



Beja & another v Cabinet Secretary Ministry of Lands & 9 others; County Government of Kilifi & another (Interested Parties) (Environment & Land Petition 13 of 2022) [2023] KEELC 75 (KLR) (16 January 2023) (Ruling)

Neutral citation: [2023] KEELC 75 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND PETITION 13 OF 2022**

**MAO ODENY, J
JANUARY 16, 2023**

BETWEEN

RUMBA MATANO BEJA 1ST PETITIONER

NAZI CHILANGO MRIMA 2ND PETITIONER

AND

THE CABINET SECRETARY MINISTRY OF LANDS 1ST RESPONDENT

THE DIRECTOR OF LAND ADJUDICATION 2ND RESPONDENT

**THE DISTRICT LAND ADJUDICATION OFFICER-KILIFI
COUNTY 3RD RESPONDENT**

THE CHIEF LAND REGISTRAR 4TH RESPONDENT

THE CABINET SECRETARY, INTERIOR 5TH RESPONDENT

**THE DEPUTY COUNTY COMMISSIONER RABAI SUB-
COUNTY 6TH RESPONDENT**

**THE DEPUTY COUNTY COMMISSIONER KILIFI SOUTH SUB-
COUNTY 7TH RESPONDENT**

THE OCS MTWAPA POLICE STATION 8TH RESPONDENT

THE OCS RIBE POLICE STATION 9TH RESPONDENT

OFFICE OF THE ATTORNEY GENERAL 10TH RESPONDENT

AND

COUNTY GOVERNMENT OF KILIFI INTERESTED PARTY

NATIONAL LAND COMMISSION INTERESTED PARTY



RULING

1. This ruling is in respect of a Notice of Motion dated April 20, 2022 by the Petitioners seeking the following orders: -
 - a. Spent
 - b. That a conservatory order do issue against the 1st to 7th Respondents staying or suspending any formation of a land committee, any fresh adjudication, fresh demarcation or fresh survey of land with regard to plot No 10 Kidutani/ Mtwapa GL 15A (AKA GL Nyika Reserve) and particularly the land adjudicated to 174 beneficiaries in 1988 by the 3rd Respondent pending the hearing and determination of this application.
 - c. That a conservatory order do issue against the 1st to 7th Respondents staying or suspending any formation of a land committee, any fresh adjudication, fresh demarcation or fresh survey of land with regard to Plot No 10 Kidutani/ Mtwapa GL 15A (AKA GL Nyika Reserve) and particularly the land adjudicated to 174 beneficiaries in 1988 by the 3rd Respondent pending the hearing and determination of this Petition.
 - d. Costs of this application.
2. Counsel agreed to canvas the application vide written submissions which were duly filed.

Applicants' submissions

3. The application was supported by the affidavit of Rumba Matano Beja sworn on April 8, 2022 where he deponed that sometimes in 1988 the Government of Kenya through the 2nd and 3rd Respondents started adjudication of Plot No 10 Kidutani/ Mtwapa GL 15A (AKA GL Nyika Reserve) in favour of the residents staying on the land. That the 3rd Respondent carried out the exercise and adjudicated his portion and registered it as plot No 48 on 23rd November 1988.
4. It was the Applicant's case that the 2nd and 3rd Respondents carried out a comprehensive exercise of adjudication as contemplated by Sections 5 to 27 of the [Land Adjudication Act](#) and that pursuant to the exercise the 1st and 2nd Petitioners were the identified as the rightful owners of Plot Nos. 48 and 10 respectively among other beneficiaries.
5. Further that the 1st Interested Party's predecessor the Kilifi County Council was identified as a beneficiary of public utility plots in the area to include a primary school- plot 174, a cattle dip- plot No 10 and a public market- plot 177 whereby upon completion of the exercise and confirmation of the beneficiaries the 2nd and 3rd Respondents officers issued the beneficiaries with temporary certificates confirming their parcel numbers.
6. The Applicant further deponed that at issuance of the temporary certificates by the 2nd and 3rd Respondents to the Petitioners created a legitimate expectation that the process of land adjudication would be followed strictly and completed as provided by the [Land Adjudication Act](#) only for the Respondents to state that the process was abandoned and an new committee to be established as per section 6 of the [Land Adjudication Act](#).
7. Counsel identified issues for determination and submitted that the court has jurisdiction under article 22 and 23 (3) of the [Constitution](#) to grant conservatory orders. According to counsel the relief for conservatory orders is urgent as the 3rd Respondent in in the process of survey and demarcation of



the parcel of land and that the same is almost complete hence will affect the Applicants 'right to own property.

8. Counsel relied on the cases of *Wilson Kaberia Nkunja v Magistrates and Judges Vetting Board & another* [2018] eKLR, *Board of Management of Uburu Secondary School v City County Director of Education and 2 others* (2015) eKLR and *Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 others* (2014) eKLR where the court summarized the principles for grant of conservatory orders and submitted that the Petitioners have established a prima facie case which is meritorious as it raises questions regarding an exercise which the 3rd Respondent has averred at paragraph 6 was abandoned without taking into account the magnitude consequences of the abandonment.
9. According to counsel, if conservatory orders are not granted, the Petitioners and their co-beneficiaries will lose out and that the titles will be registered and issued to third parties and urged the court to grant the orders as prayed.

