



Mutiso & 2 others v Kenya Commercial Bank Limited & 3 others (Environment & Land Petition 15 of 2021) [2023] KEELC 940 (KLR) (21 February 2023) (Ruling)

Neutral citation: [2023] KEELC 940 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND PETITION 15 OF 2021

CA OCHIENG, J

FEBRUARY 21, 2023

IN THE MATTER OF ARTICLES 22 AND 258

OF THE CONSTITUTION

OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED THREAT OF

VIOLATION OF ARTICLES

3, 10, 19, 20, 21, 22, 23,

24, 25(C), 27, 28, 41,

50, 51 AND 232 OF THE

CONSTITUTION OF

KENYA, 2010

AND

IN THE MATTER OF THE PUBLIC SERVICE

COMMISSION ACT, 2017

AND

IN THE MATTER OF THE EMPLOYMENT ACT,

2007

AND

IN THE MATTER OF THE FAIR

ADMINISTRATIVE

ACTIONS ACT



BETWEEN

DAVID MUSAU MUTISO 1ST PETITIONER
FAITH NDUKU MUTUKU 2ND PETITIONER
DANIEL MWANGANGI KIMWELI 3RD PETITIONER

AND

KENYA COMMERCIAL BANK LIMITED 1ST RESPONDENT
EAST AFRICAN PORTLAND CEMENT COMPANY LIMITED 2ND
RESPONDENT
CHIEF LAND REGISTRAR 3RD RESPONDENT
NATIONAL LAND COMMISSION 4TH RESPONDENT

RULING

- 1 What is before this court for determination is the petitioners' notice of motion application dated the August 12, 2021 and the 2nd respondent's notice of preliminary objection dated the September 20, 2021. The petitioners seek conservatory orders in respect to the Land Reference Numbers 8784/4 and 8786 hereinafter referred to as the 'suit lands', pending the determination of the petition. While the notice of preliminary objection seeks to have the petition dismissed *in limine* for being incompetent having been founded on a claim of adverse possession. It is further based on the following grounds:-
 - i. East African Portland Cement PLC is a state corporation pursuant to section 2 of the [State Corporation Act](#).
 - ii. Therefore, land held and/or registered in the name of EAPC PLC is public land within the provision of article 62 of the [Constitution](#).
 - iii. The subject properties, being public land allocated or granted to EAPC, a state corporation are excluded from the provisions of [Limitation of Actions Act](#) pursuant to section 41(a) (i) of the [Limitation of Actions Act](#).
 - iv. The properties in issue have been mines for purposes of mining limestone for manufacturing cement by EAPC PLC. Therefore, the same are mines within the definition of mines under section 4 of the mines Act. Accordingly, section 41(a) (ii) of definition of [Limitation of Actions Act](#) excludes such properties from adverse possession claims.
- 2 In their submission filed in support of the objection, the 1st respondent submitted that the 2nd respondent is a state corporation under the Ministry of Industrialization and hence all land held by the corporation is public land and not subject to adverse possession as per section 41 of the [Limitation of Actions Act](#).
- 3 The preliminary objection is opposed by the petitioners vide their submissions dated the October 14, 2021. They argue that the objection does not raise pure questions of law as the status of EAPCC as a State Corporation is contentious. They contend that though the suit lands are registered under EAPCC, the corporation is a limited liability company with the government holding about 25% of



shares. They dispute that the suit lands is a 'mine' and insist this is not a pure point of law and will require proof thereof. They contend that the legal status of the suit lands as community land or not cannot be summarily determined *vide* a preliminary objection.

