



**Kamumo v Mugo & 6 others (Constitutional Petition
E004 of 2023) [2024] KEELC 5495 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5495 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
CONSTITUTIONAL PETITION E004 OF 2023**

CK YANO, J

JULY 25, 2024

BETWEEN

EPHANTUS NJUKI KAMUMO APPLICANT

AND

LAWRENCE MUCHIRI MUGO 1ST RESPONDENT

**THE DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER, MERU
SOUTH 2ND RESPONDENT**

**THE DEPUTY COUNTY COMMISSIONER, MERU SOUTH 3RD
RESPONDENT**

**THE DEPUTY COUNTY COMMISSIONER, IGAMBA NG'OMBE 4TH
RESPONDENT**

THE DIRECTOR OF LAND ADJUDICATION 5TH RESPONDENT

LAND REGISTRAR, MERU SOUTH 6TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 7TH RESPONDENT

RULING

1. The subject of this ruling is a notice of motion application dated 19th December, 2023 said to be brought pursuant to rules 13, 19, 23 and 24 of the *Constitution of Kenya (protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013.
2. The petitioner/applicant is seeking for the following orders: -
 1. Spent.



2. That pending inter-parties hearing of this Application an interim conservatory order do issue restraining the 4th Respondent from implementing the directions of the letter dated the 29th of August 2023 from the Land Adjudication and Settlement Department Nairobi.
 3. That pending the hearing of this petition an interim conservatory order do issue restraining the 4th respondent from implementing the directions of the letter dated the 29th of August, 2023 from the Land Adjudication and Settlement Department Nairobi.
 4. That pending the hearing and determination of this Application an interim conservatory order do issue to the 2nd, 4th, 5th and 6th Respondent from implementing the decision of the 4th respondent decision in Appeal to the minister case No. 417 of 2011 relating to parcel No. 537 Kamwimbi Adjudication Section after the hearing on 13th of December 2023.
 5. That pending the hearing and determination of this petition an interim conservatory order do issue to the 2nd, 4th 5th and 6th respondent from implementing the decision of the 4th respondent decision in Appeal to the minister case No. 417 of 2011 relating to parcel No. 537 Kamwimbi Adjudication Section after the hearing on 13th of December, 2023.
 6. That costs of the suit do abide to the outcome of the petition.
3. The application is premised on the grounds thereon and supported by the affidavit of Ephantus Njuki Kamumo, the petitioner/applicant, sworn on 19th December, 2023. The applicant deposed that he was the Appellant in Appeal case 417 of 2011 before the 3rd Respondent in an appeal instituted against the 1st respondent. That the findings in the said appeal resulted in his favor, a decision that the 1st respondent has tried to challenge through Judicial Review Misc. Application No. E008 of 2023 that was dismissed for being filed out of time and Judicial Review No. E003 of 2023 that he withdrew after he claimed to have received a letter from the 5th respondent asking that the Appeal 417 of 2011 be re-heard. The applicant has attached a copy of the ruling in JR Misc. Application No. E008 of 2023 marked ENK 1a, a copy of the Misc JR E003 of 2023 marked ENK 1b and a copy of the letter from the office of the 5th respondent marked ENK 1c.
 4. The applicant further states that he received a letter from the 4th Respondent dated the 29th November, 2023 on the 7th December, 2023 instructing him to appear for the hearing of Appeal No. 417 of 2011 in regards to parcel No. 537 Kamwimbi Adjudication Section even though the case had already been heard and fully determined by the 3rd respondent. He has attached a copy of the said letter marked ENK2.
 5. It is the applicant's contention that due to the short notice of the hearing date, through his advocates, he wrote a letter to the 4th respondent requesting for an adjournment on the premise that the matter had already been heard and determined and that he was intending on challenging the decision to re-hear the appeal by filing a constitutional petition and/or a judicial review application. That he further requested for the matter to be mentioned before him within 14 days to confirm the filing of the said applications. A copy of the letter marked ENK3 has been attached.
 6. The Applicant avers that on the date of the hearing, the 4th respondent declined to receive the physical copy of the letter presented to him by his son but an advance copy had been sent to him via email address provided in their letter dated the 29th of November 2023, that is igambangombedcc1@gmail.com, and he has attached proof of service of the letter via e-mail by his advocate marked ENK4.