Respondents' Submissions

10. The Respondents filed a Replying affidavit sworn by Francis Obiria Oseko the Land Adjudication and Settlement Officer Kilifi on June 8, 2022 and deponed that Kidutani Nyika measuring approximately 500.2 Ha is situated at the border of Kilifi South and Rabai sub-counties and that GL15A measuring 35.08 Ha is a separate parcel within the same area.
11. He further deponed that the Department of Land Adjudication and Settlement had started demarcation and survey of the two parcels but the exercise was abandoned when they discovered that the land is government land and the necessary reservation had not been made. That since the reservation has now been made by the National Land Commission, the department has to move in and finalize the regularization of squatters living on the land.
12. He asserted that the exercise did not commence immediately owing to an injunction issued in ELC No. 26 of 2021 which case was withdrawn by the Plaintiffs on February 15, 2022 and further that in April 2022 survey and demarcation commenced with the exercise nearing completion.
13. It was the Land Adjudication Officer's case that disputes arising from demarcation are resolved through a four tier hierarchical mechanism starting from Land Committee, appeal to the Arbitration Board, objection to the Adjudication register and appeal to the Minister and upon completion of adjudication process the Director of Land Adjudication and Settlement issues a letter of finality which together with the adjudication register comprising of the map and adjudication records are forwarded to the Chief Land Register for processing of title deeds as per Section 27 and 28 of the *Act*.
14. The Respondent also deponed that Kidutani GL and Nyika Reserve have never been adjudication Sections and therefore the Adjudication Act does not apply to the said parcels.
15. Counsel submitted on the law applicable to issuance of conservatory and cited the cases of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* (2014) eKLR and *Center For Rights and Awareness (CREAW) & 7 others v Attorney General*.
16. Counsel also submitted that whereas the adjudication did commence, it was abandoned upon discovery that the land was government land and thus could not be subject to adjudication and that it follows that the exercise being undertaken is not adjudication but resettlement and the other beneficiaries who are not parties in the Petition have been fully involved in the process.
17. According to counsel the issuance of the orders sought will affect the public since the process will be stopped to their detriment and cited the case of *Platinum Distillers Limited v Kenya Revenue Authority*



(2019) eKLR and urged the court to dismiss the application as the Respondents are not in violation of Section 6 of the [Land Adjudication Act](#) since the land is not an adjudication Section and the provisions of the [Land Adjudication Act](#) do not apply.

Analysis and Determination.

18. The issue for determination is whether this court should grant conservatory orders to the Applicants. The principles for grant of conservatory orders are set out in various cases that courts have churned out.
19. In the case of [Kenya Small Scale Farmers Forum v Cabinet Secretary Ministry of Education](#) High Court Petition No 399 of 2015 eKLR the court summarized the principles as follows: -
 1. The Applicant ought to demonstrate a prima facie case with a likelihood of success and that he is likely to suffer prejudice as a result of the violation or threatened violation if the conservatory order is not granted.
 2. The grant or denial of the conservatory relief ought to enhance constitutional values and objects specific to the rights or freedoms in the Bill of Rights. If the conservatory order is not granted, the petition or its subtraction will be rendered nugatory.
 3. The public interest should favour a grant of the conservatory order.
 4. The circumstances dictate that the discretion of the court be exercised in favour of the applicant after a consideration of all material facts and avoidance of inn material matters.
20. If the Applicants meet the above criteria, then the court would not hesitate to grant the orders as prayed. In this case there are many issues to be cleared. First there are issues as to whether the suit land falls under an adjudication Section, whether the land is government land, whether it is for adjudication or under settlement of squatters and whether it is governed by Section 6 of the [Land Adjudication Act](#). The other issue is public interest vis a vis individual interest.
21. According to [Black's Law Dictionary](#), "public interest" is defined as: -

"The general welfare of the public that warrants recognition and protection; or something in which the public as a whole has a stake especially an interest that justifies governmental regulation."
22. The land in issue measures approximately over 500 Hectares involving two areas in the border of Kilifi and Rabai sub counties. This is vast land which involves many beneficiaries who are not parties to this Petition. Public interest requires that the welfare of the general public is recognized and protected. The reason for the regulation is that the public has a stake in adjudication and settlement of the squatters on the land. Issuance of a conservatory order would be counterproductive at this stage as it would amount to determining the Petition at an interlocutory stage.
23. In the case of [Adrian Kamotho Njenga v Selection Panel for the Appointment of Commissioners of the Independent Electoral and Boundaries Commission \(2021\) & 2 others; Independent Electoral and Boundaries Commission](#) [2021] eKLR the court held that: -

"It is trite that the public interest lies in the uninhibited operation of the law and if this Court needlessly suspends the operation of the law the consequences will be far-reaching and detrimental to the upcoming 2022 General Election.

Notwithstanding what I have stated above, I remain alive to the fact that laws that are detrimental to the rights and fundamental freedoms in the Bill of Rights can indeed be



suspended at the interlocutory stage. However, such suspension can only occur where it is demonstrated that the suspension will not hamper the State in the delivery of its mandate.”

24. The Land Adjudication and Settlement Officer deponed that the Department of Land Adjudication and Settlement had started demarcation and survey of the two parcels but the exercise was abandoned when they discovered that the land is government land and the necessary reservation had not been made. That since the reservation has now been made by the National Land Commission, the department has to move in and finalize the regularization of squatters living on the land.
25. The issue is regularization of squatters residing on the land which in essence is settlement and not adjudication for allocation and argued by the Applicants.
26. I have considered the application, the submissions by counsel and the relevant judicial authorities and find that the Applicants have not demonstrated a prima facie case with a probability of success and how they will suffer prejudice if conservatory orders are not issued as per the principles set out in the cases of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR; *Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another* [2015] eKLR; and *Susan Wambui Kaguru & 4 others v Attorney General & another* [2012] eKLR (*supra*).
27. The upshot is therefore that the application is dismissed as it lacks merit for not meeting the threshold for grant of conservatory orders.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF JANUARY, 2023

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M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