4 In the notice of motion application dated the August 12, 2021, the petitioners' seek for the following orders:

1. Spent
2. Spent
3. That pending the hearing and determination of this petition, a conservatory order so issue restraining the 1st and 2nd respondents whether jointly or severally, by themselves, servants, agents or assigns or any other agency from entering, invading, occupying, selling or otherwise alienating the petitioners' parcel of land comprised in Land Reference Numbers 8784/4 and 8786 situated in Athi River Machakos County, or in any manner interfering with the petitioners' possession of the said land by forcible entry or otherwise in any manner whatsoever or proceeding in any manner whatsoever with advertisement or sale or taking any other action adverse to the petitioner's sanctity of title.
4. Any further relief that this court deems fit in the interest of justice.
5. Costs be in the cause.

5 The application is premised on grounds on the face of it and supported by the affidavit of David Musau Mutiso where he deposes that the 1st and 2nd respondents including their agents have been scouting the suit lands with the aim of selling the same, to their detriment as well as the 1000 persons resident therein who have built permanent structures thereof. He avers that the acts of the respondents and their agents have infringed on their right to shelter and decent residence as their homes are threatened with demolition. He states that the question of ownership of the suit lands by the 2nd respondent has already been determined in Machakos ELC Petition No 20A of 2020 [East African Portland Cement Company Limited Vs Attorney General](#) whereby any charge created against the affected titles were vitiated. In their further affidavit sworn by the deponent, they insist that all registration and subsequent legal instruments created thereafter were faulty as was determined in Machakos ELC Petition No 20A [East African Portland Cement Co Limited vs Attorney General](#). They maintain that unless the conservatory orders are granted, the petitioners would suffer irreparable loss based on the 1st respondent's intended illegal and unconstitutional disposal of the suit lands.

6 In opposition to the instant application, the 1st respondent filed a replying affidavit sworn by Alforne Kisilu, its head of special assets where he maintains that there exists a chargee-chargeor relationship between the 1st and 2nd respondents involving various parcels of land including the suit lands, for debts totaling to Kshs 4,844,568,708.84 and a further sum of US\$614,547.97. He confirms that the 2nd respondent had defaulted in the repayments and *vide* a deed of settlement between the parties, the suit lands were offered for sale for purposes of offsetting the debt. He avers that the court had granted leave to the 1st respondent to dispose of the suit lands to offset the debt and that the 2nd respondent is still indebted to the 1st respondent for Kshs 1,791,685,713.13. He states that the alleged claim for adverse possession by the petitioners is subject to the legal charge and that the rights of a charge rank higher in priority to the said claim.

7 The 2nd respondent filed its replying affidavit sworn by one Florence Mitey where she deposes that the petition was fatally defective since the suit land was public land and adverse possession could not apply. She explains that the 2nd respondent had obtained several banking facilities from the 1st respondent in



order to facilitate its working capital, creating several legal charges over the suit lands. She avers that the 1st respondent had obtained the court's leave to purchase as a chargee the property known as LR No 8786 and since the value of property was not sufficient to settle the entire debt, LR No 8784 was further subdivided and property number LR No 8784/144, also transferred to the 1st respondent to clear the outstanding amounts. She reiterates that the 2nd respondent being the registered proprietor of the suit lands at all times relevant to this petition had the liberty to deal with the properties as it deemed fit and that the petitioners have not demonstrated any *prima facie* case to entitle them to interim orders.

8 The instant application and notice of preliminary objection were canvassed by way of written submissions.

Analysis and Determination

9 Upon consideration of the instant notice of motion application including the notice of preliminary objection, respective affidavits and rivaling submissions, the following are the issues for determination: Whether the said notice of preliminary objection is merited. Whether conservatory orders should issue restraining the respondents from dealing with the suit lands, pending the determination of the petition.

10 From a perusal of petition, I note the petitioners have sought for various orders including a declaration that the title held by 2nd respondent over LR No 8766 Athi River, is irregular null and void; the charge held by the 1st respondent over the said land is also irregular, null and void; the intended sale of suit property pursuant to the alleged irregular charge is a violation of their rights as they have been residents on the suit property. They have also sought a declaration that the suit property is community land and they want conservatory orders restraining the respondents from dealing with LR No 8784/4 and LR No 8786 as well as general damages, and exemplary damages. Further, that investigation over the historical injustices be undertaken and for the 3rd respondent to revoke the 2nd respondent's title.

