



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**PETITION NO. 103 OF 2012**

**MOHANSONS (KENYA)  
 LIMITED.....PETITIONER**

**VERSUS**

**THE REGISTRAR OF TITLES .....1<sup>ST</sup> RESPONDENT**

**MARY MURTAZZA ONDATTO .....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**EQUITORIAL COMMERCIAL BANK LIMITED.....INTERESTED PARTY**

**RULING**

[1] This is a ruling on an application for conservatory order by Chamber Summons dated 31<sup>st</sup> October 2012 as follows:

1. ***“THAT*** for reasons to be recorded, the application herein be certified as urgent and be heard ex-parte in the first instance in respect of prayers 2 and 3 herein.

2. ***THAT*** this Honourable Court do grant a Conservatory Order barring the Second Respondent herein from taking possession and/or entering into occupation of the property known as L.R. No.MN/I/2149 Beach Road, Nyali registered as Title No. C.R. 14642 at the Land Title Registry, Mombasa or in any other manner howsoever dealing with and or attempting to sell or charge the same pending the hearing and determination of this application inter-partes;

3. ***THAT*** this Honourable Court do grant a Conservatory Order barring the Third Respondent from making any entries in respect of the property known L.R.No.MN/1/2149 Beach Road, Nyali registered as Title No. C.R. 14642 at the Land Title Registry, Mombasa and/or registering any instruments dealing in the said property or seeking to alter the proprietorship status from the Petitioners’ name pending the hearing and determination of this application interpartes;

4. ***THAT*** this Honourable Court do grant a Conservatory Order barring the Second Respondent herein from taking possession and/or entering into occupation of the property known as L.R. No.MN/I/2149 Beach Road, Nyali registered as Title No. C.R. 14642 at the Land Title Registry, Mombasa or in any other manner howsoever dealing with and or attempting to sell or charge the same pending the hearing and determination of this petition.

5. **THAT** this Honourable Court do grant a Conservatory Order barring the Third Respondent herein from making any entries in respect of the property known L.R. No.. MN/I/2149 Beach Road, Nyali registered as Title No. C.R. 14642 at the Land Title Registry, Mombasa and/or registering any instruments dealing in the said property or seeking to alter the proprietorship status from the Petitioner's name pending the hearing and determination of this petition interpartes;

6. **THAT** :- this Honorable Court do grant the Petitioner a Conservatory Order, direction and/or writ as may be necessary to safeguard and prevent the Petitioners fundamental Rights and Freedoms under the Constitution of Kenya;

7. **THAT** :- This Honorable Court give further orders and /or directions as may be necessary herein; and

8. **THAT**:- the costs of this application be provided for.”

[2] The application was based on grounds set out in the application as follows:

(a) “the petitioner is registered proprietor of the property known as L.R.NO.MN/I2149 Beach Road, Nyali registered as Title C.R.14642 at the Land Titles Registry, Mombasa[hereinafter called “**the said property**”]

The said property is charged to Equatorial Commercial Bank Limited and the Petitioner has for some time now been engaged in litigation with the said Bank in respect thereto;

(b) the second Respondent herein has no proprietary, beneficial or other interest whatsoever in so far as the said property is concerned yet she continues to unlawfully and illegally use the police to assert herself to the said property;

(c) the first Defendant has wrongfully and unlawfully failed and continues to fail to avail to the Petitioner an official search and/or the Registry records relating thereto for purposes of verification;

(d) the Petitioner is entitled to access the Land Registry records as a matter of right under the Constitution of Kenya as he is to protection of his fundamental proprietary rights; and

(e) the First Respondent continues to wrongfully and in breach of the provisions of the Constitution to withhold the requisite records/information in respect of the said property.”

[3] The application was supported by the affidavit of Sandeep Singh Kandhari sworn on the 31<sup>st</sup> October 2012 in which he deponed that the petitioner was the registered proprietor of the suit property, whose title deed was deposited by virtue of a charge with Equatorial Commercial Bank Limited, and which was occupied by one Cyril Ondatto with the permission of the petitioner which retained possession and control thereof. The deponent averred that the 2<sup>nd</sup> Respondent had at least since 2004 not resided on the property but had since sometime in 2011 unlawfully attempted to evict the family of the said Mr. Ondatto from the property under a pretext that it formed part of her deceased husband's estate and had filed a civil suit in the subordinate court at Mombasa. The Petitioner's attempt to obtain records of title from the Registrar of Titles was unsuccessful the Registrar indicating that the file in respect of the suit property was missing. The deponent complained that the 2<sup>nd</sup> respondent had variously attempted to use police to obtain possession of the suit property and he described the last such incident at paragraph 12 of the supporting Affidavit as follows:

