quo in **LR. No. 6992/2** pending the hearing and determination of this application and thereafter pending the hearing and determination of the appeal.

8. It is proper to consider whether:-

(a) The prayer for a conservatory order and the alternative prayer for maintenance of status quo the appropriate ones in the circumstances where a petition has already been dismissed;

(b) The application is brought under the proper provisions of the law;

(c) If the answers to the two issues above are in the negative, whether there are any other grounds that the court may consider to be so valid as to allow the application.

9. I want to cite a passage in the ruling delivered by this court on **31/5/2018** striking out the petition, for it has a bearing on the issues raised above. It reads as follows:-

“In my view, this court has already pronounced itself in those two previous sets of proceedings that the land is forest land, having been acquired for the purpose of it being made into forest. The issue is therefore res judicata. If the petitioners herein had any further step that they could take, it was the lodging of an appeal against the decisions, and particularly the decision in Kitale HC Misc. Civil Appl. 67 of 2006 - Republic v Minister of Environment & Natural Resources Ex-Parte Chorlim Multi-Purpose Co-operative Society Ltd [2014] eKLR. They did not do that and I find that this court has no jurisdiction over this matter.

It is also interesting to note that in Kitale HC Misc. Civil Appl. 67 of 2006 - Republic v Minister of Environment & Natural Resources Ex-Parte Chorlim Multi-Purpose Co-operative Society Ltd [2014] eKLR, the court noted that the notice to vacate the subject land did not name the Petitioners herein yet they instituted those proceedings.

In my view, in this era of great deforestation and resultant climate change, the environment is to be safeguarded within the framework of the law, and the decisions of this court cited herein above demonstrate that the handling of the petitioners and others encroaching on the forest land were procedurally done.

If there was any gazettelement process that was underway, the petitioners must have known of it before those decisions were made. Perchance they never knew of the process before those decisions were made, those proceedings made the petitioners aware of the same; they did not challenge the process either before the full gazettelement was effected or in those proceedings. The petitioners are therefore also guilty of unreasonable delay in approaching this court in that they have come when the gazettelement process is already over. It was done over 5 years ago. They thus slept on their rights”.

10. The court struck out the petition after stating as above. I agree with the 3rd and 4th respondent that a conservatory order is normally issued during the pendency of a petition to maintain a certain state of affairs before the final rights of the parties are adjudicated upon with finality by the court.

11. I have considered the case of **Nairobi Kiru Line Services Limited Vs Subcounty Of Othaya, Sub County Administrator And Mawat Nissan Sacco** cited by the 3rd and 4th respondents and I do not find it applicable in this matter for the reason that the prayers of the applicants are not expressed to be in the nature of stay, but as conservatory orders which in my view and in constitutional practice, are broader than an order of stay. However for the reason that the petition is already struck out, I still find that the application is unmerited.

12. In this case the court has not once but twice adjudicated the issues before it which relate to the suit land and found that the petitioners do not have any proprietary rights to the suit land. Each party therefore knows their own rights. In respect of the dismissed petition I agree with the 3rd and 4th respondents that this court is *functus officio*.

13. It would be improper and also contrary to good practice for this court to find that the respondents have no right to the suit land, that it remains gazetted forest land and that they never objected to the gazettelement of the land, and subsequently issue an order in the instant Notice

of Motion that the applicants do remain in the land which is meant to be a forest.

14. If the court issued that kind of order, this court would be in effect as if it had revived the petition for the purpose of the issuance of a conservatory order and that would be perpetuation of illegal occupation of what it has already gazetted forest land.

15. I have noted that the applicants have averred that the intended appeal raises weighty and triable issues. However in the already concluded proceedings, the alleged allocation of the suit land to the petitioners has been successfully challenged and I am of the view that there is greater public benefit that would be derived in conserving the forests by keeping out the applicants in contrast to the possible destruction and hindrance to reforestation or environmental restoration work that would continue if the applicants were allowed to remain on the ground. In any event I find that no possible loss or damage upon denial of the orders has been alleged or proved, and even if there were any, it would at this post-judgment stage be counterbalanced with the public benefit of conserving the forest or reforestation aforementioned.

16. In respect of the alternative prayer that the status quo be maintained I note that the maintenance of the status quo would only be urged by the applicant if it were in their interest. The applicants have not however responded to the averments in the replying affidavit filed by the 3rd and 4th respondents which state that they have been evicted from the forest. I find it to be the correct position that the applicants are already out of the forest. Issuance of an order of *status quo* while they are already evicted would not aid them at all, and this court should not issue orders in vain.

17. I therefore find that the application dated **2nd August, 2018** has no merit. The application is therefore dismissed with costs to the 3rd and 4th respondents only.

Dated, signed and delivered at Kitale on this 14th day of November, 2018.

MWANGI NJOROGE

JUDGE

14/11/2018

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kuria for 1st, 3rd - 10th respondents

Mr. Kuria holding brief for Masaka - 2nd respondent

Ms. Muniolo holding brie for Murgor - petitioners

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

14/11/2018