



Nyamongo v Catholic Diocese of Kisii (St. Charles Lwanga Kisii Central Church) & 4 others (Environment & Land Petition E001 of 2024) [2025] KEELC 539 (KLR) (12 February 2025) (Ruling)

Neutral citation: [2025] KEELC 539 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND PETITION E001 OF 2024**

**M SILA, J
FEBRUARY 12, 2025**

BETWEEN

CLEMENT NYAMBINYA NYAMONGO PETITIONER

AND

THE CATHOLIC DIOCESE OF KISII (ST. CHARLES LWANGA KISII CENTRAL CHURCH) 1ST RESPONDENT

THE CHAIRMAN, SECRETARY AND TREASURER, ST. CHARLES LWANGA, KISII CENTRAL 2ND RESPONDENT

LAND CONTROL BOARD CHAIR, KISII COUNTY 3RD RESPONDENT

LAND REGISTRAR, KISII COUNTY 4TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 5TH RESPONDENT

RULING

(Application for injunction; principles to be applied; applicant contending that he owns the suit land and that it was fraudulently transferred by third parties to the 1st respondent; 1st respondent having become proprietor in 2016, taking possession, and now erecting a complex; court not persuaded that such suit cannot be heard through an ordinary plaint and not a constitutional petition; applicant not disclosing that he had a previous suit with the third parties who transferred the suit property to the 1st respondent which suit was dismissed; 1st respondent also being in possession since 2016 without the petitioner filing suit against her; application for injunction dismissed)

1. This suit was commenced through a petition filed on 3 October 2024. In the petition, the petitioner avers to be the owner of the land parcel Nyaribari Chache/B/B/Boburia/4475 (the suit land) and



contends that the suit land was illegally transferred to the 1st respondent. He avers that he still holds the document of title issued to him on 30 June 1989 and has never sold the suit land to any person. He alleges to have been in possession until 2015 when he learnt that the 1st respondent has taken possession upon a purchase from one Sam Nyamari Mose who had in turn acquired the land from one Annah Kerubo Ocharo. He claims that these are fictitious fronts who are unknown to him and who worked with the 1st respondent to steal his land. He pleads that there was a previous suit, CMCC No. E006 of 2023 which he withdrew in favour of this petition. In the petition he wants a declaration that he is owner of the suit land, an order to cancel the 1st respondent's title, and an order of permanent injunction against the 1st respondent.

2. Together with the petition, the petitioner filed an application dated 2 October 2024, for injunction, to have the 1st respondent restrained from commencing or continuing with developing the suit land, or transfer of the suit land, pending hearing of the petition. It is this application which is the subject of this ruling.
3. In the supporting affidavit, he has more or less repeated what he pleaded in the petition, as I have elaborated above, and he has annexed a copy of his title deed and a search dated 11 July 2006 showing him as proprietor. He avers that the 1st respondent is in the process of erecting a complex building.
4. The 1st respondent filed a replying affidavit sworn by Mobesh Ratemo to oppose the motion. He asserts that the 1st respondent is the registered proprietor of the suit land having purchased it from one Sam Nyamari Mose through a sale agreement dated 24 February 2016 at a consideration of Kshs. 3,500,000/=. The copy of the sale agreement is annexed. He has deposed that prior to the purchase, they carried out due diligence including a search which confirmed that the seller was the registered owner. A copy of the search is annexed. Upon transfer, a second search was done on 13 March 2016 which confirmed the 1st respondent duly registered as proprietor. The same is annexed. He has deposed that after the transfer the 1st respondent put up a permanent perimeter wall in the month of April 2016 and took possession of the land. The suit land came to be used together with a larger parcel owned by the 1st respondent which is registered as Nyaribari Chache/B/B/Boburia/6489 and the suit land could only be accessed through a main gate to the church which has been there for the last eight years. He avers that the church has been using the suit land for eight years and is now putting up a multi-purpose complex. He has further deposed that the petitioner has failed to disclose that he had filed the suit Kisii CMCC No. 29 of 2016, against one Annah Kerubo Ocharo and Sam Nyaberi Mose, and the suit was dismissed. He has annexed an order showing that the suit was dismissed under Order 17 Rule 2 (1) on 21 November 2018. He avers that the petitioner knows the two individuals as he actively participated in litigation with them. He contends that the petitioner ceased being owner of the suit land on 15 December 2005. He has added that the petitioner filed the suit Kisii CMCC/ELC No. E006 of 2023 and sought an order for injunction which was dismissed in a ruling delivered on 24 April 2023, which ruling he has annexed. He has deposed that stopping the construction at this stage will cost the 1st respondent millions of shillings thus an irreparable loss.
5. I gave liberty to the applicant to file a supplementary affidavit within specific timelines that were not met and I had no option but to expunge it.
6. I have taken note of the submissions filed in respect of the application.
7. This is an application for injunction and I stand guided by the holding in the case of *Giella vs Cassman Brown* (1973) EA 358 where it was decided that to succeed in an application for injunction, one needs to demonstrate a prima facie case with a probability of success; show that he stands to suffer irreparable loss; and if the court is in doubt, it will decide the application on a balance of convenience.



8. At the outset I am at a loss as to why this suit has been filed as a petition. If the petitioner wishes to have a declaration that he is the owner of the suit land and for nullification of title of the 1st respondent, that is a matter that ought to have been filed through an ordinary plaint given the doctrine of constitutional avoidance. I am not, at this juncture, persuaded that this is a proper constitutional petition, subject of course to being persuaded otherwise at a later stage of the proceedings.
9. Apart from the above, the petitioner has failed to disclose that he had a previous suit with the people that he now says he does not know and are fictitious. That is the suit Kisii CMCC No. 29 of 2016. Without disclosing this previous suit, it is apparent that the petitioner has come to this court with unclean hands. I observe that the said suit was dismissed for failure to prosecute and I have seen no effort to reinstate it, if at all the petitioner was keen to sue the persons that he now says had no good title. In fact, it would appear that the petitioner is now trying his luck through this suit because he failed to get an order of injunction in the suit Kisii CMCC/ELC No. 6 of 2023 as noted in the ruling of the Magistrates' Court delivered on 24 April 2023.
10. Moreover, it is apparent that the 1st respondent has been on the suit land since the year 2016. The petitioner has not refuted that the 1st respondent put up a gate in 2016 and has all along been in possession. Where has the petitioner been since 2016? Why is he choosing to sue the 1st respondent now after 8 years?
11. For the foregoing reasons, I am not persuaded that the petitioner has demonstrated a prima facie case with a probability of success. I am not in doubt, but even if I was, the balance of convenience tilts in favour of the 1st respondent, who has been in possession for 8 years, and has commenced development of a multi-million shilling project. Stopping the project at this stage would cost the 1st respondent heavy loss and the applicant has not given any iota of evidence that he is capable of making such loss.
12. In essence I find no merit in this application dated 2 October 2024 and it is hereby dismissed with costs.
13. Orders accordingly.

DATED AND DELIVERED THIS 12 DAY OF FEBRUARY 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Ms. Kwamboka for the petitioner/applicant

Mr. Orucho h/b for Mr. Ogari for the 1st & 2nd respondents

Mr. Wabwire for the 3rd – 5th respondents

Court Assistant : Michael Oyuko

