



**Nganga & 28 others v Kenya Railways Corporation & 2 others
(Environment & Land Petition E002 of 2024) [2024] KEELC 13486 (KLR)
(Environment and Land) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13486 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIRONMENT & LAND PETITION E002 OF 2024
MC OUNDO, J
NOVEMBER 28, 2024
IN THE MATTER OF ARTICLES 2, 19, 20, 22, 23, 27,
40 AND 47 OF THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF VIOLATION OF RIGHTS**

BETWEEN

PETER KAMAU NGANGA 1ST APPLICANT

JON MWANGI NGUGI 2ND APPLICANT

AND

PETER MBURU MWANGI PETITIONER

AND

SECUNDA MUTHONI KARANJA 1ST APPLICANT

FRANCIS WAINAINA MWANGI 2ND APPLICANT

DANIEL NJUNG'E NDUNG'U 3RD APPLICANT

CHEGE STEPHEN NJUGUNA 4TH APPLICANT

PETER NDUNGU KARANJA 5TH APPLICANT

HENRY MOINDI ANGIENDA 6TH APPLICANT

HIRAM MBUGUA 7TH APPLICANT

GIDEON NGANGA WAINAINA 8TH APPLICANT



MERCY WAMURINGO MUCHIRI	9 TH APPLICANT
FRANCIS MWAURA WAINAINA	10 TH APPLICANT
MARY WANGUI MWANGI	11 TH APPLICANT
GRACE WANJIRU MBUGUA	12 TH APPLICANT
PATRICK KIVUVA KASUNGI	13 TH APPLICANT
JOSEPHINE WAJIRU NDERU	14 TH APPLICANT
TERESIA WAIRIMU KIHARA	15 TH APPLICANT
JAMES KAMAU GITHIACA	16 TH APPLICANT
MICHAEL KAHURA NJOROGE	17 TH APPLICANT
JULIUS KIGOTHO KABIRU	18 TH APPLICANT
ETHELDREDA JANE ADHIAMBO	19 TH APPLICANT
JOHN NJOROGE NGANGA	20 TH APPLICANT
DEBORAH CHEPTOO RUTTO	21 ST APPLICANT
MICHAEL NDURA NJOROGE	22 ND APPLICANT
SIMON MWANGI IRUNGU	23 RD APPLICANT
PETER GICHIHI MBURU	24 TH APPLICANT
DEREK KIHUGI NGANGA	25 TH APPLICANT
PHILIS WAITHERA NJUGUNA	26 TH APPLICANT

AND

KENYA RAILWAYS CORPORATION	1 ST RESPONDENT
THE ATTORNEY GENERAL	2 ND RESPONDENT
THE NATIONAL LAND COMMISSION	3 RD RESPONDENT

RULING

1. Before me for determination is a Notice of Motion Application dated 9th February, 2024 brought under the provisions of Articles 22, 23(3) (c) and 40 of the *Constitution* of Kenya, Rules 23 and 24 of *the Constitution(Protection of Rights & Fundamental Freedoms) Practice and Procedure Rules*, 2013) wherein the Petitioners/Applicants have sought for a conservatory order restraining the 1st Respondent either by itself, its employees, agents or any other person whomsoever acting on their instructions from taking possession, demolishing structures on or interfering with land parcel Numbers Gilgil/ Gilgil Block 9802, 33603, 33596, 9796, 25742, 25760, 133595, 60637, 9087, 10179, 9869, 9868, 14046, 14047, 14045, 28163, 563, 18107, 60710, 14034, 14033, 33597, 18109, 8742, 18726, 9798, 9800, 20130, 53020, 20139, 22015, 747, and 9799 in any manner whatsoever pending the hearing and determination of the main Petition herein. The Applicants also sought for costs of the Application.



2. The application was supported by the grounds therein as well as the supporting Affidavit of an even date, sworn by Peter Kamau Nganga, one of the Petitioners/Applicants herein who deponed that the Petitioners were the registered owners of the suit properties herein above captioned. That the suit lands had been generated from a large parcel of land initially owned by Agricultural Holdings Limited (the company) which company had sold to the members 5 acres each and who had subsequently obtained title deeds for their respective land parcels.
3. That in January, 2024, the 1st Respondent through Mumbi Company Limited accompanied by the police had encroached into suit parcels and commenced illegal mapping, resurveying and sampling. That the 1st Respondent had intended to illegally acquire the Petitioners/Applicants' suit parcels of land compulsorily without consultation and engagement in contravention of their rights. That the Petitioner/Applicants effort to seek audience with the 1st Respondent had been fruitless. That further, there had been no valuation done on the suit parcels to determine their market value which was a necessary exercise before the suit parcels could be compulsorily acquired.
4. That the 1st Respondent's acts was a violation of their rights to own property under Article 40 of the Constitution. That most of the Petitioners had extensively developed their parcels hence they stood to suffer irreparable loss should the 1st Respondent proceed acquire the same compulsorily.
5. In response to and in opposition to the Petitioners/Applicants' Application, the 1st Respondent *vide* its Replying Affidavit of 26th April, 2024 sworn by Nathaniel Ochieng, its Land Surveyor, deponed that the Application was unfounded and ought to be dismissed forthwith. That the Petitioners/Applicants' claim was based on fraudulent acquisitions of titles to land belonging to the 1st Respondent wherein the suit parcels lay on a railway line corridor running from Gilgil Railway Station to Lanet Station through Eburu and Elementaita stations and which railway line had originally been reserved for the East Africa Railways Corporation as defined under East African Railways and Harbors Drawing Number 6473/1 as per the annexed survey plans marked as NO-1 and 2 (a-d).
6. That the suit parcels among others had been vested in the General Manager of East African Railways and Harbors Administration *vide* the *Kenya (Vesting of Land) Regulations, 1963* (L.N. 245 of 1963) herein marked as annexure No 3. That in a subsequent Legal Notice, that is, Kenya Railways Corporation (Vesting of Land) Order, 1986 (L.N. 24 of 1986), it had been directed in the Schedule that all land that had been reserved for use or had been in use by the East African Railways and Harbors Administration should vest in Kenya Railways Corporation hence the 1st Respondent had become the successor of all land titles that had been owned by East African Railways and Harbors Administration. Herein marked as annexure NO 4.
7. That the suit parcels, which were railway line corridors had not been surrendered for allocation as private land thus the Petitioners titles had been illegal, the same having been acquired irregularly. That the 1st Respondent had only embarked on a pegging exercise to re-establish the railway corridor extents thus the Petitioners/Applicants' claim of encroachment was baseless since they (the Petitioners) are the ones who had encroached on the 1st Respondent's land.
8. That the 1st Respondent did not intend to acquire any land that was within its corridors as the same had already been reserved for railway operations and not subject to any further acquisition. That the Petitioners/Applicants had not demonstrated any entitlement to the conservatory orders thus the instant Application ought to be dismissed.
9. The 2nd Respondent on the other hand responded to and opposed the Petitioners/Applicants' Application *vide* its Grounds of Opposition dated 29th April, 2024 to the effect that:



- i. That the Petitioners have failed to demonstrate with reasonable precision how their legal rights have been violated by the 2nd Respondent.
 - ii. That the Application was incurably defective and ought to be dismissed in the first instance.
 - iii. That the Petitioners have failed to prove the fact that the government have intentions of compulsorily acquiring the suit parcels.
 - iv. That the petitioners have failed to prove or demonstrate that there exists a cause of action against the 2nd Respondent.
 - v. That the Petitioners, in their Application and Petition had failed to prove that their properties have been compulsorily acquired.
 - vi. That the government, if it has intentions of acquiring a property, then, the property being acquired was for the public purpose or interest pursuant to the provisions of Article 40 (3) of the Constitution.
 - vii. That the Petitioners' consent was not necessary during the process of compulsory acquisition of land by the government.
 - viii. That the Application and the Petition is a mere abuse of the court process hence should be struck out.
10. The 2nd Respondent thus prayed that the Applicant's Application and Petition dated 9th February 2024 be dismissed with costs.
 11. The 3rd Respondent did not participate in the instant Application.
 12. The Application dated 9th February, 2024 was canvassed by way of written submissions wherein only the Petitioners/Applicants and the 1st Respondent complied and filed their respective submissions which I shall summarize as herein under.

Petitioners/Applicants' Submissions.

13. The Applicants summarized the factual background of the matter and then framed their issues for determination as follows; -
 - i. Whether the Petitioners have established a *prima facie* case.
 - ii. Whether the Petitioners have satisfied the requirement for the grant of Conservatory orders.
14. On the first issue for determination as to whether the Petitioners had established a *prima facie* case, reliance was placed on the provisions of Section 26 of the Land Act (sic) to submit that by virtue of them holding title deeds to the suit parcels, was proof of ownership of the said parcels. That subsequently, unless evidence was led to the effect that the title deeds in their names had been acquired through fraud, misrepresentation or through corruption, they were to be regarded as the absolute owners of the suit parcels hence they had established a *prima facie* case. That further, whereas the 1st Respondent had claimed ownership of the suit parcels, it had not produced a certificate of title to prove the same. They placed reliance in the decided case of Margaret Njeri Wachira v Eliud Waweru Njenga [2018] eKLR to submit that indeed, they had an arguable case in light of the fact that they not only had the title deeds to the suit parcels, but were also in occupation of the same. Further reliance was placed in the decided case of Kevin Mwiti & Others v Kenya School of Law and Others [2015] eKLR to submit that they had established a *prima facie* case with a likelihood of success.



15. On the second issue for determination as to whether they had satisfied the requirement for the grant of conservatory orders sought, reliance was placed in a combination of decisions in the case of *Gatirau Peter Munya v Dickson Mwenda Kitbinji and 2 Others* [2014] eKLR and *Martin Wambora V Speaker of the County Assembly of Embu and 3 Others* [2014] eKLR to submit that having established that they had a prima facie case, there was a real risk of demolition of their developments in the suit parcels the 1st Respondent having admitted on their interest in taking possession of the suit parcels and which would then render the Petition herein nugatory and a mere academic exercise. Reliance was placed in the decided case of *Law Society of Kenya v Office of the Attorney General & another; Judicial Service Commission (Interested Party)* [2020] eKLR.
16. They thus submitted that conservatory orders ought to be issued to preserve the substratum of the suit and urged the court to so find.

1st Respondent's Submissions

17. The 1st Respondent via its submissions dated 15th October, 2024 and in opposition of the Applicant's Application also summarized the factual background of the matter and then framed one issue for determination, to wit: whether the Petitioners had satisfied the conditions for granting conservatory orders. It hinged its reliance in the decided case of *Invesco Assurance Company v MW (Minor suing thro' next friend and mother (HW))* [2016] eKLR to submit that the purpose of a conservatory order was to preserve the property in dispute pending the hearing and determination of the suit.
18. Reliance was placed on the decided case of *Board of Management of Uburu Secondary School v City County Director of Education and 2 others* [2015] eKLR that spoke on the conditions for granting of conservatory orders.
19. That the 1st condition was the establishment of a prima facie case, for which reliance was placed on the decided case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR to submit that it was upon the court to consider whether the Petitioners possessed a right that had been infringed by the 1st Respondent that would in turn call for a rebuttal. That the 1st Respondent had demonstrated that the suit parcels were alienated public land which vested in the 1st Respondent as the same had not been legally placed into private hands but had been preserved for use by the 1st Respondent. That whereas the Petitioner had annexed titles, there had not been evidence of how the said titles had been acquired.
20. That the Petitioners had therefore failed to demonstrate a prima facie case as their claim had been based on fraudulent acquisition of titles. That possession of titles could not be sufficient evidence where the root of title was under challenge. Reliance was placed on the Supreme Court's decision in the case of *Dina Management Limited vs. County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment).
21. That the Petitioners had failed to demonstrate the existence of any compulsory acquisition and therefore the Petition herein filed was merely speculative. Reliance was placed in the *Board of Management of Uburu Secondary School* (*supra*) to submit that the test for *prima facie* must move beyond the potential arguability and it ought to be beyond a speculative basis. The 1st Respondent thus submitted that the Petitioners having failed to establish a *prima facie* case, could not claim imminent danger with respect to the suit premises.
22. It was their submission that the suit parcels had been reserved public land thus the Petitioners were seeking to preserve illegally acquired private interests over public land herein the balance of convenience tilted in favour of preserving the public interest. That the court should therefore not grant the



conservatory orders. That it was in the public interest that public land remains designated as such for the development of infrastructure that served the general welfare of the public.

23. Reliance was hinged on the decision in the *Board of Management of Uhuru Secondary School (supra)* to submit that the court should exercise its discretion by denying the conservatory orders sought by the Petitioners herein taking into consideration the parties' respective pleadings and submissions. That the Petitioners' Notice of Motion Application dated 9th February, 2024 should be dismissed with costs.

Determination.

