



**Eldoret Hotel Limited v Kenya Railways Corporation (Petition  
E003 of 2024) [2024] KEELC 13364 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13364 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
PETITION E003 OF 2024  
EO OBAGA, J  
NOVEMBER 21, 2024**

**BETWEEN**

**ELDORET HOTEL LIMITED ..... PETITIONER**

**AND**

**KENYA RAILWAYS CORPORATION ..... RESPONDENT**

**RULING**

1. The Petitioner herein filed a Notice of Motion application dated 30<sup>th</sup> April, 2024 where he sought the following orders:-
  - a. Spent
  - b. Spent
  - c. That there be and is hereby issued a temporary Conservatory Order restraining the Respondents, whether by itself, agents, nominees, assignees of interest or any person whosoever acting under the Respondent's authority whether under lease or howsoever, from continuing any construction whatsoever upon, or remaining upon all or any part of the property known as L.R. No. Eldoret Municipality/block 3/58 pending hearing and determination of the Petition.
  - d. That the High Court be at liberty to issue such further directions and orders for purposes of meeting the ends of justice and protection of public interest and *the Constitution* of Kenya.
  - e. The costs of this Application be borne by the Respondent.
2. The Application is premised on the grounds set out in the Notice of Motion and supported by the Affidavit of Japheth Kipkemboi Magut, the Managing Director of the Petitioner. He deponed that the Petitioner is the registered proprietor of L.R. No. Eldoret Municipality/block 3/58 (the suit property) and holds a title thereto issued on 3<sup>rd</sup> September, 1997. The Respondent filed Eldoret ELC



Case No. 632 of 2012; Kenya Railways Corporation vs Namasu Enterprises Limited, Eldoret Hotel Limited, the Commissioner of Lands & the Attorney General, seeking cancellation of the Petitioner's title and vacant possession, which suit was dismissed with costs. Despite this and in contravention of Articles 10(1)&(2), 40(1) and 260 of *the Constitution*, the Respondent has invaded, taken over and expropriated the suit property and is currently constructing a concrete perimeter wall. The Petitioner filed the instant Petition to protect its fundamental rights to property and the instant motion for urgent conservatory orders.

3. A Replying Affidavit sworn on 31<sup>st</sup> May, 2024 by Stanley Gitari, the Respondent's Ag. General Manager, Legal Services & Corporation Secretary was filed opposing the Application on grounds that it lacked merit and was an abuse of court process. Mr. Gitari deposed that the Respondent is proprietor of all the land along railway lines including the land forming part of the Eldoret Railway station. He deposed that the original allottees to the suit land herein, being Mamusu Ltd & Kuyang Agencies Ltd, were unlawfully and unprocedurally allocated and obtained title to the suit property without the Respondent's involvement contrary to Section 13 & 14 of the *Kenya Railways Corporation Act*. The Petitioner herein then acquired the suit property and obtained title thereto from the said original allottees owing to the un-procedural allocation of the land owned by the Railway Station.
4. The Respondent averred that the said title was fraudulently and illegally obtained by the original allottees and eventually by the Petitioner. That the title is undeserving of protection under Article 40 of *the Constitution* as well as Section 24, 25 and 26 of the *Land Registration Act*. Mr. Gitari deposed that for the reallocation to be done, the original title would have to be surrendered, which was not done here. He deposed that the Respondent filed Eldoret ELC No. 632 of 2012 to protect its interest but the suit was dismissed for non-joinder of parties. That the Respondent has since filed an ownership claim being Eldoret ELC Case No. E017 over the suit property, where the Petitioner is sued as the 4<sup>th</sup> Defendant. Mr. Gitari further deposed that the Petitioner had failed to establish the criteria for grant of conservatory orders thus he urged the court to exercise its discretion and dismiss the Application with costs as it had been brought in bad faith.
5. The Petitioner filed a Supplementary Affidavit also sworn by its Managing Director, Japheth Kipkemboi Magut, on 15<sup>th</sup> July, 2024 where he deposed that Eldoret ELC Case No. 632 of 2012 was heard on the merits and final judgment delivered on 25<sup>th</sup> July, 2023. That the Respondent had now filed a cross-petition claiming the same reliefs over the same property as it had in the decided case. The Respondent has indeed filed Eldoret ELC Case No. E017 of 2023 also seeking the same reliefs as those sought herein. The Petitioner raised grounds of lack of jurisdiction by this court, res judicata, sub-judice and legal grounds ex turpi causa as well as abuse of court process. The Petitioner deposed that it is in the interest of fair administration of justice and protection of the integrity of the court to grant the reliefs sought in the Application herein.

