**Kipsang v Nairobi City County Government & 2 others (Environment & Land Petition E050 of 2024) [2025] KEELC 3122 (KLR) (28 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 3122 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ENVIRONMENT & LAND PETITION E050 OF 2024**

**TW MURIGI, J**

**MARCH 28, 2025**

**IN THE MATTER OF BREACH, VIOLATION AND/OR THE INFRINGMENT OF THE PETITIONER'S FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2(1), 3(1), 10(1) (2), (A), (B) AND (C), 19(2) 20(2), 21,22, 23,24, 27(1), 28, 36, 40,162(2)(B), 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010 AND SECTION 75 OF THE OLD KENYA CONSTITUTION**

**AND**

**IN THE MATTER OF THE PROTECTION OF THE RIGHT TO PRIVATE PROPERTY UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTION 4(1),(2), (3) AND 4(4) OF THE FAIR ADMINISTRATIVE ACTION ACT CHAPTER 7 REVISED EDITION, 2022**

**BETWEEN**

**HARON CHEPKILOT KIPSANG ..... PETITIONER**

**AND**

**NAIROBI CITY COUNTY GOVERNMENT ..... 1ST RESPONDENT**

**DEPUTY COUNTY COMMISSIONER, STAREHE SUB-COUNTY .... 2ND RESPONDENT**

**OCPD, MAKADARA SUB-COUNTY ..... 3RD RESPONDENT**

**RULING**

1. Before me for determination is the Notice of Motion dated 4th June 2024 in which the Applicant seeks the following orders: -

a) Spent.

b) Spent

c) That the Honourable court be pleased to issue an order of temporary injunction restraining the Respondents actions by themselves, their employees, agents or servants to desist from causing threats or demolishing the Petitioner land L.R No. 209/14522 and/or in any manner issuing threats of demolition and/or from having any dealings at all with the Petitioner quiet and exclusive occupation and possession of L.R No 209/14522 pending the hearing and determination of this Petition and/or until further orders of the court.

d) That the cost of the Petition be in the cause.

2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Haron Chepkilot Kipsang sworn on even date.

**The Applicant's Case**

3. The Applicant averred that he is the registered proprietor of land parcel No. 209/14522 (the suit property herein) having acquired the same from the Government vide a title dated 24/04/2002. He further averred that he has been in possession of the suit property since 1st June 1998 when he was allocated the same. In addition, he averred that he constructed a perimeter wall and has been carrying out stalls and garage business therein.

4. He deposed that the suit property is not a riparian reserve and added that the use of his land has not caused pollution or environmental degradation. He denied having been summoned by NEMA or having received any notice with regards to environmental degradation. He went on to state that in May 2024, the Respondents agents and/or servants threatened to demolish his property without issuance of a legal notice.

5. He deposed that his property was marked X to signify that it was earmarked for demolition. He further deposed that the Respondents have not issued any notice or given any reason why they want to demolish his property. He contended that his rights to property and to a fair administrative action have been violated or threatened with violation by the acts of the Respondents.

6. In a further affidavit dated 18th June 2024, the Applicant attached a bundle of photographs showing the marking on the suit property. In conclusion, the Applicant urged the court to allow the application as prayed.

**The 1st Respondent Case**

7. The 1st Respondent opposed the application through a replying affidavit sworn by Boniface Waweru, the acting Director Litigation of the 1st Respondent.

8. The deponent averred that the 1st Respondent has no authority to deal with properties allegedly constructed on riparian land. He further averred that properties earmarked for demolition by the 1st Respondent are usually marked "NCC" and not "WRA" He denied the allegations that the 1st Respondents marked the suit property for demolition. He contended that the Applicant has not established a prima facie case since he has not demonstrated that the 1st Respondent and its employees marked the suit property for demolition.

