



Ole Kanktai v Kinampu & 5 others (Environment & Land Petition 3 of 2022) [2023] KEELC 15819 (KLR) (21 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15819 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT & LAND PETITION 3 OF 2022
EM WASHE, J
FEBRUARY 21, 2023**

BETWEEN

MOSES OLE KANKTAI PETITIONER

AND

CHARLES MBASIO KINAMPU 1ST RESPONDENT

DEPUTY COUNTY COMMISSIONER TRANSMARA WEST SUB-COUNTY 2ND RESPONDENT

CABINET SECRETARY LAND, SETTLEMENT & PHYSICAL PLANNING 3RD RESPONDENT

DIRECTOR LAND ADJUDICATION & SETTLEMENT 4TH RESPONDENT

LAND REGISTRAR TRANSMARA EAST/WEST SUB-COUNTY 5TH RESPONDENT

ATTORNEY GENERAL 6TH RESPONDENT

RULING

1. The Applicant herein filed an Application dated 5th August 2022(hereinafter referred to as “the instant application”) seeking the following Orders; -
 - i. The Application herein be certified urgent and same be heard ex-parte on the first instance owing to the urgency of the matter.
 - ii. That pending the hearing and determination of the Application herein, this Honourable Court be pleased to issue interim conservatory orders restraining the Respondents from taking over, moving into, or undertaking any other activity which may injure or interfere with the Petitioner’s right of ownership,



use, occupation and whatsoever manner disposing of displacing the Petitioner over the parcel number TRANSMARA/OLDONYAT/411.

- iii. That pending the hearing and determination of the Constitutional Petition herein, this Honourable Court be pleased to issue interim conservatory orders restraining the Respondents from taking over, moving into, or undertaking any other activity which may injure or interfere with the Petitioner's right of ownership, use, occupation and whatsoever manner disposing of displacing the Petitioner over the parcel number TRANSMARA/OLDONYAT/411.
 - iv. Costs of this Application be borne by the Respondents.
 - v. Such further and/or other orders be made as the Court may deem fit and expedient.
2. The grounds in support of the prayers outlined hereinabove have been pleaded in the body of the present Application and further expounded by the Affidavit of Petitioner sworn on the 5th of August 2022.
3. The summary of the grounds in support of the Petitioner's prayers in the present Application are as follows; -
- i. The Petitioner was legally allocated a parcel of land known as PLOT NO.411 WITHIN OLDANYATI ADJUDICATION SECTION which is now registered as L.R.NO. TRANSMARA/OLDANYATI/411 (hereinafter referred to as "the suit property").
 - ii. Prior to the adjudication and allocation of the suit property, the Petitioner was residing on the said portion of land together with his family which occupation continued even after the adjudication and allocation exercise.
 - iii. However, the 1st Respondent filed an Objection against the allocation of the suit property under Section 26 of the [Land Adjudication Act](#), Cap 284 Laws of Kenya and upon deliberations, a verdict was pronounced on the 24th March 2011 by the Land Adjudication & Settlement Officer.
 - iv. The Petitioner/Applicant submits that any Appeal from the verdict of the Land Adjudication & Settlement Officer must be appealed within 60 days in line with the provisions of Section 29 (1) of the [Land Adjudication Act](#), Cap 284 Laws of Kenya.
 - v. Unfortunately, the 1st Respondent did not comply with the provisions of Section 29(1) of the [Land Adjudication Act](#), Cap 284 Laws of Kenya and filed an Appeal to the Minister which was recorded an Appeal To The Minister Case No. 360 Of 2012.
 - vi. The Petitioner's position is that the admission and registration of the 1st Respondent's appeal outside the prescribed timeframe by the 2nd Respondent was illegal, ultra-vires hence null and void.
 - vii. Despite the unlawful admission and registration of the 1st Respondent's Appeal to the Minister out of time, the Petitioner/Applicant and 1st Respondent amicably settled the dispute through an Agreement dated 23rd August 2013 and the unlawful Appeal to the Minister was consequently marked as withdrawn.