24. In so filing the said application, the Petitioners seek for conservatory injunctive orders against the 1st Respondent restraining it either by itself, its employees, agents or any other person whomsoever acting on their instructions from taking possession, demolishing structures on or interfering with suit land parcels herein above stated.
25. I have considered the Petitioners' application together with the grounds of opposition and replying affidavits that have been filed by the Respondents in opposition thereto. Article 40 of the *Constitution* of Kenya guarantees every person a right to acquire and own property.
26. It is now settled that an Applicant seeking a conservatory or interim order must demonstrate that: -
- (i) He has a *prima facie* case.
 - (ii) Unless the conservatory or interim order is granted he is likely to suffer prejudice or injury as a result of violation or threatened violation of his Constitutional rights or the *Constitution*.
 - (iii) It would be in the public interest to grant the order.
27. In the case of *Gatirau Peter Munya -vs- Dickson Mwenda Kitbinji and 2 others*, Supreme Court of Kenya, Petition No. 2 of 2014 (unreported), the Supreme Court held 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.”

28. In the case of *Kenya Association of Manufacturers & 2 Others -vs- Cabinet Secretary Ministry of Environment and Natural Resources & 3 Others* [2017] eKLR the Court stated thus:-

“...In an application for a conservatory order the Court is not invited to make any definite or conclusive findings of fact or law on the dispute before it because that duty falls within the jurisdiction of the Court which will ultimately hear the substantive dispute. The jurisdiction of the Court at this point is limited to examining and evaluating the materials placed before it, to determine whether the Applicant has made a prima facie case to warrant grant of a conservatory order. The Court is also required to evaluate the materials and determine whether, if the conservatory order is not granted the Applicant will suffer prejudice. Thirdly, it is to be borne in mind that conservatory orders in public law litigation



are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the Court in the public interest.”

29. Having considered the motion, the supporting grounds, the affidavits in opposition and the submissions, the following issue stands out for determination;

Whether the Applicants are entitled to the conservatory orders.

30. The Respondents have denied the Petitioner’s claims in their entirety to the effect that the suit parcels of land were within the railway line corridors. That the Petitioners titles had thus been acquired illegally and irregularly. That the 1st Respondent had only embarked on a pegging exercise to re-establish the railway corridor extents thus the Petitioners/Applicants’ claim of encroachment was baseless since they (the Petitioners) had been the ones who had encroached on the 1st Respondent’s land.
31. That the 1st Respondent did not intend to acquire any land that was within its corridors as the same had already been reserved for railway operations and not subject to any further acquisition. That the Petitioners/Applicants had neither demonstrated any entitlement nor how their legal rights have been violated by the Respondents. That the Application was an abuse of the court process and should be dismissed.
32. The Applicants on the other hand have argued that by virtue of them holding title deeds to the suit parcels, was proof of ownership of the said parcels and they were to be regarded as the absolute owners of the suit parcels. That not only did they possess the title deeds to the suit parcels, but were also in occupation and hence they had established a prima facie case. That being in occupation and possession of their respective portions of land, there was a real risk of demolition of their developments in the suit parcels wherein they would suffer prejudice as a result of the violation or threatened violation of the Constitution and which would then render the Petition herein nugatory and a mere academic exercise should the conservatory orders sought not granted.
33. Conservatory orders are meant to preserve the substratum of the suit pending the hearing and determination of the suit. The grant thereof of Conservatory orders is not meant to occasion prejudice to any party. In this particular case the Respondents have not indicated whether they would be in a position to compensate the Applicants by way of damages should the Court find that the Applicants deserved the grant of the Conservatory orders. Indeed there was nothing submitted by the Respondents that there would be an adequate remedy to which they were capable of paying. I therefore find in favour of the Applicants in that they would suffer irreparable damages should the Court not grant the orders sought.
34. In the case of Nguruman Limited vs Jan Bonde Nielsen & 2 others [2014] eKLR, where the Court held that:
- “If the Applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the Court must further be satisfied that the injury the Respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the Respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the Applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”
35. Having found as I did herein above, I find that the balance of convenience, favors the Petitioner/Applicants. In essence therefore and in fashioning a suitable remedy for the situation before the Court,



I find that since the Applicants/Petitioners are in possession and occupation of the suit property, that it would be in the interest of justice for the Court in giving effect to the Petitioner's right over the suit property on conservatory basis, to direct that the 1st Respondents together with its agents and/or servants should not commit any acts on the suit lands that would interfere with the Applicants/Petitioners' occupation and use of the suit properties, pending determination of the Petition.

36. The Notice of Motion dated the dated 9th February, 2024 herein succeeds to that effect. However the costs to await the outcome of the Petition which should be fixed for expeditious hearing and disposal.

It is so ordered.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT NAIVASHA THIS 28TH DAY OF NOVEMBER 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

