



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME, M'INOTI & MURGOR, J.J.A.)

CIVIL APPLICATION NO. NYR 121 OF 2020

BETWEEN

HON. FATUMA ADAN DULLO.....1ST APPLICANT

HON. REHEMA JALDESA.....2ND APPLICANT

HON. ABSHIRO SORA ARAKE.....3RD APPLICANT

HON. HASSAN HULUFO.....4TH APPLICANT

HON KOROPU TEPO.....5TH APPLICANT

AND

CABINET SECRETARY LANDS & PHYSICAL PLANNING.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

(Application for injunction pending the hearing and determination of an intended appeal

against the judgment and decree of the Environment and Land Court of Kenya

at Meru (Mbugua, J.) dated 18th November 2020 in ELC. Pet No. 28 of 2019)

RULING OF THE COURT

On 18th November 2020, the **Environment and Land Court** at **Meru (Mbugua, J.)** dismissed an application by the applicants for conservatory orders whose effect would have been to prohibit adjudication of community land in **Isiolo County** under the **Land Adjudication Act (the Act)**. Under the the Act, adjudication is the process of ascertaining existing rights and interests over community land, leading ultimately to registration of individual title to land. The adjudication process which the applicants sought to stop was initiated by **the 1st respondent, the Cabinet Secretary, Lands and Physical Planning**, who applied the Act to specified community land in Isiolo county pursuant to an order published in **Legal Notice No. 150 of 2019** on 27th August 2019, which was subsequently amended by **Legal Notice No. 1 of 2020** of 10th January 2020.

In their petition and in the application for conservatory orders to stop the adjudication, the applicants averred that the adjudication was not requested by the County Government as required by law; that there was no public participation as required by law and the Constitution; and that therefore the adjudication process was arbitrary, illegal and unlawful. The application was opposed on the grounds that the County Government had indeed resolved that adjudication should commence in the County as borne out by the 2018 report of the County Assembly and of the Land, Housing and Urban Development Committee. It was further contended that the process of adjudication was preceded by elaborate public sensitisation and participation in which some of the applicants actively participated and that indeed the amendment of the initial Legal Notice was informed by proposals made by the people of the County after public participation.

After considering the matter, the learned judge concluded that the burden was on the applicants to establish that they had a *prima facie* case

worthy of protection by conservatory orders and further that the applicants must satisfy the court that public interest tilted in favour of stopping rather than continuing the adjudication process. The learned judge was not persuaded that there was any breach of the law in the making of the adjudication order and as for public participation, she found that a total of 38 public participation exercises were carried out in ten wards of the County. The learned judge also noted that from the record, the 1st applicant had passionately supported the adjudication process in her contributions in the County Assembly. For all those reasons, the learned judge found that the application for conservatory orders was not brought in good faith and that the applicants had deliberately omitted to make the County Government a party to the suit, until the court intervened. Accordingly she declined to issue conservatory orders.

In their application for injunction now before us, the applicants rehash their arguments in the trial court and reiterate that their intended appeal is arguable because the notices by the 1st respondent were illegal and unconstitutional; that there was no public participation; and that there was no compliance with various provisions of the Community Land Act. They add that unless the injunction they have prayed for is granted, their appeal will be rendered nugatory.

Although the respondents were electronically served with a hearing notice on 25th February 2021 which also requested them to file their written submissions, none has been filed. This however does not obliterate the duty on the appellant to satisfy the two conditions for grant of an order of injunction under **rule 5(2)(b)** of the **Court of Appeal Rules**. As has been stated time and again, the applicant must firstly show that the intended appeal is arguable, or as is otherwise put, that it is not frivolous. Secondly he must satisfy the Court that the intended appeal will be rendered nugatory unless the injunction sought is granted. (See **Githunguri v. Jimba Credit Corporation Ltd (No. 2) [1988] KLR 838**).

In considering whether the applicants have presented an arguable appeal, we must bear in mind that they will be challenging exercise of discretion by the superior court, which this Court does not readily interfere with. Secondly, we must take into account the fact that the applicants applied for a conservatory order in the trial court and therefore they must demonstrate misapplication of the principles guiding issuance of conservatory orders. In **Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others [2014] eKLR**, the Supreme Court explained the principles applicable in a conservatory order as follows:

“Conservatory orders, consequently, should be granted on the inherent merit of a case bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes.”

Looking at the evidence on record, the most we can say is that the applicants will be hard-pressed to demonstrate that the learned judge exercised her discretion otherwise than judiciously.

And in considering whether the intended appeal will be rendered nugatory, that cannot, in the circumstances of this application, be divorced from the issue of the wider public interest, the respective hardships that the parties will be exposed to by grant or denial of a conservatory order, and on which side the balance of convenience tilts. (See **Reliance Bank Ltd v. Norlake Investments Ltd [2002] 1 EA 232**, **Nation Media Group & 2 Others v. John Joseph Kamotho & 3 Others, CA. No. 108 of 2006** and **Erwen Electronics Ltd & 3 Others v. Radio Africa Ltd & Another, CA. No. Nai 82 of 2011**)

Taking into account all the foregoing, we are not satisfied that the applicants have made out a case to warrant an injunction to stop the adjudication process in Isiolo County. Accordingly this application is hereby dismissed. Costs will abide the outcome of the intended appeal. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH,2021

M. K. KOOME

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR