Kariobangi South Land Owners Welfare Group & 3 others v Nairobi City County & 5 others; Kariobangi South Jua Kali Society (Interested Party) (Civil Appeal 392 of 2017) [2021] KECA 183 (KLR) (19 November 2021) (Judgment)

Neutral citation: [2021] KECA 183 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 392 OF 2017

MA WARSAME, P NYAMWEYA & JW LESSIT, JJA

NOVEMBER 19, 2021

BETWEEN

KARIOBANGI SOUTH LAND OWNERS WELFARE GROUP .. 1ST APPELLANT

JAMES MBUGUA KIMIRI ..... 2ND APPELLANT

SABINA MANDERE ..... 3RD APPELLANT

JOSEH JUMA OMENYA ..... 4TH APPELLANT

AND

NAIROBI CITY COUNTY ..... 1ST RESPONDENT

GOVERNOR NAIROBI CITY COUNTY ..... 2ND RESPONDENT

CHIEF OFFICIAL LANDS (NAIROBI CITY COUNTY ..... 3RD RESPONDENT

COUNTY SECRETARY NAIROBI CITY COUNTY ..... 4TH RESPONDENT

NAIROBI LAND COMMISSION ..... 5TH RESPONDENT

ATTORNEY GENERAL ..... 6TH RESPONDENT

AND

KARIOBANGI SOUTH JUA KALI SOCIETY ..... INTERESTED PARTY

(An appeal from the ruling of the Environment and Land Court at Nairobi (Okong'o, J.) dated 15th September 2017)

JUDGMENT

1. This is an appeal against the ruling and order of the Environment and Land Court (Okong'o, J.) dated 15th September, 2017 dismissing the appellants' application for interim orders pending the hearing and determination of their main petition before the High Court. In that application, the appellants sought conservatory orders against the respondents from interfering in any form with various portions of the parcel of land known as LR No. 12062/R, situated at Kariobangi South Sector VI (the suit property).

2. The brief facts are that the appellants were allocated various portions of the suit property following a directive by the Permanent Secretary Ministry of Local Government to the Town Clerk of Nairobi City County Council through a letter dated 2nd May, 2002. The letters of allotment were specific as to the size of each plot and duration of the lease.

3. A dispute arose when the respondents later reduced the size of the plots, issued new letters of allotment and proceeded to prepare a Part Development Plan with a view to issue new title deeds. The new letters of allotment contained a demand for enhanced premium, ground rent and survey fees. Aggrieved, the appellants filed ELC Petition No. 1337 of 2016 alleging that the respondents had violated their constitutional rights including their right to legitimate expectation, right to acquire and own property and their right to fair administrative action. As we have indicated, the appellants filed, alongside the petition, a motion on notice seeking inter alia, conservatory orders in the nature of an injunction pending the determination of the petition before court restraining the respondents from alienating, subdividing, downsizing or any other conduct prejudicial to their interests and rights; which application gave rise to the ruling the subject of the present appeal.

4. The respondents opposed the petition stating that the history of the suit dated back to the year 1990 when the former President Daniel Arap Moi directed that the property be allocated to the interested party to aid in industrialization and entrepreneurship. The directive was not followed and the interested party sued the 1st respondent in HCCC No. 2303 of 1998 for illegal allocations.

5. According to the respondents, the Ministry of Local Government, in the year 2011 intervened and directed that the 1st respondent follow the presidential directive of 1990 and settle the members of the interested party on the suit property. Consequently, the parties in HCCC No. 2303 of 1998 agreed to settle the dispute amicably and recorded a consent on 1st November, 2012 in which they agreed that the suit property be subdivided to formalize the settlement thereon of the members of the interested party in accordance with the agreed list of members provided to the court. The respondents complied with the consent order and contended that if the appellants had any issue with the consent order made in the 1998 case, they ought to have moved the court to set it aside. They further contended that the appellants had concealed material facts by failing to mention the interested party in the petition or the consent order which was made in the 1998 case.

6. The interested party also opposed the petition and reiterated the history narrated by the respondents. They alleged that the suit property belonged to its members who had occupied the same since 1980's and that the presidential directive was disregarded by corrupt officials of the 1st respondent who resorted to allocating the suit property to non-members of The Kariobangi South Jua Kali Society which forced them to file the 1998 suit. They alleged that after they entered into the consent with the 1st respondent, another group of its members filed a suit seeking to be included in the allocation of the suit property. This led to fracas on the property and after consultations, the officials of the interested party decided to resolve the dispute by advising the 1st respondent to downsize the plots to

accommodate all its members. They further confirmed that and the 2nd, 3rd and 4th appellants were also its members, who were trying to change the size of their plots contrary to the interested party's decision.

7. It was alleged that the process of subdividing and allocating the suit property to the interested party's members had been completed and the letters of allotment issued and that if the current plot sizes were interfered with, which is what the appellants intended, the conflict that reigned on the property for several years would be reignited.