“12. **THAT** on Friday, 28<sup>th</sup> September 2012 the second respondent has yet again made another attempt to gain unlawful possession and/or occupation of the said property using Police assistance and by throwing out and forcefully evicting the family of Cyril Ondatto who were residing at the said property. The guards employed to guard the said property by the petitioner, namely

*Guardforce (K) Ltd were also allegedly ejected from the suit premises. In this respect, I had several telephone conversations with the Chairman of Guardforce (K) Limited, Mr. Polycarp Ocholla who assured me on several occasions that he was there to cater for and protect the Petitioners' interest given that he was employed by the Petitioner whilst his (Guardforce (K) Ltd's) guard still remains on the property, I am not altogether sure of his loyalty as access appears to be allowed severally since then to the Second Respondent to the said property despite my specific instructions to him not to allow her in. The Second Respondent is not, however, in occupation of the said property."*

Hence the petition for protection of the petitioner's property rights and for access to information on the records of the suit property.

[4] At the hearing *ex parte* the court granted prayers 2 and 3 of the Chamber summons for a period of 14 days pending hearing *inter partes* of the application. On allegation that the 2<sup>nd</sup> respondent was in possession of the property, the Court on 8<sup>th</sup> November 2012 when the application came up for *inter partes* hearing, while granting time for respondents to file replying affidavits and the petitioner a supplementary affidavit if necessary to respond to the replying affidavits, ordered that –

*"As the situation on the ground is disputed I will extend the orders granted on 31<sup>st</sup> October 2012 subject to a condition that the Respondent should not be evicted from the suit property if she is in possession."*

[5] The Equitorial Commercial Bank as chargee of the suit property was by order of the Court on the 8<sup>th</sup> November 2012 joined as an interested/necessary party.

### **Responses**

[6] The 2<sup>nd</sup> respondent filed a replying Affidavit sworn on 27<sup>th</sup> November 2012 claiming on behalf of the estate of her late husband a proprietor's interest in the property. She asserted at paragraph 4 of the Affidavit that the late Linus Juma Ondatto was "the registered proprietor of the suit property herein", and at paragraph 22 thereof sought to "affirm that the house belongs to my late husband Mr. Linus Juma Ondatto. I annex hereto and mark as "MMO 5" a water bill and electricity bill in my late husband's name showing that we have always paid water bills in his name." The bills are dated September 2003 and May 2011 respectively. The 2<sup>nd</sup> Respondent filed a further replying affidavit of 21<sup>st</sup> February 2013 in she challenged the charge on the suit property produced by the Interested Party.

[7] The Interested Party filed a replying Affidavit sworn by its manager Gafla Abdulrahman on 11<sup>th</sup> February 2013, producing among others a copy of the title documents on the suit property and a Charge thereon dated 20<sup>th</sup> March 1997 in favour of the Interested Party and a Court of Appeal judgment in Civil Appeal NO. 236 of 2006 in proceedings between the Bank and the petitioner over the loan secured by the charge.

[8] The 1<sup>st</sup> and 3<sup>rd</sup> Respondents did not file any affidavits.

### **Submissions**

[9] Counsel for the parties filed written submissions on the Chamber Summons application with supplementary oral argument by way of highlighting, and ruling was reserved. The Counsel for the Attorney General and the Registrar of Titles requested not to take part in the proceedings for the conservatory order.

[10] The petitioner's case is that there was no doubt as to its proprietary interest as registered proprietor, the title document of which was with the interested Party as a chargee, and that the primary prayer of the petition was to compel the Registrar of Titles to produce the records on the suit parcel of land. The

petitioner opposed the 2<sup>nd</sup> respondent's claim to the suit property on the basis of payment of bills without producing a duly registered title. It was further contended that failure by the Registrar to avail the title document was an infringement of its property rights within the competence of the constitutional court and not a property dispute for determination by a civil court.