- viii. However, without any lawful justification, the 3rd, 4th and 5th Respondents proceeded to omit the Petitioner's/Applicant's name in their records and instead issued a Title Deed to the 1st Respondent on the 4th of March 2021.
 - ix. The 1st Respondent now having been registered the lawful owner of the suit property is threatening to evict the Petitioner/Applicant and his family from the parcel of land in issue.
 - x. The Petitioner is of the view that the Respondents herein jointly and/or severally violated the Petitioner's/Applicant's constitutional rights to property by engaging in illegal and unconstitutional activities, including failing to act on the Petitioner's application or grant of permission to develop the property thus completely impairing, vitiating, impeding the Petitioner's/Applicant's right over the suit property, through whimsical and illegal conduct which expressly subvert the law and the Constitution.
 - xi. The Petitioner's/Applicant's prayer is that this Court do move with speed and protect the Petitioner's rights by issuing a conservatory order to preserve the suit property from being wasted and/or alienated by the 1st Respondent.
4. The Affidavit sworn by the Petitioner/Applicant on the 5th August 2022 attached the following documents as annexures thereof.
- a. A Copy of the Adjudication Record No.263811 relating to the suit property.
 - b. A Copy of the proceedings and verdict of the Land Adjudication & Settlement Officer dated 24-03-2011.
 - c. A copy of the Withdrawal Letter and/or Agreement dated 23rd May 2013 settling the MINISTER'S APPEAL dealing with suit property.
 - d. A copy of the Adjudication Record No. 263811 with the entry indicating the Minister's Appeal was allowed and the suit property be registered in the name of the 1st Respondent.
 - e. A Copy of a Letter from the Chief Land Registrar to the District Land Registrar dated 27th January 2021 together with the proceedings and decision of the Minister appertaining to the MINISTER'S APPEAL NO. 360 OF 2012 relating to the suit property.
 - f. Copy of a Certificate of Official Search of the suit property in the name of the 1st Respondent.
5. The present Application was then served on the all the Respondents but only the 1st Respondent entered appearance and filed a response thereof.
6. The 1st Respondent's Replying Affidavit was filed on the 4th of November 2022 and opposed the Petitioner/Applicant's present application on the following grounds; -
- i. The suit property is a private property and lawfully registered in the 1st Respondent's name.
 - ii. The 1st Respondent further indicates that he is in occupation and resides on the suit property.
 - iii. The 1st Respondent further denied that the Petitioner/Applicant herein resides and/or occupies the suit property as alleged.
 - iv. The 1st Respondent admitted that there was an Objection Case No. 138 against the Petitioner which was relating to the suit property.



- v. The Objection proceedings were heard by the Land Adjudication & Settlement Officer and a determination pronounced on the 24/03/2011.
 - vi. The 1st Respondent being dissatisfied of the determination made on the 24/03/2011 by the Land Adjudication & Settlement Officer, filed an Appeal to the Minister.
 - vii. The 1st Respondent position is that the Appeal to the Minister was filed within the prescribed 60 days as required by Section 29 (1) of the [Land Adjudication Act](#), Cap 287 Laws of Kenya.
 - viii. The 1st Respondent further submitted that the all parties involved in the Appeal to the Minister fully participated in its hearing and an appropriate decision arrived therein.
 - ix. The 1st Respondent denied knowledge of the Letter and/or Agreement of Withdrawal dated 23rd May 2013 and has only come to know about its existence in this present Application.
 - x. In addition to the point above, the purported letter and/or Agreement of Withdrawal dated 23rd May 2013 was not served on any office as an indication of a consent to withdraw the said Appeal to the Minister.
 - xi. Consequently therefore, both the Director of Land Adjudication and Settlement as well as the Chief Land Registrar in the implementation of the Minister's decision of the suit property wrote letters approving the rectification of the Government Records and issuance of the title deed which was done on 4th March 2021.
 - xii. The 1st Respondent's position is that the Petitioner is attempting to unlawfully appeal against the decision of the Minister which the law says is final in all aspects relating to the adjudication of the suit property.
 - xiii. Similarly, the 1st Respondent reiterated that he was in occupation and possession of the suit property even before the demarcation and even graves of his father and other relatives are on the said property.
 - xiv. The 1st Respondent's prayer is therefore for the Court to dismiss the present Application with costs.
7. The 1st Respondent in the said Replying Affidavit dated 3rd November 2022 attached the following documents; -
- a. A copy of the Certificate of Official Search of the suit property dated 1st September 2022.
 - b. Copies of the photographs depicting the 1st Respondent's occupation of the suit property.
 - c. A Copy of the Objection proceedings of the suit property undertaken before the Land Adjudication & Settlement Officer as well as the verdict pronounced on the 24/03/2011.
 - d. A copy of a Receipt No. 1360236 issued on the 20/05/2011.
 - e. A copy of the proceedings and judgement of the Minister's Appeal No. 360/2012 relating to the suit property.
 - f. Copies of letters from the Director of Land Adjudication & Settlement and Chief Land Registrar dated 18th December 2020 and 27th January 2021 respectively.
 - g. A copy of the Adjudication Register No. 263811 relating to the suit property with the 1st Respondent being the lawful owner.



8. Upon service of the 1st Respondent's Replying Affidavit on the Petitioner/Applicant, the Court directed the parties to file submissions in support of their positions.
9. The Petitioner/Applicant filed his submissions on the 17th of November 2022 and the Respondent's filed his submissions in response on the 6th December 2022.
10. The Court has gone through the present Application, the Replying Affidavit filed in opposition and the submissions of the parties herein and identified the following issues for determination.

Issue No.1- Does The Court Have Jurisdiction To Issue An Conservatory Order In This Petition?

Issue No.2- If The Answer Is To The Positive, Has The Applicant Satisfied The Principles Granting A Conservatory Order As Prayed In The Present Application?

Issue No. 3-Who Bears The Costs Of The Present Application?

11. The Court having outlined the issues for determination in the present Application, the same are discussed and/or determined as hereinbelow.

Issue No.1- Does The Court Have Jurisdiction To Issue An Conservatory Order In The Present Application?

12. The issue of whether or not this Court has jurisdiction to issue a Conservatory Order in the present application has been raised by the 1st Respondent.
13. The 1st Respondent in the submissions filed on the 6th December 2022 is of the view that the dispute regarding the suit property is a private matter between two individuals.
14. Consequently therefore, the remedies sought in the present application are remedies in personam and not remedies in rem.
15. The 1st Respondent relied on the authorities of Gatirau Peter Munya-versus- Dickson Mwenda Kithinji & 2 Others (2014) eKLR and Judicial Service Commission-versus- Speaker Of The National Assembly & Another (2013) eKLR in support of this position.
16. In addition to the two authorities mentioned hereinabove, the 1st Respondent further relied upon the case of Monata Matiko Chonchorio-versus- John Marwa Chabaro (2021) eKLR.
17. As earlier mentioned, the 2nd to 6th Respondents have not filed any response to the present application dispute proper service.
18. In the case of Japheth Nzila Muangi-versus- Kenya Safari Lodges & Hotels Limited (2008) eKLR, the Court made the following observation; -

“It is trite law that ordinarily a judgement binds only the parties to it. This is known as Judgement in personam. A judgement may also be conclusive not only against the parties to it but also against all the world. This is known as a judgement in rem. This is a judgement which declares, defines or otherwise determines the status of a person or of a thing i.e. the jural relation of the person or thing to the world generally.”

19. The understanding of the Court is that prayers in personam strictly bind particular parties only while on the other hand, prayers in rem deal with orders that bind the parties involved and also go further to pronounce themselves to other persons who might not be directly involved in the suit before it.



20. In the present Application, the Petitioner/Applicant is seeking to conservatory orders against the 1st -6th Respondents jointly and severally.
21. The 2nd -6th Respondents are public office holders who deal with the general citizenry this Republic.
22. The Orders sought in this present application are to directly bind the parties in this Petition and also inform or pronounce to the general world that there is a dispute between the Petitioner/Applicant with the Respondents as regards the suit property.
23. The fact that the suit property was titled and is deemed to be a private property, allegations of illegal and unlawful activities by the 2nd to the 6th Respondent who are public office holders resulting to the purported infringements of the Petitioner's/Applicant's right to own property can not be considered as private matters.
24. The determination of the Petition herein will be binding on the parties herein and the public office holders or the world so to say depicting the pronouncement of a remedy in rem.
25. In conclusion therefore, the Court is of the considered opinion that this Court has jurisdiction to hear and determine the present Application as drawn.

Issue No.2- If The Answer Is To The Positive, Has The Applicant Satisfied The Principles Granting A Conservatory Order As Prayed In The Present Application?

26. The Court having made a finding that it had jurisdiction to hear and determine the present Application, the next issue for determination is whether the Applicant has satisfied the principles of granting a Conservatory Order as prayed?
27. In the case of the Judicial Service Commission-versus- Speaker Of National Assembly & Another (Petition No. 518 Of 2013) the Court held as follows; -

“Conservatory orders, in my view are not ordinary civil law remedies but are remedies provided for under *the Constitution*, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in suit.

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...

28. In another case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR as follows:

“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.



29. Similarly, in another case of Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General [2011] eKLR expressed itself as follows; -

“It is important to point out that the arguments that were advanced by counsel and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the petitioner’s application and not the petition. I will not therefore delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*.”

30. The definition of a prima facie case was discussed in the case of Board of Management of Uhuru Secondary School v City County Director of Education & 2 others [2015] eKLR, where the Court observed as follows; -

“It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis...”

31. The authorities highlighted hereinabove clearly identify two principles that a Court should consider when exercising its discretion in deciding applications of conservatory orders.
32. First and foremost, the Applicant must demonstrate a prima facie case and secondly the conservatory Order must be for purposes of preserving the suit property pending the hearing of the substantive case.
33. On the first principle of prima facie case, the Petitioner/Applicant herein has submitted that the proceedings undertaken as the Minister’s Appeal No 360 Of 2012 were irregular and illegal thereby resulting to the cancellation of his name on the Adjudication Record No. 263811.
34. The Petitioner’s/Applicant’s Petition is therefore to establish whether or not the 1st -6th Respondents actions beginning from the hearing and determination of the proceedings known as Minister’s Appeal No. 360 Of 2012 were lawful and were done within the law by ensuring that the Petitioner’s constitutional rights to be heard and consequently thereof his rights to own property were infringed or not.
35. The annexures presented to the Court by both the Petitioner/Applicant and the 1st Respondent give conflicting versions of the manner in which the title deed of the suit property was processed and thereafter issued to the 1st Respondent yet there is an allegation that the same was to be sub-divided between the Petitioner and the 1st Respondent if the Agreement and/or Letter of Withdrawal dated 23rd May 2013 is to be considered.
36. All these issues which have been raised in the pleadings in this Application clearly point out to the existence of serious issues for determination through a proper hearing and/or evaluation of the various documents before the Court.
37. This Petition cannot be deemed to be frivolous and/or one which is speculative.
38. The Petition filed in this Court raises arguable points of law and fact hence it is the considered opinion of the Court that a prima facie case has been established by the Petitioner.



39. On the second principle is the preservation of the suit property during the pendency of the Petition, there is no dispute that a title deed of the suit property was processed and issued to the 1st Respondent.
40. The 1st Respondent is therefore within law allowed to deal with such a title deed in whatsoever manner that would please to him.
41. However, any exposure and/or actions in dealing with the title deed of the suit property by the 1st Respondent through the offices of the 2nd to 6th Respondents would fundamentally alter and most probably adversely affect the rights and/or ownership of the suit property which the Petitioner is seeking to reclaim.
42. It is therefore important that this threat is arrested pending the hearing of the main Petition herein so that the subject matter which is the ownership of the suit property is not meddled by the Respondents and/or any other persons or legal entities.
43. Nevertheless, even as the Court is of the view that a conservatory injunction should be issued, there is a dispute of who is in occupation of the suit property.
44. Both the Petitioner and the 1st Respondent have claimed occupation of the suit property with both placing evidence to proof the same.
45. Indeed, the Court has looked at the evidence placed before it through the annexures in the affidavits by the Petitioner and the 1st Respondent and it has observed that there is a possibility the suit property is occupied by both the Petitioner and the 1st Respondent at different and separate locations.
46. The good and encouraging thing between the Petitioner and the 1st Respondent is that their dispute has not be violent and/or caused any threat of peace between them.
47. Each party has continued to occupy their different and separate locations even as the dispute as to who ought to be registered and given the title deed continues to be handled in the legal forums.
48. In essence therefore, the issuance of the conservatory orders sought by the Petitioner would be to technically bar, injunct and/or prohibit the 1st Respondent from accessing the portion which he has been in occupation as demonstrated in the pictures annexured in the Replying Affidavit.
49. On the other hand, if the conservatory orders are not issued as prayed in the present Application, there is a likelihood that the Petitioner will be evicted and/or disposed of the physical occupation of the portion he occupies within the suit property or even the suit property sold off hence rendering the hearing and determination of the pending Petition as an exercise in futility.
50. It is in this kind of scenario that the Court turns to the provisions of Section 3 A of the Civil Procedure Rules which provides as follows; -

“Nothing in this act shall limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”
51. In the Court’s considered view, both the Petitioner and the 1st Respondent should continue to occupy their different and separate portions within the suit property until the hearing and determination of this Petition.
52. In addition to the above, the 1st to 5th Respondents should be prohibited from dealing with the title deed and/or register pending the hearing and determination of the present Petition.



Issue No. 3-who Bears The Costs Of The Present Application?

53. In this issue of costs, the Court is of the considered view that each party should bear its own costs as there is not clear winner in this present Application keeping in mind the orders which the Court seeks to pronounce hereinbelow.
54. In conclusion therefore, the Court hereby makes the following Orders as appertains the Notice of Motion application dated 5th August 2022; -
- a. A Status Quo Order Be And Is Hereby Issued As Regards The Portions Occupied By The Petitioner And 1st Respondent Pending The Hearing And Determination Of The Petition Herein.
 - b. The 5th Respondent Is Hereby Directed To Register An Inhibition Against The Title Deed And Register Of The Property Known As L.r.no. Transmara/oldanyati/411 Pending & Determination Of This Petition Or Other Further Orders Of The Court.
 - c. The Petition Be Listed For Hearing Within 45 Days From The Date Of This Ruling.
 - d. Each Party To Bear Its Own Costs Of This Application.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 21ST FEBRUARY 2023.

EMMANUEL.M.WASHE

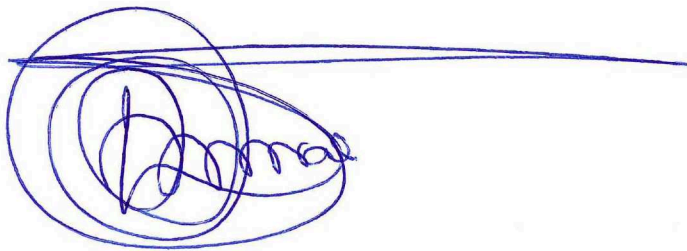
JUDGE

In The Presence Of:

Court Assistant: Ngeno

Advocates For The Petitioner/applicant: O.m Otieno

Advocates For The 1st Respondent: Shira



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