



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Matipe v Murunya & 6 others (Environment and Land Constitutional Petition
E001 of 2024) [2024] KEELC 7194 (KLR) (29 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7194 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E001 OF 2024**

CG MBOGO, J

OCTOBER 29, 2024

**IN THE MATTER OF: ARTICLES 1,2,3,10,19,20,21,22,23
(30),35,40,43,47, (10,50,73,75,165)30 AND
258,259,48,50,60 AND 232 OF THE CONSTITUTION OF**

KENYA

AND

**IN THE MATTER OF SUPREMACY OF THE CONSTITUTION
PURSUANT TO ARTICLE 2 OF THE CONSTITUTION**

AND

**IN THE MATTER OF CONTRAVENTION AND THREATENED
CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLE 20,27,28,40,50 AND 174& 53**

OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF ILLEGAL AND UNLAWFUL DEPRIVATION
OF PROPERTY RIGHTS BY THE RESPONDENTS**

AND

**IN THE MATTER OF DEFENCE OF THE CONSTITUTION
UNDER ARTICLE 3(1) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF INTERPRETATION, ENFORCEMENT AND
PROTECTION OF THE BILL OF RIGHTS UNDER ARTICLE
19,20,22,23,24,165,258 AND 259 OF THE CONSTITUTION**



BETWEEN

KIRIGA MATIPE PETITIONER

AND

TUKEROQ OLE MURUNYA 1ST RESPONDENT

KEMET ENE MURUNYA 2ND RESPONDENT

SAITAGA OLE NANGARI 3RD RESPONDENT

KOIRESOI BWATIKA 4TH RESPONDENT

KANTAI MAKU 5TH RESPONDENT

DISTRICT SURVEYOR 6TH RESPONDENT

DISTRICT LAND REGISTRAR 7TH RESPONDENT

RULING

1. Before this court for determination is the notice of motion dated 22nd May, 2024 filed by the 1st-5th respondents/ applicants, and it is expressed to be brought under Article 159 of *the Constitution* of Kenya, Sections 1A and 1B, 3, 3A and 63 (c) and (e) of the *Civil Procedure Act*, and Order 40 (1) Rule 3, Rule 4 (1), Order 40 Rule 7 and Order 51 Rule 1, 3 and 13 (2) of the Civil Procedure Rules seeking the following orders:-
 - 1 Spent.
 2. That this honourable court be pleased to vary, discharge and/or set aside the orders issued on 3rd May, 2024 and all consequential orders thereto.
 3. That pending hearing and determination of the petition/suit this honourable court be pleased to issue an order of injunction restraining the petitioner/ respondent, his servants, licensees, agents or any other persons acting on his behalf from howsoever harassing, evicting or interfering with the occupation by the 1st and 2nd respondents/ applicants of that parcels of land known as former Cis-Mara/ Oltukat/ 337 and 338.
 4. That this honourable court issues such orders or directions as it deems fit to grant for the ends of justice to be met in this application.
 - 5 That the costs of this application be provided for.
2. The application is premised on the grounds inter alia that the petitioner/ respondent herein was granted adverse and conclusive orders against the 1st and 2nd respondents/ applicants, yet they are the legitimate owners of CisMara/ Oletukat/ 337 and 338, although the interim orders refer to parcel no. CisMara/ Oletukat/ 674. The application is further supported by the affidavit of the 3rd respondent/ applicant, who is the Chairman of Olekuta Group Ranch, sworn on even date. The 3rd respondent/ applicant deposed that whereas the interim orders refer to parcel no. CisMara/ Oletukat/ 674, the ground where the petitioner/ respondent is claiming is the parcels of land known as CisMara/ Oletukat/ 337 and 338 which are owned by the 1st and 2nd respondents/ applicants. He deposed that during the demarcation, the petitioner/ respondent was allocated parcel no. 321 as captured in the area



list, and that title CisMara/ Oletukat/ 674 was irregularly issued to him. That upon detection of the fraudulent consolidation of parcels CisMara/ Oletukat/ 337 and 338, the 7th respondent vide gazettee notice no. 10273 dated 4th August, 2023, revoked the title to CisMara/ Oletukat/ 674 and reissued new titles in the name of the 1st and 2nd respondents/ applicants.

