



Murgor & 9 others v County Physical Planner, Uasin Gishu & 2 others (Environment and Land Constitutional Petition E003 of 2022) [2023] KEELC 82 (KLR) (19 January 2023) (Ruling)

Neutral citation: [2023] KEELC 82 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E003 OF 2022

EO OBAGA, J

JANUARY 19, 2023

IN THE MATETR OF ARTICLES 10,19,20,22,23, 24, 35, 40, 47, 60,61, 63, 64 69, 70, 165, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010ANDIN THE MATTER OF THE LAND ACT, 2012ANDIN THE MATTER OF THE LAND REGISTRATION ACT, 2012ANDIN THE MATTER OF THE PHYSICAL AND LAND PLANNING ACT, 2019BETWEEN

BETWEEN

- JOHANSEN KIPELEI MURGOR 1ST PETITIONER**
- EMMANUEL KIPTOO KIPYEGO 2ND PETITIONER**
- SIMON KIPSAINA SAMMIN 3RD PETITIONER**
- NOAH K. BARMAO 4TH PETITIONER**
- EVERLYNE JEPCHUMBA TANUI 5TH PETITIONER**
- JANE K. KIBIEGO 6TH PETITIONER**
- CAROLYN J. KIMAIYO 7TH PETITIONER**
- DANIEL KIBIEGO 8TH PETITIONER**
- RAYMOND K. CHEMWOLO 9TH PETITIONER**
- SALINA J. KIPKETER 10TH PETITIONER**

AND

- COUNTY PHYSICAL PLANNER, UASIN GISHU 1ST RESPONDENT**
- COUNTY SURVEYOR, UASIN GISHU 2ND RESPONDENT**
- COUNTY GOVERNMENT, UASIN GISHU 3RD RESPONDENT**



RULING

Introduction

1. This is a ruling in respect of two applications. The first application is dated May 5, 2022 in which the petitioners/applicants seek the following orders:-
 1. Spent
 2. Spent
 3. That this honourable court be please to grant a temporary conservatory order restraining the respondents, their agents, servants, employees and/or anyone acting under their instructions from interfering, altering or in any manner interfering with the approved development plan No 1 of April 21, 1999 with respect to Kaptagat/Kaptagat Block 1 (Naiberi trading centre) pending the hearing and determination of this application interpartes and thereafter the petition.
 4. That costs of this application be provided for.

Background

2. The applicants are among 62 members who during demarcation of Kaptagat/Kaptagat Block 1 (Losirwa Farm) agreed to each contribute 0.3 acres of land in order to set up a trading centre at Naiberi. Before the trading centre was planned, each of the members took up a portion at the trading centre.
3. The applicants and other members approached the defunct Eldoret municipal council to assist them to comply with the *Physical Planning Act*. The members were advised to set aside land for roads, market, slaughter house and green belt. This was duly done. However, before the planning was done, the members who had taken possession of their plots at the trading centre had built temporary structures and some had put up permanent structures.
4. In a members meeting held on January 27, 1996, it was agreed that when planning was to be done, those who had put up permanent structures were not to be moved. Subsequently, planning of the trading centre was undertaken and an approved development plan was duly prepared on April 21, 1999.
5. On diverse dates since July, 2020, the staff of the respondents have been going to Naiberi trading centre with a view to carrying out a re-survey and affixing of new beacons which have resulted in the applicants being moved from their original places of occupancy without any public participation. This is what prompted the applicants to file a petition contemporaneously with this application in which they contend that their constitutional rights to property have been or are likely to be infringed.

Applicants' Contention:

6. The applicants contend that the respondents' actions of re-surveying the trading centre is being carried without public participation and that the intended exercise will push them to road reserves and green belt areas and this amounts to compulsory acquisition of their land without due compensation.
7. The applicants contend that they constructed their buildings in accordance with the approved development plan and the intended re-survey will push them from their respective portions and result in demolition of their structures. The applicants contend that the intended action by the respondents



is in bad faith. They further state that the plots are private properties which cannot be taken away other than by way of compulsory acquisition.

Respondent's Contention:

8. The respondent opposed the applicants' application through a replying affidavit sworn on July 26, 2022. The respondents contend that it is their constitutional and statutory duty to undertake planning of trading centres and urban centres. They state that they undertook to carry out planning of Naiberi trading centre in accordance with the approved development plan of April 21, 1999 but the exercise was frustrated by particularly the 1st petitioner who hurriedly constructed a building which did not adhere to the approved development plan of April 21, 1999.
9. The respondents further state that they have never had any intention to compulsorily acquire any of the petitioners' properties and that if there will be need to re-locate any of the applicants from where they occupy, that will be done with the affected parties interest being taken into account.

Analysis And Determination:

10. I have carefully considered the applicants' application as well as the opposition to the same by the respondents. The parties were directed to file written submissions. The applicants filed their submissions on November 10, 2022. The respondents were granted 7 days to file their submissions from the November 10, 2022. As at the time of writing of this ruling on December 28, 2022, no submissions had been filed and if any were filed, then they are not in the file.
11. I have carefully considered the submissions by the applicants as well as their application together with the opposition thereto by the respondents. The only issue for determination is whether the applicants have made out a case for grant of conservatory orders pending hearing and determination of the petition.
12. The principles which have to be satisfied before conservatory orders are granted were succinctly summarized by Justice J A Makau in the case of *The Law Society of Kenya v the Office of the Attorney General and another, Judicial Service Commission (interested party)* (2020) eKLR as follows:-

“From various authorities of the courts the principles required to be satisfied before granting conservatory orders or interim conservatory orders comprises of the following:-

 - a. First, an applicant must demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice.
 - b. The second principle is whether the grant of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the bill of rights.
 - c. Thirdly, the court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.
 - d. The final principle for consideration is whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.”
13. I have examined the materials placed before me by the applicants. It is clear that the intended process by the respondents did not commence owing to frustration by the applicants. I am alive to the fact



that I am not supposed to delve into the merits of the petition but I must say that from the materials placed before me and the depositions by the applicants, the applicants have not made out a *prima facie* case to warrant issuance of conservatory orders.

14. The denial of the conservatory orders sought will neither infringe on the rights of the applicants nor prejudice their rights. Equally, the substratum of the petition will not be rendered nugatory.

Disposition

15. From the above analysis, I find that the applicants' application is devoid of merit. The same is dismissed with costs to the respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 19TH DAY OF JANUARY, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of absence of parties who were aware of date of delivery of ruling.

Court Assistant –Akidor

E. O. OBAGA

JUDGE

19TH JANUARY, 2023