11 The respondents have vehemently opposed the application for conservatory orders and the 2nd respondent has sought for the petition including the interlocutory application to be dismissed *in limine*.

12 On preliminary objection, in the case of *mukisa Biscuits Manufacturing Ltd vs West End Distributors* (1969) EA 696 the court observed thus:

13 A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.”

14 The respondents insist that the 1st respondent holds various legal charges over the suit lands. Further, that the 2nd respondent is a state corporation. They contend that vide the ruling in Miscellaneous Cause No E 13222 of 2020, Hon Justice D S Majanja granted leave to the 1st respondent to purchase LR No 8786 as a chargee. I note the petitioners claim this parcel of land but since there is a valid court order in respect to its disposal, as a court, I will not interfere with it. On the claim for LR No 8784/4, it has emerged that the same is no longer in existence as it has been subdivided with one of the resultant subdivisions being 8784/144 in the process of being transferred to the 1st respondent. I note the petitioners have heavily dwelt on the Machakos ELC Petition No 20A of 2020, [*East African Portland Cement Company Limited vs Attorney General*](#) but from a perusal of the said decision, I note it did not make a determination over ownership of the suit lands. However, since the petitioners have



sought for prayers in the petition which will require *viva voce* evidence, at this juncture, I opine that the notice of preliminary objection is premature as the 2nd respondent has not even filed any Answer to the Petition to anchor the said notice of preliminary objection (See the decision of *Avtar Singh Bhamra & Another Vs Oriental Commercial Bank*, Kisumu HCCC No 53 of 2004).

15 On the prayer for conservatory orders, I wish to make reference to certain decisions:

16 In Nairobi Civil Appeal 151 of 2011 *Invesco Assurance Co Ltd v MW (Minor suing thro' next friend and mother (HW))* [2016] eKLR the court defined a conservatory order as follows: -

“A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of *status quo* for the preservation of the subject matter.”

17 While the Supreme Court of Kenya in Civil Application No 5 of 2014 *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others* (2014) eKLR, pronounced itself on the threshold for granting interim conservatory orders as follows:-

- i. That unless the orders sought are granted, the intended matter, were it to eventually succeed, would be rendered nugatory.
- ii. The intended matter intended appeal is arguable and not frivolous; and that
- iii. That it is in the public interest that the be granted

18 In applying the principles set out in the said decisions to the circumstances at hand, I note the petitioners who are not owners of the suit lands are simply staking a claim over it, insisting it is community land. Further, from the annexures herein, the petitioners had even sought to purchase the suit lands as per the letters dated the January 31, 2020 and January 31, 2021 respectively from Messrs Etole & Company Advocates, but they have not explained why they failed to do so. Further, it emerged that the petitioners were fully aware that LR No 8786, LR No 8784/144, LR No 8784/145, and LR No 8784/146 were all charged to the 1st respondent and admitted the 2nd respondent's proprietorship rights to the said suit lands. They insist that their rights are being violated but have not demonstrated this to the required standard. Further, that they represent over 1000 persons residing on the suit lands but the said persons' names have not been indicated herein. I opine that the petitioners have not demonstrated a *prima facie* case to the required standard set and in circumstances, I will decline to grant conservatory orders as sought. It is my considered view that the petitioners ought to have filed a proper civil suit, adduce proper evidence on how long they have been on the suit lands and challenge the sale of said lands, instead of filing the instant petition.

19 it is against the foregoing that I find the notice of preliminary objection dated the September 20, 2021 premature and will disallow it. I find the instant notice of motion application dated the August 12, 2021 unmerited and will dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 21ST DAY OF FEBRUARY, 2023

CHRISTINE OCHIENG

JUDGE