[11] The 2<sup>nd</sup> Respondent claimed title to the suit property and averred that her title documents were lost but she had utility bills showing that she had been in the suit property since 1984. The petitioner's title was challenged as doubtful and it was contended that because of allegations of fraud the matter ought to be determined at full hearing of the dispute. The 2<sup>nd</sup> respondent pointed to the entries on the petitioner's title document as showing discrepancies on the entries therein and deponed in her further affidavit of 21<sup>st</sup> February 2013 that-

*“6. That in reference from the above is that either the entries were superimposed or the same are forgeries and meant to mislead and alter the register with the aim of distortion, deceit and committing fraud.*

*7. That it would be prudent that the registrar at the Registrar of Titles Mombasa, who entered and/or endorsed the entries, be summoned by the court to explain the obvious and glaring discrepancies whose aim is to mislead and misrepresent.*

*8. The Court ought to be satisfied that the charge actually existed and a proper title issued as on the face of I, it is not clear whether the charge existed and a title deed was issued to the petitioner as alleged.”*

It was further contended, however, that the proper forum for determination of the ownership question of title to the suit property was not the constitutional court but a civil court.

[12] The Counsel for the Interested Party supported the Petitioner's case as regards title to the suit property asserting that a certificate of title under section 23 of the Registration of Titles Act was conclusive evidence of ownership, citing *Moya Drift Farm Ltd. v. Theuri* (1973) EA 114. As a chargee and Judgment Creditor in Court of Appeal Civil Appeal No. 236 of 2006 decree, however, the interested party opposed any conservatory orders as sought in prayer no. 6 that would restrict the exercise of its Chargee's statutory power of sale and use of the property to recover the decretal amount in the aforesaid appeal. The interested party accordingly opposed the part of prayer 4 of the application to restrain the Registrar's power to register its dealings with the suit property.

### **Determination**

[13] The test for the grant of conservatory orders is now well settled. The Court considers whether the applicant has an arguable case or *prima facie* case for the claim in the petition; whether the injury or threatened loss is irreparable and the Petition, if successful, would therefore be rendered nugatory; and the balance of convenience with regard to public interest concerns in the matter subject of the dispute. In Mombasa Constitutional Petition No. 62 of 2014, *Muslims for Human Rights (MUHURI) & 4 Ors. v. Inspector General of Police & 2 Ors.*, I elaborated the test as follows:

*12. The emerging principles for the grant of injunction or conservatory orders under the constitutional litigation, as I understand them, are **firstly**, that the applicant must demonstrate an arguable case - sometimes called *prima facie* arguable case - the reference to arguable case distinguishing it from the *prima facie* test of the *Giella v. Casman Brown* (1973) EA 385 traditionally applied in regular civil cases; **secondly**, that the applicant must show that the petition would be rendered nugatory or that the damage that would be suffered in the absence of the conservatory order would be irreversible; and, **thirdly**, that in constitutional cases, the public interest in the matter would be considered and generally upheld. See *Kenya Transport Association Limited v. Cabinet Secretary for Transport and Infrastructure and Ors.*, Mombasa HC Petition No. 16 of 2014 where I considered some of the decisions on the matter as follows:*

“The tests for the grant of conservatory orders has been variously expressed by different courts. See Mombasa High Court petition No. 7 of 2011, Muslim for Human Rights and 2 Ors v the Attorney General, per Ibrahim J (as he then was), Mombasa High Court Petition No. 47 of 2011 Harun Barky Yator v. Judicial Service Commission (JSC), per Okwengu J, (as she then was), Nairobi High Court Petition No. 557 of 2013, per Majanja J, and Mecha Magaga v Jackson Obiero Magaga (2014) eKLR, per Okong’o, J. All the courts require for the grant of conservatory orders a prima facie case or a prima facie arguable case as in Yator’s case; irretrievability or irreparability if conservatory order is not granted and the subject matter is irretrievably lost (akin to the irreparability by damages test) and a balancing of the interests of the applicant and the respondents. There arises confusion as to whether the test of standard of the applicant’s case is on the prima facie or arguable case. Once accept that the court cannot determine the disputed merits of the case at the interlocutory stage, the correct standard must be the standard of arguable case. See Mbuthia v. Jimba Credit Corporation (1988) KLR 1. **I also consider that Under Article 23(3) of the Constitution, the court may make a broad spectrum of orders as conservatory orders to preserve the status quo where circumstances warrant and that may include fashioning a remedy to fit the particular circumstances of the application before the court.**”

### **On the merits of this application**

#### *Arguability of the petitioner’s case*

[14] As registered proprietor, the petitioner has legal rights protected under section 23 of the Registration of Titles Act. In **Wreck Motor Enterprises v Commissioner of Lands & 3 others** [1997] eKLR the Court of Appeal considered the effect of section 23 and held that -

“Sections 23(1) of the Registration of Titles Act reads as follows:-

"Section 23 (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, **subject to the encumbrances**, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misinterpretation to which he is proved to be a party."