3. The 3rd respondent/ applicant further deposed that in obtaining the orders, the petitioner/ respondent misled this court and concealed from this court all the relevant facts necessary to guide the court in determining the application appropriately and judiciously. He deposed that in an attempt to fraudulently create parcel no. CisMara/ Oletukat/ 674, the petitioner/ respondent purported to carry out a mutation on parcel no. CisMara/ Oletukat/ 317 which is registered in the name of Mpatinga Ole Ngosila. He went on to depose that the petitioner/ respondent has construed the injunctive orders to mean conclusive evidence that he is the rightful owner of a portion of the parcels owned by the 1st and 2nd respondents/ applicants to justify his illegal claim of the said parcels, and by extension, depriving them of their property as protected by law.
4. The 3rd respondent/ applicant further deposed that the delay in responding to the application was occasioned by the delay in procuring relevant documents from the 6th and 7th respondents and the District Land Adjudication Officer. Further, he deposed that no court ought to aid a litigant on an illegally acquired property where the illegality is brought to its notice. He deposed that the temporary injunction orders sought is an equitable remedy at the court's discretion, and that he who comes to equity must come with clean hands. It was further deposed that an injunction cannot be granted to prevent what has already happened since the 1st and 2nd respondents/ applicants are already in occupation of the ground where the petitioner/ respondent alleges parcel no. CisMara/ Oletukat/ 674. It was also deposed that since they are in occupation and possession of the suit parcel of land, they cannot be enjoined in the interim.
5. The 3rd respondent/ applicant deposed that the petitioner/ respondent has not come to court with clean hands having concealed material and relevant information relating to the actual situation on the ground. In conclusion, it was deposed that an applicant whose illegal activities have been brought to the attention of the court is underserving of the court's direction, and the court cannot be the refuge of a land grabber.
6. The application was opposed vide the replying affidavit of the petitioner/ respondent sworn on 25th June, 2024. The petitioner/ respondent deposed that there is no dispute as to whether Cis Mara/ Oletukat/ 316 is a public utility or not, and that the title deed for parcel known as Cis Mara/ Oletukat/ 321 was issued to Benson Ngosila on 1st February, 2021 which is already disposed off and only a small portion exists. The petitioner/ respondent further deposed that the chairman of Oletukat Group Ranch must explain why there are several area lists in the group ranch, and also shed light as to why there is no nexus between the various area lists, and the title deeds issued to some members of the group ranch being Lunke Matipe and Rupa Matipe.
7. The petitioner/ respondent further deposed that this new turn of events is a clear demonstration by the committee member to allocate him property that is either meant for public use or already registered to other bona fide members of the adjudication section, and that the allegation that Cis Mara/ Oletukat/ 674 was fraudulent is misplaced and misleading. He deposed that during the adjudication exercise, the officials of the group ranch accompanied the surveyor to the ground in his presence including the proprietor of Cis Mara/ Oletukuta/ 337 and 338 and no objection was registered until the registration of Cis Mara/ Oletukat/ 674.
8. He deposed that he has occupied Cis Mara/ Oletukat/ 674 for close to 50 years now, and that his presence has not affected the proprietor of Cis Mara/ Oletukat/ 337 and 338 who held their respective



shares on the other side of the road opposite his parcel of land. Further, he deposed that it was only after the gazette notice cancelling his title that the proprietor of Cis Mara/ Oletukat/ 337 and 338 were intentional to frustrate him and to date, he does not understand the cause of the cancellation of his parcel of land which he has never been given the right to defend the said title regardless of the position that the land registry had on the same.