9. He further contended that the application is a sham and urged the court to dismiss the same with costs.

**The Response**

10. The Applicant filed a further affidavit in response to the Respondent's replying affidavit. He averred that he obtained approvals from the City County to construct on the suit property and has been paying rates for the same. The Applicant contended that the 1st Respondent cannot run away from the current proceedings because it is responsible for enforcing zoning by laws, the environmental guidelines touching on the riparian land and is also part of the Nairobi Regeneration Programme.

11. The 1st Respondent filed a Notice of Motion dated 4th July 2024 seeking the following orders: -

    1. That the Petition dated 4th June 2024 against the 1st Respondent/Applicant be struck out and wholly dismissed as it discloses no reasonable cause of action against the 1st Respondent/Applicant.

    2. The costs of this application and Petition be borne by the Petitioner/Respondent.

12. The application is premised on the grounds appearing on its face together with the supporting affidavit of Boniface Waweru the acting Director Litigation of the 1st Respondent.

**The Applicant's Case**

13. The deponent averred that the 1st Respondent has no authority to deal properties allegedly constructed within riparian land. He further averred that the properties ear marked for demolition by the 1st Respondent are usually marked NCC and not WRA as indicated in the photographs. According to the deponent, the Petition herein is incompetent, bad in law and untenable against the 1st Respondent/Applicant. He contended that the 1st Respondent cannot be held liable for acts committed by another institution.

14. The applications were canvassed by way of written submissions

**The Applicant's Submissions.**

15. The Applicant filed his submissions dated 20th February 2024

16. On his behalf, Counsel submitted that the County of Government Nairobi was involved in passing laws touching on the procedures related to eviction, demolition and resettlement within the County. Counsel further submitted that the Nairobi City County Evictions, Resettlement and Demolitions Control Bill 2023 defines the jurisdiction of demolition which consist of premises or land on railroad tracks, garbage dumps, riverbanks, shorelines, water ways and public places.

17. Counsel submitted that the 1st Respondent does not dispute that the Applicant's construction was approved and that the Petitioner has been paying rates for the same.

18. Counsel submitted that the 1st Respondent is a necessary party to the suit herein because it is legally mandated to oversee urban planning, land use regulation and enforcement of development control within its jurisdiction. To buttress this argument, Counsel relied on the case of Zephir Holdings Ltd v Mimosa Plantation Ltd Jeremiah Maztagaro and Ezejiel Misiango Mutisya (2014) eKLR.

19. It was further submitted that the marking on the suit property is a direct violation of the Petitioner's rights under Article 40 and 47 of the *constitution*. To buttress this point Counsel relied on the case of Evelyn College if Design Ltd v Director of Children's Department & Another (2013) KEHC 2186 (KLR). Counsel urged the court to determine the dispute on its merits.

20. As regards the application dated 4th June 2024, Counsel submitted that the only issue for determination is whether the Applicant has met the threshold for the grant of a temporary injunction. Counsel submitted that the Applicant has satisfied the conditions set out in the case of Giela vs Cassman Brown (1973) EA 358.

21. On the first condition, Counsel submitted that the Applicant is the registered proprietor of the suit property and has therefore established a prima facie case with a probability of success. Counsel reiterated the contents of the supporting affidavit to submit that the suit property is not a riparian reserve. It was further submitted that the issue of whether or not the suit property falls within a riparian reserve cannot be determined at the interlocutory stage. It was submitted that the Applicant has demonstrated that the Respondents have earmarked his property for demolition.

22. On the second condition, Counsel submitted that the Applicant will suffer irreparable loss if an injunction is not issued. It was argued that the Respondents did not issue any prior notice for the intended demolition of the suit property contrary to Article 47 of the *constitution*. To buttress this point, Counsel relied on the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai (2018) eKLR.

23. Counsel contended that the balance of convenience lies in favour of the Applicant. Counsel submitted that the Applicant will lose his property permanently if an order of injunction is not granted.