7. The Applicant further states that the 4th respondent refused to grant the adjournment and insisted that the hearing of the appeal was going to continue and proceeded to conduct the hearing with only the 1st respondent and even conducted a site visit of the disputed portion.
8. The Applicant states that the 1st respondent has created confusion among the various offices of all the other Respondents by writing letters claiming that Land Parcel. No. 537 was allocated to two owners under appeals to the minister Cases No's 417 of 2011, 194 of 2017 and 227 of 2019. That it is true that the land was issued to the 1st respondent under Appeal No. 194 of 2017, but during the hearing of Appeal No. 227 of 2019 between the 1st respondent and one Ephantus Njuki who is the applicant's grandson, the 3rd respondent addressed the issue on pages 2, 3 and 4 of the appeal. The Applicant has attached a copy of the Appeal No. 227 of 2019 marked ENK5 and a copy of the Appeal 417 of 2011 marked ENK 5b.
9. The Applicant further states that the 3rd respondent considered all the three appeals and decided that the judgment in Appeal No. 194 of 2017 that gave the 1st respondent ownership of the suit land be set aside and the interests of the 1st respondent and petitioner herein were to be considered fully under appeal No. 417 of 2011 which resulted with the applicant being declared as the rightful owner of parcel No. 537 Kamwimbi Adjudication Section.
10. The Applicant avers that he is advised by his counsel that the decision to re-hear appeal No. 417 of 2011 between the same parties over the same subject matter offends the principle of res judicata and litigation must come to an end.
11. The Applicant further avers that he is apprehensive that the 4th respondent's decision after re-hearing the appeal on the 13th December 2023 with only the 1st respondent present will be implemented which action shall affect the substratum of the petition. That it is expedient and necessary to have the prayers sought herein granted awaiting the determination of this application and ultimately the petition. That it is in the interest of justice and fairness that the orders herein are sought.
12. In opposing the application, the 1st respondent filed a replying affidavit sworn on 13th February, 2024 by Lawrence Muchiri Mugo wherein he states inter alia that the application by the petitioner is riddled with lies and untruth and brought purposely to mislead the court to rule in his favour.
13. In response to paragraph 2 of the supporting affidavit, the 1st respondent avers that there was an initial case regarding land parcel No. 537 which was Appeal Case No. 194 of 2017 which involved Erasmus Ileri Njeru Versus Njagi Muchunje & 11 Others where the ruling was delivered on 4th August 2022 in which the appeal was dismissed and the parcel of land No. 537 given to Njagi Muchunje. He has annexed a copy of the minister's decision on appeal case 194 of 2017 marked "LMM1."
14. The 1st Respondent further states that the petitioner's father filed an appeal to the minister vide the appeal case No. 417 of 2011. He denies the contents of paragraph 3 in toto and avers that the appeal case number 417 of 2011 was heard on 10th June 2011 and that it is not logical that a ruling was delivered on 19th July, 2022 before the hearing of the parties and as a result the minister acted in bad faith and maliciously. He has attached a copy of the minister's decision on appeal case number 417 of 2011 marked "LMM 2."
15. It is the 1st respondent's contention that when comparing the two decisions, it is only clear that there was no hearing that was conducted procedurally and as a result there was an abuse of power by the 3rd respondent when issuing the award of land parcel No. 537 to the petitioner thus rendering him and those claiming under him landless. In further response to paragraph 3 of the supporting affidavit, the 1st respondent avers that the petitioner without putting into consideration latter appeal filed by



his father, filed an appeal to the minister vide the appeal case No. 227 of 2019 and which hearing was conducted on 29th August, 2022 contrary to the date 29th August, 2021 written on the ruling delivered and the copy issued to the 1st respondent which was neither dated nor signed. He has annexed a copy of the ruling in appeal case number 227 of 2019 marked “LMM3.”

