



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**PETITION CASE NO. 23 OF 2013**

**IN THE MATTER OF ARTICLES 23 & 40 OF THE CONSTITUTION OF THE  
REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY  
JURISDICTION AND PROTECTION OF THE FUNDAMENTAL RIGHTS  
AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND  
PROCEDURE RULES, 2006**

**AND**

**IN THE MATTER OF SECTIONS 10,111,112,113,114 AND 115 OF THE LAND  
ACT NO.6 OF THE 2012**

**AND**

**IN THE MATTER OF SECTION 24, 25, 26, 30, 79, 80 & 81 OF THE LAND  
REGISTRATION ACT**

**AND**

**IN THE MATTER OF SECTION 6,8,10 & 13 OF THE LAND ACQUISITION  
ACT CAP 295 OF THE LAWS OF KENYA (REPEALED)**

**AS READ WITH**

**SECTION 27, 28 & 143 OF THE REGISTERED LAND ACT**

**AND**

**IN THE MATTER OF PETITION BY MR. MARTIN OGUTU  
ODIYO.....PETITIONER**

**VERSUS**

**THE PRINCIPAL SECRETARY MINISTRY OF HOUSING & PLANNING....1<sup>ST</sup>  
RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**MICHAEL OSEWE.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. **Martin Ogutu Odiyo**, the Petitioner through the notice of motion dated 3<sup>rd</sup> December 2013, seeks for a conservatory order restraining **The Principal Secretary Ministry of Housing & Planning** and Michael Osewe, the **1<sup>st</sup> and 3<sup>rd</sup> Respondents** respectively, either by themselves, servants and or agents from entering alienating, claiming, allocating, repossessing, evicting the Petitioner, his family members, relatives or agents, residing in the said premises with the Petitioner’s permission or in any other manner interfering with the Petitioner’s quiet possession, occupation and ownership of all that parcel of land known as **Kisumu Municipality/Block 12/123** measuring 0.2092 hectares. The application is based on the six grounds on its face and the supporting and further affidavits sworn by Martin Ogutu **Odiyo** on the 3<sup>rd</sup> December 2013 and 25<sup>th</sup> September 2014 respectively.
2. The application is opposed by the respondents through the affidavit sworn by Michael Ben Osewe on the 18<sup>th</sup> March 2014.
3. The application came up for hearing on 5<sup>th</sup> May 2015 when direction on filing written submissions were given. The counsel for the Petitioner filed their submissions dated 12<sup>th</sup> February 2016 on the 7<sup>th</sup> April 2016 while counsel for the Respondents filed theirs dated 11<sup>th</sup> February 2016 on the same date.
4. The Petitioner’s case is that he acquired land parcel Kisumu Municipality/Block 12/123, hereinafter referred as the suit land, in 2007. The copy of the certificate of lease he annexed to the supporting affidavits shows that he got registered as proprietor and had the certificate of lease issued on 10<sup>th</sup> May 2007. The Petitioner then used the suit land as collateral for a Ksh.4,800,000/= loan with Barclays Bank of Kenya on 13<sup>th</sup> June 2007. Then on the 2<sup>nd</sup> December 2013, the 3<sup>rd</sup> Respondent threatened to evict him from the suit property which would amount to infringement of the right to own property under **Article 40** of the Constitution and hence this petition. The Petitioner deponed that he had bought the suit property and the house on it from **Edison K. Bundotich** and **David S. Kipngetich**, hereinafter referred to as the vendors, who had paid the requisite duty to the government and therefore the said property was not government property. The Petitioner’s counsel submitted that the court should take the petitioner as the absolute and indefeasible owner of the suit land by virtue of **Sections 26 (1)** of the Land Registration Act, No.3 of 2012.
5. The Respondents case is that the suit land was “originally **L.R. No.1148/967, 968 and 969**” and contains Government house **No.Kisumu/HG/81** which “together with other houses **Kisumu/hou/49/73-84** are pool houses reserved for Senior staff of Russia Aided Hospital” now named Jaramogi OgingaOdinga Teaching and Referral Hospital since 15<sup>th</sup> May 1967 and are exclusively occupied by Medical Consultants. That the suit land has never been boarded for sale by the Government and therefore cannot be available for alienation by a private individual. That the Petitioner entered and occupied the house on 3<sup>rd</sup> December 2013 when it had been allocated to one Dr. Awuonda of the hospital. That even though the Petitioner alleges that he has title to the suit land, the Commissioner of land had on 16<sup>th</sup> August 2007 advised that the title had been fraudulently issued and that a caution be filed. That the allotment of the suit land to Edison Kiplagat Bundotich and David S. Kipngetich was done irregularly and fraudulently and hence is a total forgery. The counsel for the Respondents submitted that the registration of the Petitioner with the suit land had not followed the due process of the law. That the Petitioner had not demonstrated any violation of his constitutional rights to warrant the filing of a petition and the same

should be dismissed with costs. The counsel referred to the case of **Susan Waithera Kariuki & 4 others –V- The Town Clerk; City Council of Nairobi & 2 others** [2011] eKLR, **Ethics and Anti-Corruption Commission –V- Njuguna Macharia** NBI HC ELC No.310 of 2014 (2015) eKLR where the court cited the case of **Millankurman Shah & 2 others –V- City Council of Nairobi & others** Nairobi HCC No.1024 of 2005 on the principle that Public interest takes precedence over private interest.

6. The following are the issues for the court determination;

- a) Whether the Petitioner has established a case for conservatory orders to be issued at the interlocutory stage.
- b) Whether the petition discloses any likely infringement of the Petitioner's constitutional right.
- c) Who pays the costs.

7. The court has considered the grounds on the notice of motion, the affidavit evidence by both sides, the submission by both counsel and come to the following determination;

- a) That from the certificate of lease annexed to the supporting affidavit sworn by the Petitioner on 3<sup>rd</sup> December 2013, Land parcel **Kisumu Municipality/Block 12/123** got registered in the name of the petitioner on 10<sup>th</sup> May 2007.
- b) That the petitioner acquired the said property in the year 2007 after purchasing it from Edison K. Bundotich and David S. Kipngetich. This is confirmed by the copies of the receipts for payment of rates and transfer form annexed to the Petitioner's further affidavit sworn on 25<sup>th</sup> September 2014.
- c) That though the sale agreement between the Petitioner and the two vendors has not been availed to the court, it appears from the copy of the letter dated 23<sup>rd</sup> July 2007, by S.E. Chemoiywa, the district Building Surveyor that is annexed to the Petitioner's further affidavit sworn on 25<sup>th</sup> September 2007, that the vendors did not give the Petitioner vacant possession of the suit land. The letter is addressed to one Oduor, occupant of Government quarter HG.81 and talks of the intention of the private developer who is holding the title being willing to validate the acquisition. The letter asks the said Oduor to arrange to vacate from the house.
- d) That it appears the said Oduor did not vacate from the house as on 21<sup>st</sup> May 2008, the Petitioner wrote to the Barclays, Bank, Head of mortgage lending, to intervene for him to get vacant possession. The letter is also annexed to the Petitioner's further affidavit.
- e) That the findings in (c) and (d) above makes the Petitioner deposition that he has **".....owned it (suit property) peacefully without any foreign claims against my title ....."** (see paragraph 3 of the supporting affidavit), doubtful. The finding then makes the Respondents position in paragraph 6 of the replying affidavit that **"... the applicant (petitioner) illegally entered and occupied the house on 3<sup>rd</sup> December 2013 while the property had been allocated to one Dr. Awuonda of Jaramogi Oginga Odinga hospital,"** more plausible and credible when taken against the Petitioner's claim.
- f) That the pleadings commencing this suit are dated 3<sup>rd</sup> December 2013 which is also the same date they were filed and interim orders in terms of prayers 2 and 4 issued. That the foregoing shows that the Petitioner did not get possession until on the 3<sup>rd</sup> December 2013 though he got registered with the suit land on 10<sup>th</sup> May 2007.
- g) That the two vendors are not parties in this suit and yet the Petitioner do not seem to have any complaints against them for failing to give him vacant possession. The Respondents have taken the possession that the two vendors had obtained documents to title of the suit land **"irregularly and**

**fraudulently**". That should evidence to be adduced confirm the position taken by the Respondents, then the vendors' title would be liable to be impugned and if the Petitioner is shown to have been aware of the defect in the vendors' title, then his title may be impugned under **Section 26 (2)** of the Land Registration Act No.3 of 2012.

h) That the vendors can only be enjoined in a case involving the Petitioner and the Respondents over the suit land if the case is commenced through a plaint and not a petition. That the case before this court is commenced through the petition dated 3<sup>rd</sup> December 2013 alleging infringement of the Petitioner's constitutional right to property as guaranteed under **Article 40** of the Constitution. That in view of the findings in (f) above, that the petition and the notice of motion were filed on the same date that the Petitioner took possession of the property, that is 3<sup>rd</sup> December 2013, then it is obvious the purpose of the petition and notice of motion was to wade off any challenge to the Petitioner's possession of the suit property. The court is of the considered view that the better option would have been for the Petitioner to approach the court through a plaint and enjoin the vendors, if they had breached the sale agreement to give him (Petitioner) vacant possession.

That approach would have given the Respondents and the vendors the opportunity to ventilate the issue of the genuineness of the title to the land that the vendors acquired and whether they passed good or any title to the suit land to the Petitioner.

i) That from the grounds set out in the petition and the supporting affidavit by the Petitioner, the court is in agreement with the Respondents counsel's submission that no infringement of the Petitioner's constitutional right to the property has been disclosed. That the issue the Petitioner may have against the Respondents, and probably the two vendors who sold the suit land to him and failed to give him vacant possession, can be better handled through an ordinary suit. The Superior Courts have severally expressed themselves on this issue including this court in **Kisumu ELC Petition No.10 of 2013, Michael Otieno Nyagutti & 5 others –V- Kenya National highways Authority & 2 others** . That in that case, the court cited the case of **International Centre for policy and Conflicts & 5 others –V- The Attorney General & 4 others [2013] eKLR, Republic –V- The National Exparte Abullhafidu Sheikh Ahmed Budadi Zubedi eKLR** on the position that where disputes can adequately be dealt with within the forum provided for in a legislative framework, then that is the forum to pursue the matter and not a constitutional petition.

8. That flowing from the foregoing, the court finds that the Petition as filed do not raise any issue of an infringement or breach of a constitutional right but is a dispute on possession of the suit property and the legality of the title document held by the Petitioner. That those issues can best be dealt with through an ordinary suit where all the relevant parties may be enjoined, and all the issues determined after taking of evidence. That the petition and the notice of motion dated 3<sup>rd</sup> December 2013 are therefore struck out with costs. The interim conservatory order of 4<sup>th</sup> December 2013 is hereby vacated.

It is so ordered

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

DATED AND DELIVERED THIS 14<sup>TH</sup> DAY OF DECEMBER 2016

In presence of;

Petitioner                      Absent

Respondents                  absent

Counsel                        Mr Mutai for the Respondents

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**14/12/2016**

14/12/2016

S.M. Kibuja Judge

Parties absent

Mr Mutai for the Respondents

Court: the ruling dated and delivered in open court in presence of Mr. Mutai for the Respondents.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/12/2016