**The 1st Respondent's Submissions**

24. The 1st Respondent filed its submissions dated 18th February 2025.

25. On its behalf, Counsel outlined the following issues for the court's determination:-

    i. Whether the Petitioner's suit against the 1st Respondent should be struck out for failure to disclose a reasonable cause of action?

    ii. Whether the orders sought in the application dated 4th June 2024 should be granted against the 1st Respondent?

26. On the first issue, Counsel submitted that the Petition against the 1st Respondent should be struck out for failing to disclose a reasonable cause of action. To buttress this argument, Counsel relied on the contents of the affidavit in support of the application. Counsel submitted that the Water Resources Authority is the body that ensures compliance when developing properties located near water resources. Counsel further submitted that the 1st Respondent is not aware of the circumstances that led to WRA to mark the Petitioner's property for demolition. It was further submitted that the Petitioner has not demonstrated how the 1st Respondent violated his right to property and right to a fair administrative action.

27. On the second issue, Counsel submitted that the Applicant has not met the threshold set out in the case of Giella vs Cassman Brown & Co. Ltd (1973) E.A 358. Counsel submitted that the 1st Respondent did not mark the Petitioner's property for demolition as alleged. Counsel argued that the Petitioner has not bothered to engage the body that marked his property for demolition. Counsel further submitted that the Petitioner has not demonstrated that he will suffer any harm arising from the actions of the 1st Respondent. It was further submitted that the balance of convenience tilts in favour of not granting the orders sought by the Applicant.

**Analysis and Determination**

28. Having considered the applications, the respective affidavits and the rival submissions, the following issues fall for determination: -

    i) Whether the Petition against the 1st Respondent should be struck out?

    ii) Whether the Applicant has met the threshold for the grant of injunction?

29. On the first issue, Order 2 Rule 15 of the Civil Procedure Rules provides for striking out of pleadings as follows: -

> "At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that: -
>
> a) It discloses no reasonable cause of action or defence in law; or
>
> b) It is scandalous, frivolous or vexatious; or
>
> c) It may prejudice, embarrass or delay the fair trial of the action; or
>
> d) It is otherwise an abuse of the process of the court.

30. The principles guiding the court when considering an application for striking out a suit were stated by Madan J.A in D.T. Dobie & Company (Kenya) Ltd vs Muchina (1982) KLR 1 as follows: -

> "The power to strike out should be exercised after the court has considered all facts but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case."

31. Similarly, in the case of Kivanga Estate Ltd vs National Bank of Kenya Ltd (2017) eKLR the court of Appeal held that: -

> "It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic and discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction, capable of bringing a suit to an end before it has been heard on merit, yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice without a hearing however weak his case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case brought against him is clearly a non0starter. The exercise of power to strike out pleadings must balance these two vital considerations."

32. The 1st Respondent denied the allegations of marking the Petitioner's property for demolition. The Applicant contended that the 1st Respondent is a necessary party in the proceedings herein since it is legally mandated to oversee urban planning, use and regulation within its jurisdiction. In order to ascertain the truth of the matter, there will be need to allow the parties to test the veracity of the evidence produced. From the foregoing, I find that it will be draconian to strike out the Petition against the 1st Respondent. In the end, I find that the application dated 4th July 2024 is devoid of merit and the same is hereby dismissed with costs to the Petitioner.

33. With regards to the second issue, this court is called upon to determine whether the Petitioner has met the threshold for grant of conservatory orders.

34. Article 23(3) of the *constitution* empowers a court to grant appropriate reliefs in any proceedings brought under Article 22 where there has been violation or threat of a violation of a fundamental right or freedom. The relief may include a conservatory order.

35. The law on the issuance of conservatory orders is well settled. Conservatory orders were defined in the case of Judicial Service Commission vs Speaker of the National Assembly & Another (2013) eKLR where the court held that;

> " Conservatory orders in my view are not ordinary civil remedies but are remedies provided for under the *constitution*, the supreme law of the land. They are not remedies between one individuals against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person."