*The pleadings do not disclose any fraud on the part of the second respondent. In such event, therefore, the second respondent is a bona fide purchaser for value without notice. His title takes precedence and is supreme over all other alleged equitable rights of title. The Act is very specific on this protection and sanctifies title. In such circumstances, it is now too late and irrelevant whether or not the Commissioner of Lands ignored the appellant's application for the suit plot. It would not, either, help matters to go to trial to ascertain whether or not the Commissioner of Lands abused his discretion as a public officer.”*

[15] Section 26 of the Land Registration Act, 2012 the successor of the Registration of Titles Act has provisions similar to section 23 of the Registration of Titles Act.. In considering section 26 in **Republic v Land Registrar Taita Taveta District & another** [2015] eKLR, this Court held as follows:

34. *The Court must therefore uphold the Rule of Law with regard to the applicant’s rights, as a registered proprietor, under sections 27 and 28 of the Registered Land Act as then applicable to the suit property (now section 25 of the Land Registration Act, 2012), until fraud shall have been established in accordance with section 26 (1) of the Land Registration Act 2012 which provides as follows:*

“26. **Certificate of title to be held as conclusive evidence of proprietorship**

*(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and **the title of that proprietor shall not be subject to challenge, except—***

***(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or***

***(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”***

35. *Before any order may be made in terms of Article 40 (6) of the Constitution of Kenya 2010 and section 26 (1) (a) of the Land Registration Act 2012 that the title to land was acquired by fraud, misrepresentation and or illegally and it is therefore not protected by the Constitution, the fraud, misrepresentation and illegality in the acquisition of property must be proved to the required standard. The case of fraud and illegality in the acquisition of the suit property herein must, therefore, be proved in proceedings brought by the Government in that behalf under the civil procedure relating to filing of actions before the Court.*

[16] In the present case, there similarly has not been any determination that the petitioner’s title to the suit property is vitiated by fraud or misrepresentation to which the petitioner was a party or that its certificate of title was acquired illegally, unprocedurally or through a corrupt scheme. The 2<sup>nd</sup> respondent’s claim to the suit property is based on what counsel has called doubtful title of the petitioner. With respect, this is an instance where a party must rely on the strength of his case rather than the weakness of the other side’s case.

[17] The petitioner as a registered proprietor of the suit property has established a strong *prima facie* case for the grant of the reliefs for the protection of his property rights sought in the petition. I do not agree that the petition is about ownership of the suit property which should be determined by a civil suit rather than by petition for protection of property rights. Having perused petition, I do not accept that the petitioner has violated the rule of specificity of pleading constitutional claims as propounded by **Anerita Karimi Nejru v. A.G** No. 1 (1979) KLR 154. The petitioner as registered proprietor asserts his constitutional right to protection of property under Article 40 of the Constitution. If he 2<sup>nd</sup> Respondent contends that the title of the petition is vitiated by fraud, misrepresentation or the certificate of title is illegal, unprocedural or obtained through a corrupt scheme, it is for the said respondent to move the appropriate Court by suitable proceedings in that behalf for such determination. In the absence and prior to any such determination, the petitioner is entitled to protection of his undoubted property rights.

[18] As held by the Court of Appeal for East Africa held in **Moya Drift Farm Ltd. v. Theuri** (1973) EA 114 a registered proprietor of land is the absolute and indefeasible owner of land and is entitled to take proceedings for trespass and eviction of a trespasser even if he did not have possession of the property. Spry, V-P at 116, considered the effect of section 23 of the Registration of Titles Act and held –

*“I cannot see how a person could possibly be described as “the absolute and indefeasible owner” of land if he could not cause a trespasser to be evicted. The Act gives a registered proprietor his title on registration and, unless there is any other person lawfully in possession, such as a tenant, I think that title carries with it legal possession: there is nothing in the Act to say or even suggest that his title is imperfect until he has physical possession.”*

Sir William Duffus, P. *ibid* at p.117 agreed with Spry, JA as follows:

*“In any even I agree with the Vice-President that the fact that the appellant was the registered proprietor as owner in fee simple under the Registration of Titles Act, and as such vested with the absolute and indefeasible ownership of the land, was sufficient to vest legal possession of the land*

*in the appellant and that this possession would be sufficient to support the action of trespass against a trespasser wrongly on the land.”*

The third member of the Court, Lutta, JA agreed with the judgment prepared by the Spry, V-P.