16. It is also the 1st respondent’s contention that as a result of the said error, he sought for the intervention of higher authorities who advised him to return the said rulings to the 2nd respondent to rectify the error. That the Directorate of the Land Adjudication and Settlement-Nairobi wrote a letter dated 16th February, 2023 to the Land Adjudication and Settlement Officer – Chuka informing it to liaise with the Deputy County Commissioner – Meru South to resolve the various issues with regard to the said awards which was confusing and not implementable. The 1st respondent has annexed a copy of the letter marked “LMM4.”
17. The respondent avers that even after the said rulings were returned to the 2nd respondent, there was no other hearing of the appeal No. 417 of 2011 and appeal Case No. 227 of 2019 but instead the ruling was rubber stamped and once again back dated with the sole intention of denying him an opportunity to challenge the said decision. He has annexed copies of the rulings marked “LMM5” & “LMM6.”
18. The 1st respondent further avers that paragraph 4 is true to the extent that a letter was issued on 29th November, 2023 to the petitioner in which he failed to appear and as a result, a reminder letter dated 14th December 2023 was again issued to the petitioner inviting him to appear before the Deputy County Commissioner at the disputed land from 9.00 am and which he also failed to appear and the matter proceeded notwithstanding his absence. He has annexed copies of the letters dated 29th November, 2023 marked “LMM7” & “LMM8.”
19. The 1st respondent denied paragraph 5 and 6 of the supporting affidavit in toto and put the petitioner to strict proof thereof.
20. The 1st respondent also denied paragraph 7 of the supporting affidavit in toto and avers that the petitioner was granted another chance and opportunity and as a result the petitioner cannot defend himself yet it was as a result of his own ignorance that he decided not to show up and as they say, “ignorance is not a defence in law.”
21. The 1st respondent avers that consequently, he received land parcel No. 537 upon the final determination of the appeal case number 194 of 2017.
22. The 1st respondent further denied the contents of paragraph 11 of the supporting affidavit in its entirety and avers that the actions by the petitioner is filled with malice because it is very much evident in the letter dated 29th August, 2023 for the implementation of Appeal Case No. 194 of 2017 sent by the Land Adjudication and Settlement department – Nairobi to the Land Adjudication and Settlement Officer – Meru South Sub-County for purposes of deciding who was the beneficiary of the parcel No. 537. He has annexed a copy of the letter dated 29th August 2023 marked “LMM9.”
23. The 1st respondent has denied paragraph 12 of the supporting affidavit in toto and put the petitioner into strict proof thereof.
24. In response to paragraph 13 of the Supporting affidavit, he denies the contents thereof and states that the appeal case No. 417 of 2021 was heard on 10th June, 2022 and which the ruling dated 19th January, 2022 issued is on the face of it malicious in that there is no way the case could be decided earlier before the case was heard. He further states that there is no way the ruling dated 19th January, 2023 was to be used as the land Adjudication and Settlement Officer was only issued with the letter dated 16th



February, 2023 and it is in contention and evidenced that there was fraud and collusion between the petitioner and the 2nd respondent herein.

25. The 1st respondent denies the contents of paragraph 14 and 15 of the Supporting Affidavit in toto and avers that the allegations stated by the petitioner are false and misleading before the court. The 1st respondent avers that it is actually his interest and right to property that is infringed as portrayed by the ungrateful nature and ill behavior tarnished with malice to disinherit him of his legally owned property.
26. The 1st respondent states that the actions by the petitioner is an afterthought filled with malice and greed with the aim of denying or further denying him from acquiring his rights and interests on the land parcel No. 537 as well as to paralyze the efforts to effect and transfer upon him which was given to him vide appeal case 194 of 2017.
27. The 1st respondent avers that the actions by the petitioner of filing the application is a mere denial of the truth and which is filled with ill intention and that the same has been brought frivolously to not only delay justice but also to maliciously obtain orders from the same court.
28. The 1st respondent further states that the application is brought in bad faith and is a knee jerk reaction to his ownership of the suit parcel of land and should be dismissed with costs to him.
29. The application was not opposed by the 2nd – 7th Respondents.
30. The application was canvassed by way of written submissions. The applicant filed his submissions dated 13th March, 2024 through the firm of Angela Nyagah Advocates while the 1st respondent filed his dated 16th April, 2024 through the firm of Ojwang Sombe & Co. Advocates. The court has read and considered the submissions and I need not reproduce them in this ruling.

Determination

31. Upon perusal of the pleadings and submissions filed in respect of the instant application, I find that the sole issue for my determination is whether the Applicant has met the threshold for grant of conservatory orders. This threshold was established by the Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* (2014) eKLR as follows:

“(86) “Conservatory orders bear a more decided public-law connotation: for these are orders to facilitate ordered functioning with public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the 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.

The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a court of law may grant stay of execution have been crystalized through a longline of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the court that:



- i. The appeal or intended appeal is arguable and not frivolous; and that
- ii. Unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

These principles continue to hold sway not only at the lower courts, but in this Court as well. However, in the context of the *Constitution* of Kenya, 2010, a third condition may be added, namely:

- iii. That it is in the public interest that the order of stay be granted.

This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through the *Constitution*.”