36. The principles for the grant of interim conservatory orders were outlined by the Supreme court in the case of Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 Others (2014) EKR where the court stated as follows:-

> " 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",

37. In the case of Wilson Kaberia Nkunja vs The Magistrates and Judges Vetting Board and Others Nairobi High Court Constitutional Petition NO 154 of 2016, the court summarized the principles in granting conservatory orders as follows: -

a. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the *constitution*.

b. Whether if a conservatory order is not granted, the petition alleging violation of or threat of violation of rights will be rendered nugatory.

c. The public interest must be considered before grant of a conservatory order.

38. The first issue for determination is whether the Petitioner has established a prima facie case that warrants the grant of conservatory orders. It has been held in various decisions that a prima facie case is not a case which must succeed at the hearing of the main case but one which discloses arguable issues in a case alleging violation of rights.

39. A prima facie case was defined in the case of Kevin K Mwiti & Others Vs Kenya School of Law & Others (2015) eKLR where the court held that:-

> " .....A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, the Petitioner has to show that he or she has a case that discloses arguable constitutional issues."

40. The Petitioner contended that he is the registered proprietor of the suit property. In this regard, the Petitioner produced a title which shows that he was allocated the suit property by the government. He also produced photographs showing the marking on the suit property. The 1st Respondent admitted that the mark (X) signifies that the suit property has been earmarked for demolition and added that it was placed by WRA. The issue of whether the suit property falls within a riparian reserve can only be canvassed in a full trial by calling evidence and interrogating it through cross examination. At this stage the Court is not required to determine the issues which will be canvassed at the trial.

41. In an application for conservatory orders, it is imperative that the court warns itself that it is not required to make any definitive finding of fact or law. This position was enunciated in the case of Kenya Association of Manufacturers & 2 Others Vs Cabinet Secretary – Ministry of Enviroment and Natural Resources & 3 Others (2017) eKLR where the court stated as follows;

> " 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."

42. At this stage, the Applicant is required to establish a prima facie case with a likelihood of success. If the Court were to determine the issues raised, it would amount to determining the Petition at the interlocutory stage.

43. From the pleadings and the documents presented in Court, I find that the Petitioner has established a prima facie case to warrant the grant of conservatory orders.

44. Before granting conservatory orders, the court is required to evaluate the pleadings and determine whether the denial of conservatory orders will prejudice the Applicant. In the case of Centre for Rights Education & Awareness(CREAW)& Another Vs Speaker of the National Assembly & 2 Others (2017) eKLR the Court held that;

> " A party who moves the court seeking conservatory orders must show to the satisfaction of the court that his or her rights are under threat of violation, are being violated or will be violated and that such violations, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent the violation of rights and fundamental freedoms and preserve the subject matter pending the hearing and determination of a pending cause or petition."

45. The Petitioner contended that the Respondents intend to demolish his property without according him an opportunity to be heard. From the Petitioners pleadings and annexures, it is crystal clear that the Petitioner is in occupation of the suit property. Having evaluated the material placed before me, I find that the Applicant will suffer prejudice if conservatory orders are not granted as he is in occupation of the suit property.

46. On the issue as to whether public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order, I find that it will served better by preserving the status quo pending the hearing and determination of this Petition.

47. The upshot of the foregoing is that the application dated 4th June 2024 is merited and the same is hereby allowed in the following terms: -

    a. A conservatory order be and is hereby issued restraining the Respondents by themselves, their employees, agents or servants from threatening, demolishing or interfering with the Petitioner's land L.R No. 209/14522 pending the hearing and determination of this Petition.

    b) Each party to bear its own costs.

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 28TH DAY OF MARCH 2025.**

**.....**

**T. MURIGI**

**JUDGE**

In the presence of

Arusei for the Petitioner

Ms Muthoni for the 1st Respondent

Hilda – Court Assistant