Submissions:

Petitioner's Submissions;

6. The Application was canvassed by way of written submissions. In the Petitioner's Submissions, Counsel laid out various authorities on the grant of conservatory orders. Some of these authorities are Centre for Human Rights Education and Awareness (CREAW) & Another vs Speaker of National Assembly & 2 Others (2017) eKLR and Nubian Rights Forum & 2 Others vs Attorney General & 6 Others; Child Welfare Society & 8 Others (Interested Parties); Center for intellectual Property & Information Technology (Proposed Amicus Curiae) (2019) eKLR. Counsel argued that the Petitioner's claim raises an arguable and meritorious claim, and thereby a prima facie case with a high



likelihood of success warranting protection of the said rights. On prima facie case, Counsel relied on *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* (2003) eKLR among other cases..

7. Counsel for the Petitioner submitted that the rights under Article 40 as operationalised by Sections 5, 24, 25 and 26 of the *Land Registration Act* (LRA) are guaranteed under *the constitution* and statute. The Petitioner was seeking to enforce the said rights and if the suit property is not preserved as sought, the Petitioner will suffer great prejudice as the Respondent will continue to deal with the property, blatantly violating the Petitioner's right to property. Further, that it would be against the law that the Respondent be allowed to maintain an advantage over the suit property whereas the Petitioner, who is the registered title holder, and its victim is condemned to take damages. That where there is a breach of the law, a party cannot be compelled to accept damages as compensation (*Aikan vs Muchoki* (1984) eKLR, *Joseph Mbugua Gichanga vs Co-operative Bank of Kenya Ltd* (2005) eKLR, *Said Ahmed vs Mannasseh Benga & Another* (2005) eKLR and *Joseph Siro Mosioma vs Housing Finance Company of Kenya Limited & 3 Others* (2008) eKLR).
8. It was submitted on behalf of the Petitioner that the Respondent, a public body, was justifying its actions of invading and inter alia divesting the Petitioner of its property as public interest in breach of Article 10(1)(c) and 2(a) and (b) of *the Constitution*. Counsel argued that the pleas of public interest cannot justify the Respondent's illegal actions. He asserted that in the absence of a finding that the Petitioner's property was unlawfully excised from the Respondent's property and illegally issued to the Petitioner, then his title and rights arising therefrom are protected by the law. Counsel submitted that the Petitioner has satisfied all the tests for grant of conservatory orders and urged the court to allow the prayers sought in the motion. Counsel relied on *William Njoroge Karanja & 6 Others vs County Government of Nakuru* (2021) eKLR and *Capital Markets Authority vs Jereiah Kiereini & Another* (2014) eKLR.
9. Counsel for the Petitioner submitted that despite satisfying the conditions, if the court is in doubt, then the balance of convenience is in favour of restraining any dealings on the suit property and its records pending the hearing and determination of this Petition. Counsel relied on *Virginia Edith Wambui vs Joash Ochieng Ougo*, Civil Appeal No. 3 of 1987 (1987) eKLR and *Paul Gitonga Wanjau vs Gathuthis Tea Factory Company Limited* (2016) eKLR. He concluded by submitting that the circumstances are for preservation of the substratum of the Petition. Counsel urged the court that sufficient grounds had been established for grant of the reliefs in the Application.

Respondent's Submissions;

10. On his part, Counsel for the Respondents begun his submissions by quoting the case of *Progress Welfare Association of Malindi & 3 Others vs County Government of Kilifi & 4 Others* (2020) eKLR, which laid down the law on conservatory orders. Bearing that in mind, Counsel submitted that the Petitioner had not met the conditions for grant of the orders sought. Counsel argued that the Petitioner had not controverted the allegations that the property falls within the Eldoret Railway Station. Secondly, that the Petitioner had not demonstrated that the suit property was lawfully acquired to show that it enjoyed indefeasibility of title, which, as enshrined under Article 40 and Sections 24, 25 and 26 of the *Land Registration Act* is subject to limitations under Section 24 thereof. Counsel relied on *Dina Management Limited vs The County Government of Mombasa & Others* (2023) eKLR, *Munyu Maina vs Hiram Gathiha Maina*, Civil Appeal No. 239 of 2009, *Hubert L. Maina & 2 Others vs Margaret J. Kamar & 5 Others* (2016) eKLR and *Henry Muthee Kathurima vs Commissioner o Lands & Another* (2015) eKLR among other cases.
11. Counsel submitted that the Petitioner had not demonstrated that there is real danger that it will suffer prejudice unless the orders are issued. On public interest, Counsel cited *Okiya Omtatah Okoiti vs*



Kenya University Teaching, Referral & Research Hospital & 2 Others; Kenyatta University Council & 2 Others (Interested Parties) (2019) eKLR arguing that public interest frowns upon the Petitioner’s application. Counsel added that the issuance of conservatory orders will prejudice the performance of the Respondent’s statutory functions in service to the public. Counsel concluded that the Petitioner had failed the test for conservatory orders and urged the court to decline to issue the orders sought and dismiss the application with costs.