[19] Similarly, in ***Park View Shopping Arcade v. Kangethe & 2 Ors.*** (KLR) (E&L) 592, Ojwang, Ag. J. (as he then was) considered the rights of a registered proprietor under section 23 of the Registration of Titles Act and held that-

*“The Constitution safeguards the sanctity of private property. It was not proper for the defendants to forcibly occupy the plaintiff’s land and then plead public interest in environmental conservation to keep out registered owner. The effect of their action was to deprive the owner of his land without full and fair compensation.”*

The same, it would appear is the case with the 2<sup>nd</sup> Respondent in this case!

*Whether petition may be rendered nugatory*

[20] The petition seeks in addition to obtaining information held by the State as regards the title to the suit property, protection of the petitioner’s interest in the property as the registered proprietor. If the conservatory order restraining the adverse use of, and dealing with, the suit property by the respondents, the petition, if successful, will have been rendered nugatory should the respondents in the meantime dispose of the suit property. The petitioner shall also have been deprived of its use and other rights over the property as registered proprietor. As registered proprietor of land, the petitioner is entitled under the law to deal with the property as he wishes including by sale or other disposition.

### ***Public interest***

[21] There is public interest in the observance of the Rule of Law principle of Article 10 of the Constitution. The law must keep its promise to the registered proprietor that his interest in land property will be protected unless it has been proved to have been obtained through fraud or misrepresentation to which he was a party or the title document has been acquired illegally, unprocedurally or through a corrupt scheme. This not having been shown and determined in this suit, the petitioner is entitled to protection of the law.

*Third Party Interest of the Interested Party*

[22] The petitioner’s registered interest as a proprietor of the suit property is in terms of the then applicable section 23 (1) of the Registration of Titles Act (now 26(1) of The Land Registration Act 2012) **“subject to the encumbrances”** including the Interested Party’s charge. As a chargee, the interest of the Interested Party may lie with the realisation of the security in the property. It cannot be in the public interest in the rule of law to have the Chargee’s interest of the Interested Party defeated by a conservatory order based upon the proprietary rights of the petitioner sought to be enforced as against the 2<sup>nd</sup> Respondent and not the Interested Party.

[23] In fashioning a suitable remedy for the situation before the court, the conservatory order granted to protect the proprietary right of the registered proprietor petitioner herein must recognise the undoubted right of the charge over the property. Accordingly, the orders for the preservation of the suit property must be subject to the charge’s interest.

### **Orders**

[24] Accordingly, for the reasons set out above, the Chamber Summons for conservatory orders herein dated 31st October 2012 is allowed in terms as follows:

1. Prayer No. 4 of the Chamber summons is granted. As there was a dispute whether the 2<sup>nd</sup>

Respondent was in possession of the suit property, the Court in giving effect to the petitioner's right as a registered proprietor of the suit property on conservatory basis directs that the 2<sup>nd</sup> Respondent, her agents or servants will give vacant possession of the suit property, if she be in possession, to the Petitioner or its nominees pending determination of the Petition.

2. Prayer No. 5 of the Chamber Summons is granted until further orders of the Court and unless the entries relate to dealings by the Interested Party in exercise of its statutory power of sale or in execution of a valid Decree or Order of a competent court.

3. For avoidance of doubt, the Interested Party is at liberty to exercise its statutory power of sale over the property under the Charge thereon as well as any sale in execution of any decree issued by any Court of competent jurisdiction.

[25] Costs in the Cause.

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED ON THE 6<sup>TH</sup> DAY JUNE 2017.**

**E K OGOLA**

**JUDGE**

Appearances:-

M/S A. B. Patel & Patel Advocates for the Plaintiff

Mr. Richard Ngari, Litigation Counsel for the for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents

M/S Ameli Inyangu & Partners Advocates for the 2<sup>nd</sup> Respondent

M/S Timamy & Co. Advocates for the Necessary/Interested Party.