9. The petitioner/ respondent deposed that he has come to the realization that he was mistaken to believe that the committee members were genuine when they led him to believe that the creation of his parcel of land was legitimate. He went on to depose that given the circumstances that led to the unsubstantiated cancellation that he was not aware of became self-defeating hence he had to move with the records of the land office as at the time of instituting this suit.
10. The application was canvassed by way of written submissions. The 1st to 5th respondents/ applicants filed their written submissions dated 26th September, 2024 where they raised three issues for determination as follows: -
 1. Whether the interlocutory injunctive orders should be discharged, varied or set aside.
 2. Whether the application of injunctive orders against the petitioner should be allowed.
 3. Who bears the costs.
11. On the first issue, and while relying on the case of St Patricks Hill School Ltd versus Bank of Africa Kenya Ltd [2018] eKLR, the 1st to 5th respondents/ applicants submitted that the court has unfettered discretion to discharge or vary an injunction if the ends of justice demand so, and that interim injunctions are not meant to be punitive of a party to a proceeding, but they are meant to preserve the state of things pending the court investigating the dispute. They relied on the case of Gabriel Otiende & 4 Others versus County Commissioner - Siaya County and 2 Others, John Nyapola Okuku & 3 Others (Interested Parties) (2021) eKLR, and further submitted that their application is competent before the court both under Rule 25 of the Mutunga Rules and Order 45 of the Civil Procedure Rules.
12. They further submitted that there was material information not brought to the attention of court by the petitioner/respondent at the time of applying for interim orders, as he never disclosed that his title deed in respect of parcel no. CisMara/ Oletukat/ 674 had been cancelled or revoked, and that with this development now having been brought to the attention of the court, there existed sufficient reasons to warrant a discharge and setting aside of the interim orders. They also submitted that having granted the orders on 3rd of May, 2024 this court retained a residual power to set aside those orders of its own motion if it deemed fit or on an application of a party as in this case.
13. While further relying on the Supreme Court of India in the case of Ajit Kumar Rath versus State of Orisa, 9 Supreme Court Cases 596 at Page 608, the 1st to 5th respondents/ applicants submitted that the order was issued on the basis of misrepresentation of facts by the petitioner/ respondent, and that he is using the injunction order issued by the court oppressively to the detriment of the 1st and 2nd respondents/ applicants who are the bona fide proprietors of the parcel nos. 337 & 338.
14. The 1st to 5th respondents/ applicants further submitted that a party seeking equitable remedy like an injunction order must be honest and candid to the court. To buttress on this submission, they relied on the cases of Kenleb Cons Ltd versus New Gatitu Service Station Ltd another, (1990) eKLR, and Ochola Kamili Holding Limited versus Guardian Bank Limited (2018) eKLR.
15. On the second and third issues, the 1st to 5th respondents/ applicants submitted that they are the registered proprietors with indefeasible title of parcels nos. 337 & 338 which the petitioner/respondent caused a consolidation to create parcel no. 674, and the fact that they have annexed copies of title deeds



is sufficient prove they are the true owners of the said parcels. They relied on the cases of Mrao Ltd versus First American Bank of Kenya Ltd & 2 Others [2003] eKLR, Amir Suleiman versus Amboseli Resort Limited (2004) eKLR, and Mary Aliviza & Okoth Mondoh versus Attorney General of Kenya and Secretary General of East African Community Application No. 3 of 2010, EALS, Law Digest 2005 - 2011 P.I.

16. The 1st to 5th respondents/ applicants further submitted that the balance of convenience tilts in their favour considering that *the Constitution* does not protect property which has been acquired unlawfully. They submitted that the title held by the petitioner/ respondent having acquired it illegally is what is being challenged, and that no court ought to aid a litigant on an illegally acquired property especially where the illegality is brought to its notice, and especially if the person invoking the aid of the court is himself implicated in the illegality and corrupt schemes. They relied on the cases of Paul Gitonga Wanjau versus Gathuthis Tea Factor Company Ltd & 2 others [2016] eKLR, and Leah Nyambura Mburu versus Barclays Bank of Kenya Ltd [2012] eKLR. In conclusion, the 1st to 5th respondents/ applicants submitted that the proviso under the provisions of Section 27 (1) of the *Civil Procedure Act* holds that costs follow the events, and that it is trite law that the issue of costs is the discretion of court.
17. The petitioner/respondent filed his written submissions dated 12th August, 2024. The petitioner/ respondent submitted that the orders issued on 3rd May, 2024 show that they are to be in force pending the hearing and determination of the suit. He added that the object of the orders is to preserve the subject matter of this petition pending the hearing and determination of this petition, and that the instant application has been filed to defeat that purpose. He relied on the case of Pettit versus Assanad 1989 KLR page 242.
18. While relying on the case of Ramanoop versus Attorney General of Trinidad and Tobago (2004) 1 Law Reports of the Commonwealth, the petitioner/respondent further submitted that the application dated 14th February, 2024 was served on the respondents on 15th and 16th February, 2024, and that the same has not been replied to by the respondents/applicants. He submitted that according to Rule 15 of *Legal Notice No. 117 of 2013*, the respondents/ applicants should have filed a replying affidavit within 14 days, and instead of doing so, they filed the instant application which is misconceived in substance and procedure. With regard to substance, the petitioner/respondent submitted that since the respondents/applicants want to make a counterclaim against him, they should have filed a replying affidavit and cross petition after which the court will give directions as to its disposal. He relied on the case of Kironyo versus Kironyo 1976 KLR page 109.
19. The petitioner/respondent further submitted that in the instant case, the application is misconceived as it is barred by the doctrine of res judicata, as the reliefs sought could have been considered before 3rd May, 2024 had the respondents/ applicants filed their replying affidavit, cross petition and their own application for conservatory orders. That as it is, the court is functus officio, and the remedy is to the appeal to the Court of Appeal against those orders. To buttress on this submission, the petitioner/respondent relied on the case of Raila Odinga versus Independent Electoral and Boundaries Commission.
20. While further relying on the case of Jimba Credit versus Stanley Munga Githunguri, Court of Appeal at Nairobi, Civil Appeal No. 144 of 1988, the petitioner/respondent submitted that contrary to the respondents/ applicants claim, the orders were made pending the hearing and determination of the pending suit, which orders make it clear. He submitted that the respondents/ applicants who have not filed a cross petition are making a false claim because they do not understand what transpired on 3rd May, 2024. He submitted that this court lacks jurisdiction to hear the instant application.