8. Having heard the parties, the learned Judge delivered the impugned ruling on 15th September, 2017 and declined to grant the injunction or conservatory orders that had been sought stating:

> " I am not satisfied that the respondents have violated the petitioners' constitutional rights to warrant the grant of the orders sought. I wish to add that the conservatory orders sought would not have been issued even if the petitioners had established a case for it. The evidence before me shows that the process of subdivision of the suit property has been completed and the members of the interested party have been granted letters of allotment. The petitioners have sought an injunction. An injunction cannot issue to restrain what has already taken place. Considering the case as a whole, I am also of the view that it would not serve the public interest to grant the orders sought."

9. Aggrieved by the court's finding, the appellants lodged this appeal citing 21 grounds of appeal in their memorandum of appeal. Having considered the material placed before us, we remind ourselves that an appellate court will only interfere with the ruling/judgment of the lower court if the decision is founded on wrong legal principles or where the findings of fact by a trial court are based on no evidence. (See *Ainu Shamsi Hauliers Limited v. Moses Sakwa & Another (suing as the Administrators of the Estate of the Ben Siguda Okach (Deceased)* [2021] eKLR).

10. It is common ground that the appellants were not involved in the HCCC No. 2303 of 1998 which gave rise to the consent order entered in favour of the respondents and the interested party on 1st November, 2012 yet it is not denied that the appellants were lawfully allocated parcels of land in the suit property vide a presidential approval dated back to the 1990s. However, it is also apparent from the facts before us that the issue in controversy is whether the appellants deserve the conservatory orders sought against the respondents.

11. The power to grant conservatory orders is a discretionary one. Hence the question for determination is whether the trial court exercised its discretion correctly. In answering that question, we reiterate what is now the accepted principle on the grant of discretionary orders. The Court of Appeal will not interfere with a discretionary decision of a judge simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he/she misapprehended the facts; thirdly, that they took account of irrelevant matters; fourthly, that he/she failed to take account of considerations which they should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong. (See. *United India Insurance Co Ltd., Kenindia Insurance Co Ltd. & Oriental Fire & General Insurance Co Ltd. v. East African Underwriters (Kenya) Ltd* [1985] eKLR

12. It is not within our powers to substitute our discretion with that of the trial court. It must be shown that the decision is wrong or perverse. What is in question is whether the appellants were entitled to the orders sought. Clearly the application before the trial court was brought under Article 23 (b) and (c) of the Constitution of Kenya, 2010. It means the court was not exercising ordinary discretionary powers

but discretion within the realm of the Constitution. In doing so the court was aware that conservatory orders under the Constitution are not remedies between one individual as against another but should be granted on the inherent merit of a case, bearing in mind the public interest. Therefore, such remedies are in rem as opposed to remedies in personam. They are remedies in respect of a particular state of affairs as opposed to injunctive orders which only attach to a particular person. (See *Alfred N. Mutua v. Ethics & Anti-Corruption Commission (EACC) & 4 Others* [2016] eKLR).

13. In granting or denying an application for conservatory orders it must be shown that the applicant has a prima facie case with a likelihood of success; unless the conservatory or interim order is granted they likely to suffer prejudice or injury as a result of violation or threatened violation of his constitutional rights and that it would be in the public interest to grant such an order. In the Supreme Court case of *Gatirau Peter Munya v. Dickson Mwenda Kithinji and 2 others,* Supreme Court of Kenya, Petition No. 2 of 2014 (eKLR), it was stated that: -

> "Conservatory orders" bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court in the public interest. Conservatory orders, therefore, are not unlike interlocutory injunction, linked to such private-party issues as "the prospects of irreparable harm" occurring during pendency of a case; or "high probability of success" in the applicant's case for orders of stay. 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."

14. There is no indication before us to show that the trial court overlooked essential and important material placed before court so as to conclude that it failed to take into account considerations that would make us substitute our discretion with that of the trial court. Again, there is no evidence to show that the essential factors i.e. *primafacie* case, prejudice likely to be suffered and that public interest was not addressed by the trial court. In our view, the trial court addressed its mind to all the issues placed before it and came to the right conclusion that there was no public interest issue to be served by the grant of the orders sought. We entirely agree with the trial court, that what the appellants were canvassing, agitating and/or addressing was private interests of a dispute which had no public connotation. The application which was rightfully dismissed was advancing a private right/interest disguised as a constitutional issue. The material placed before us shows that the trial court was correct in finding that the appellants did not establish any grounds for the grant of conservatory orders. Consequently, we too decline the invitation to substitute the discretion of the trial court with ours. The appeal is accordingly dismissed with no orders as to costs.

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

M. WARSAME

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this a true copy of the original.

Signed

DEPUTY REGISTRAR