



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CONST. PETITION NO. 6 OF 2014

ELLEN NDEMBA IHA.....PETITIONER

=VERSUS=

**HON. CHARITY NGILU, CABINET SECRETARY MINISTRY OF LANDS, HOUSING &
URBAN**

DEVELOPMENT.....1ST RESPONDENT

**MINISTRY OF LANDS, HOUSING & URBAN DEVELOPMENT.....2ND
RESPONDENT**

**MR. J. O. ATHMAN, LAND REGISTRAR, KILIFI.....3RD
RESPONDENT**

THE ATTORNEY GENERAL.....4TH RESPONDENT

EMMANUEL C. TINGA.....5TH RESPONDENT

SAMUEL CHATAI KEAH.....6TH RESPONDENT

IRENE WANJIKU KAMAU.....7TH RESPONDENT

RONALD GITOBU MWORIA.....8TH RESPONDENT

NANCY WANDIA KABAHI.....9TH RESPONDENT

**IBRAHIM MUKTAR ABASHEIKH.....10TH
RESPONDENT**

**TAUHIDA TALIR SHEIKH.....11TH
RESPONDENT**

**ALIAN TI GLOBAL INVESTMENTS LTD.....12TH
RESPONDENT**

AND

KAHINDI KALUME.....1ST AFFECTED PARTY

BAYA THOYA.....2ND AFFECTED PARTY

BAYA KATOI.....3RD AFFECTED PARTY

RULING

Introduction:

1. What is before me is the Application dated 11th March 2015 seeking for the following orders:-

(a) **THAT pending the hearing and determination of the appeal filed herein, the Honourable Court be pleased to grant an injunction order restraining the Respondents, its servants, agents and or any other person acting on the authority of the respondents from disposing off, alienating, mortgaging and or charging or from interfering with the Petitioner's property known as plot Number Kilifi/Jimba/64 which has purportedly been subdivided into Plot No. KILIFI/JIMBA/1426/Watamu, Plot NO. Kilifi/Jimba/1427/Watamu, Plot No. Kilifi/Jimba/1428/Watamu, Plot No. Kilifi/Jimba 1429/Watamu, Plot NO. Kilifi/Kimba/1430/Watamu, Plot No. Kilifi/Jimba/1431 Watamu, Plot NO. Kilifi/Kimba 1432/Watamu, Plot NO. Kilifi/Jimba/1433 Watamu, Plot NO. Kilifi/Jimba 1434 Watamu, Plot NO. Kilifi/Jimba 1542/Watamu and Plot NO. Kilifi/Jimba/1543/Watamu.**

(b) **That the cost of this application be provided for.**

The Petitioner's/Applicant's case:

2. The Petitioner's Application is premised on the grounds that on 26th February 2015, this court delivered a Ruling wherein the Petitioner's Application dated 30th June, 2014 for conservatory orders was dismissed; that the Petitioner has filed a Notice of Appeal and that if this Application is not granted, the Respondents may alienate, mortgage or charge the suit property.

3. It is the Petitioner's deposition that a disposal of her property or any kind of interference will affect the substratum of the appeal thereby rendering the appeal nugatory and will cause her to suffer irreparable losses.

The Respondents' case:

4. The 5th Respondent filed Grounds of Opposition and a Replying Affidavit.

5. According to the 5th Respondent, this court is functus officio; that the Petitioner has no proprietary rights known in law capable of protection by this court and that the Petitioner has not offered security at all.

Submissions:

6. The Petitioner's counsel submitted that for an Application for an injunction pending appeal to be successful, there must be in existence an appeal that is pending determination; the Appellant must demonstrate that he will suffer substantial loss and the appeal will be rendered nugatory.

7. The Petitioner's counsel submitted at length on why the Appellant has an arguable appeal and how she will suffer substantial loss unless the injunctive order is granted.

8. The advocate for the 5th, 6th and 11th Respondents submitted that the Petitioner does not have the physical possession of the suit property; that the Applicant has not satisfied the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules for orders of stay of execution to be granted and that the Petitioner has not shown the substantial loss that she will suffer if the orders are not granted.

9. Counsel submitted that in any event, the Petitioner has not provided security for the due performance of the decree.

Analysis and findings:

10. On 16th June 2014, the Petitioner filed a Petition seeking for cancellation of entries in the register held at the lands registry in respect of parcel of land number Kilifi/Jimba/ 64 Watamu on the ground that the 5th and 6th Respondents were registered as absolute proprietors thereof fraudulently.

11. The Petitioner is further seeking in the Petition for an order that Kilifi /Jimba/ 64, which has been sub-divided, be registered in her name, amongst other prayers.

12. Together with the Petition, the Petitioner filed a Notice of Motion dated 16th June 2014 in which she was seeking for conservatory orders as against the Respondents from trespassing, interfering, selling or building any kind of structures or dealing in any manner with Kilifi Jimba/64, Watamu, which has since been sub-divided into eleven (11) portions, to wit Kilifi Jimba /1426-1434 and Kilifi Jimba /1542 and 1143.

13. On 27th February 2015, this court dismissed the Petitioner's Application for conservatory orders as follows:

“In the circumstances, I find that the scales of justice at this juncture obligates me not to allow the Application for conservatory orders whose effect would be to deny the 5th -12th Respondents the right to utilise the suit property for their benefit pending the hearing of the Petition”.

14. The Petitioner is now seeking for an injunction to restrain the Respondents from dealing with the suit properties pending the hearing of the Appeal.

15. The law applicable to Constitutional Petitions is the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2010) the “Mutunga Rules” and not the Civil Procedure Rules. The filing of Applications for conservatory orders is governed by the provisions of Rule 23 of the “Mutung Rules.” The provision of Order 42 Rule 6 of the Civil Procedure Rules are not applicable in this instant case.

16. As was held in the **Gitarau Peter Munya -vs- Dickson Mwenda Kithinji & 2 others (2014) e KLR** case by the Supreme Court, an Application for a conservatory order is not the same as an Application for injunctive orders. The principles applicable in granting of injunctive orders cannot be applied when an Application seeking for a conservatory order is before the court.

17. The “Mutunga Rules” have not provided that the trial court can issue injunctive or conservatory orders pending appeal upon dismissing an application for conservatory orders. Any attempt to issue an injunction pending appeal will be an affront to the “ Mutunga Rules” which stipulate how interlocutory applications should be dealt with in Constitutional Petitions.

18. Rule 32(3) of the “Mutunga Rules” provides that a formal application for stay may be filed within 14 days of the decision appealed from or within such time as the court may direct.

19. The Application that this court dismissed was seeking for conservatory orders. Having dismissed the Application, there is no positive order that this court can stay pending appeal.

20. Considering that this court does not have jurisdiction to grant an injunction pending appeal where it has dismissed an Application for conservatory orders and in view of the fact that this court will be sitting on its own appeal if it considers the issues that the Petitioner will raise in the Court of Appeal, I find and hold that it is only the Court of Appeal that can grant to the Applicant the prayer that she is seeking in the

current Application.

21. For those reasons, I dismiss the Petitioner's Application dated 11th March 2015 with costs.

Dated and delivered in Malindi this **23rd** day of **October** 2015.

O. A. Angote

Judge