32. The starting point is to determine whether the Applicant has established a prima facie case with a likelihood of success. In the case of *Centre for Rights Education and Awareness (CREAW) & 7 Others v Attorney General* [2011] eKLR it was held that:

“It is important to point out that the arguments that were advanced by counsel and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the petitioner’s application and not the petition. I will not therefore delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the *Constitution*.”

33. When a court is called upon to determine whether a prima facie case has been established, it should not delve into a detailed analysis of the facts and law but should focus on determining whether the Applicant has put forward a case that is arguable and not frivolous. In the case of *Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others* [2015] eKLR, the court posited that:

“It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis...”

34. The definition of a “frivolous case” was provided by Ringera, J in the case of *Trust Bank Limited v Amin Company Ltd. & Another* [2000] KLR 164, as cited in *Mary Wangari Mwangi v Peter Ngugi Mwangi T/A Mangu Builders Ltd & 3 Others* [2013] eKLR, as follows:

“A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the actions.”

35. The Applicant avers that he is apprehensive that the 4th respondent’s decision after re-hearing the appeal on the 13th December, 2023 with only the 1st respondent present will be implemented which



action shall affect the substratum of the petition. That it is thus expedient and necessary to have the prayers sought herein granted awaiting the determination of the application and ultimately the petition. The petition reveals that the dispute herein dates back to the year 2011 and there have been various proceedings since then. Whereas the petition cannot be said to be without substance, in my view, the petitioner has not demonstrated that he has a prima facie case against the respondents with the likelihood of success.

36. The second hurdle to be cleared by an applicant seeking conservatory orders is the need to prove that the substratum of the petition will be rendered nugatory if orders are not granted. The Applicant argues that the decision to re-hear appeal No. 417 of 2011 between the same parties over the same subject matter offends the principle of res judicata and that litigation must come to an end. In my view, the applicant has not put forward a satisfactory argument that the petition will be rendered nugatory if a conservatory order is not granted. This is because the declarations sought in the petition can still be made at the conclusion of the main suit. This statement finds support in the decision of the Court of Appeal in *Nelson Andayi Havi v Law Society of Kenya & 3 Others* [2018] eKLR; Civil Application 28 of 2018 (UR 26/2018) where it was stated that:

“Having carefully considered the rival contentions we are not persuaded, in the circumstances of this case, that the holding of the forthcoming elections will negate the applicant’s intended appeal, if it ultimately succeeds. Those elections are not immutable; this Court can nullify them if it finds that they were conducted on the basis of an illegal and unconstitutional framework that among other things discriminated against or disenfranchised the applicant and other members of LSK. The applicant will then have an opportunity to contest if it is determined with finality that indeed he is eligible to run for the office of president of LSK. The determination of this Court after hearing the intended appeal will have two possible consequences. If the appeal is dismissed and we have in the meantime stopped the elections, it will mean losses that are not petty cash for a professional society that is financed primarily by members’ subscriptions. It will also throw into confusion prescribed statutory calendar and disrupt or undermine the discharge of critical statutory and national functions vested in LSK such as regulation of the legal profession, resolution of complaints against practitioners, and assisting in the administration of justice and the practice of law in the country. If on the other hand the appeal succeeds, the applicant will have an opportunity to contest in the ensuing by-election. The primary prejudice that he will suffer is a delay in the realization of his ambition to lead the LSK, which we think can be mitigated or reduced substantially by fast-tracking the hearing and determination of his appeal. In our view that scenario is not synonymous with rendering the appeal nugatory. If he really wished, the applicant could be adequately compensated for any delay that is entailed, by award of damages.”

37. I am thus not convinced that the Applicant herein shall suffer any harm if the orders are not granted.
38. The final issue to be determined is whether the public interest lies in granting the orders sought by the Applicant. According to *Black’s Law Dictionary*, “public interest” is defined as: -

“The general welfare of the public that warrants recognition and protection; or something in which the public as a whole has a stake especially in interest that justifies governmental regulations.”

39. I am not convinced that the applicant has demonstrated whether public interest lies in granting the orders. From the material on record, the dispute is mainly between the petitioner and the 1st respondent



over the suit property. In conclusion therefore, I find that the applicant has not met the threshold for grant of conservatory orders.

40. It follows that the Applicant's notice of motion application dated 19th December, 2023 is for dismissal and is hereby dismissed with costs to the 1st Respondent.

41. Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 25TH JULY, 2024

In the presence of:

Court Assistant – Kiruja

Ms. Nyagah for Applicant

Ms. Ochola for 1st Respondent

Ms. Kendi for 2nd – 7th Respondents

C.K YANO,

JUDGE