21. I have considered the application, replying affidavit, and the written submissions filed by the 1st to 5th respondents/ applicants and the petitioner/ respondent as well as the authorities cited. In my view the issue for determination is whether the application has merit.
22. Order 40 Rule 7 of the Civil Procedure Rules, which states: -

“Any order for an injunction may be discharged, or varied, set aside by the court on application made thereto by any party dissatisfied with such order.”
23. The above section of the law applies when an order of injunction has been issued by the court and the dissatisfied party then applies for setting aside, varying or discharge of the said injunction.
24. In the case of St Patricks Hill School Ltd versus Bank of Africa Kenya Ltd [2018] eKLR it was held: -

“Similarly, this court has unfettered discretion to discharge or vary or even set aside an injunction order if the ends of justice so demand, or if the injunction does not serve the ends of justice it was intended to serve when it was issued. Questions such as whether it is unjust to maintain the injunction in force or it is otherwise unjust and inequitable to let the order remain will be asked when considering an application to discharge an injunction.”
25. From the above cited authority, it is quite clear that the decision to set aside, review or vacate the orders of the court are discretionary in nature. Thus, the unfettered discretion must be exercised judiciously, not capriciously and unreasonably. The petitioner/ respondent filed the notice of motion dated 13th February, 2024 under a certificate of urgency. The application was not certified as urgent, but the court gave directions on effecting service and a date for inter-partes hearing on 22nd February, 2024. A perusal of the affidavit of service sworn on 16th February, 2024, shows that the application and all the accompanying documents as well as the court’s directions were served upon the respondents on 15th and 16th February, 2024. On 21st February, 2024, the 1st and 2nd respondents filed their notice of appointment dated 20th February, 2024. From the proceedings, and on 22nd February, 2024, Mr. Kamwaro, the learned counsel for the 1st to 5th respondents sought for 14 days to file a response to the petition, and the same was granted. On 12th March, 2024, Mr. Kamwaro was yet to file a response and he sought for more time. While the matter came up on 6th May, 2024, Ms. Nchoe the learned counsel who was previously on record for the petitioner/respondents informed the court that the 1st to 5th respondents were yet to comply with the directions of the court issued on 14th February, 2024 and 12th March, 2024. Notably, Mr. Kamwaro was absent from court, and in view of the prayers sought by Ms. Nchoe, this court noted that the said application was unopposed and proceeded to allow the application in terms of prayers 2, 3, 4 and 5 respectively.
26. Being displeased with the orders issued by this court on 6th May, 2024, the 1st to 5th respondents filed the instant application. From the above narration of events leading to the culmination of the grant of the orders, it is clear that the 1st to 5th respondents/ applicants were granted sufficient time to respond to the application filed by the petitioner/respondent in his application. The grounds upon which the instant application is premised together with the averments contained in the supporting affidavit should have been raised or formed part of their response to their application.
27. In St Patricks Hill School Limited (supra) it is trite that in setting aside ex parte orders, the court must be satisfied of one of two things, namely, either that the respondent was not properly served with summons or that the respondent failed to appear in court at the hearing due to sufficient cause. The 1st to 5th respondents were indeed served with the application but they have failed to give sufficient reasons why they did not respond to the application. Instead, they filed the instant application seeking to set



aside the very orders granted to the petitioner/respondent. Equally and more importantly, is that the orders that were granted on 6th May, 2024 and not 3rd May, 2024. The orders issued by this court were not conclusive or final as contended by the 1st to 5th respondents/ applicants. The orders were issued to preserve the state of the subject matter pending the hearing and determination of the suit.

28. The rights and interests of either parties are yet to be ascertained, and the court having the discretion to issue the said orders had in mind the nature of the grievance by the petitioner/respondent. The 1st to 5th respondents/ applicants' failure to comply with the court's directions within the period specified does not in my view necessarily mean that there was material non- disclosure of the facts as presented by the petitioner/ respondent.
29. Arising from the above, the notice of motion dated 22nd May, 2024 lacks merit, and it is thus dismissed. Costs in the cause. Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 29TH DAY OF OCTOBER, 2024.

HON. MBOGO C.G.

JUDGE

29/10/2024.

In the presence of: -

Mr. Meyoki Pere – C. A