### **Analysis and Determination:**

12. I have considered the Application alongside the Affidavits filed in support thereof, the Replying Affidavit as well as the submissions by Counsel. The only issue for determination is whether the Petitioner is entitled to conservatory orders it is seeking in its application.
13. The Supreme Court of Kenya in *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others* set the principles for grant of conservatory orders as follows:
  86. “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 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 supplicant’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.
  87. 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 crystallized through a long line 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.
  88. 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.
  89. This third condition is dictated by the expanded scope of the Bill of Rights, and the public-spiritedness that run through *the Constitution*. This Court has already ruled that election petitions are both disputes in personam and disputes in rem. While an election petition manifestly involves the contestants at the poll, the voters always have a stake in the ultimate determination of the dispute, hence the public interest.”
14. As to whether there is an arguable case, the Petitioner’s claim is based on ownership of the land and the fact that he holds title to the land. The Petitioner allegedly purchased the land from the original allottees and acquired the said title by virtue of registration. I have not seen the report of the County Land Surveyor in ELC Case No. 632 of 2012, I note that from his testimony as summarised in the judgment in that suit, that the land was indeed part of the Eldoret Station yard. The Respondent herein claims that the land belongs to the Kenya Railways by virtue of various vesting orders that it annexed



to its Replying Affidavit. I am of the view that from the way the Petition is drafted, this court cannot at this juncture find that the Petitioner has established a prima facie case, when its ownership of the land is being challenged in another suit on grounds that it is irregularly acquired government land, and there is the uncontroverted testimony of the County Land Surveyor in ELC No. 632 of 2012 to that effect.

15. On whether the Petitioner has established that there is a real danger that it will suffer prejudice if the orders are not granted, the Petitioner has not indicated what prejudice it will suffer if the conservatory orders are not granted. It is trite that a party claiming prejudice and/or harm must demonstrate the sort of harm they are likely to suffer if the orders are not granted. It is this prejudice/harm that has to be prevented by issuance of the conservatory orders because the alternative would be that it would render the suit nugatory. In *Martin Nyaga Wambora vs Speaker of The County Of Assembly of Embu & 3 Others* (2014) eKLR, Mwangi J had this to say about real danger in applications for conservatory orders:-

“60. To those erudite words I would only highlight the importance of demonstration of “real danger”. The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court’s attention.”

16. Furthermore, I have seen the photos annexed to the Supporting Affidavit meant to demonstrate the alleged construction of a concrete perimeter wall. There does not seem to be any construction of a perimeter wall as alleged, what is seen appears to be pieces of metallic rails standing on an open field. It follows that the Petitioner has not satisfactorily established the real danger as required in an application such as this one.

17. Which then brings me to the last condition, which is for the applicant to demonstrate that it is in the public interest that the order of stay be granted. The Petitioner herein filed the Petition and the Application herein to advance and protect its own private rights over the suit property. It has not demonstrated how the orders sought herein will serve the larger public interest, as compared to the Respondent who is a public body with a mandate to serve the public. In the *Martin Nyaga Wambora Case* (Supra) :-

63. Thus, where a conservancy order is sought against a public agency like a legislative assembly that is mandated to carry out certain functions in the normal course of its business, it is only to be granted with due caution. The interruption of the lawful functions of the legislative body should take into account the need to allow for their ordered functioning in the public interest...

65. ...The court will only issue conservatory orders in exceptional circumstances and will be minded of the mandate of other constitutional organs in exercise of their constitutional mandate.”

18. Grant of a conservative order in the circumstances of this dispute would mean that the Petitioner be allowed to use what could possibly be public/government land that may not even have been available for alienation to the original allottees in the first place. Such an event would be at the expense of the Kenyan public, and would only serve the private albeit commercial interests of the Petitioner alone. It would also hinder the Respondent from fulfilling its legal mandate as a public entity in its service delivery to the general populace, thus subordinating instead of promoting the public interest. For these reasons, I am not convinced therefore that it is in the public interest to grant the orders sought.

19. The upshot of all the forgoing is that I am not satisfied that this application merits the conservatory orders sought. The application is dismissed with costs to the Respondent.



It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2024.**

**E. O. OBAGA**

**JUDGE**

In the virtual presence of;

Mr. Bwire for petitioner.

M/s Moraa for Respondent.

Court Assistant –Laban

**E. O. OBAGA**

**JUDGE**

**21ST NOVEMBER, 2024**

