



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC PETITION CASE NO. 01 OF 2020

FRED MUNIALO MAELO.....PETITIONER/APPLICANT

VERSUS

MATHEW WAMALWA WAFULA.....1ST RESPONDENT

LAND REGISTRAR, BUNGOMA..... 2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

RULING

The Petitioner’s Notice of Motion dated 4th May 2020 was first placed before **OMBWAYO J** at the Environment and Land Court Kisumu on 19th May 2020. The Judge granted prayers 3 and 4 thereof. When it was placed before me on 3rd June 2020, I directed that it be canvassed by way of written submissions after service upon the Respondents and ruling would be delivered through electronic media on 18th June 2020. However, due to the challenges in electronic filing following the **COVID – 19** pandemic, it was not until 17th June 2020 that the file reached me. As is now the trend with E – filing, some of the documents are illegible. I would once again impress upon counsel and litigants to ensure that they file legible documents and the hard copies should be properly bound. An illegible document serves no purpose.

By his Petition filed herein on 11th May 2020 **FRED MUNIALO MAELO** (the Petitioner herein) sought various orders against the Respondents alleging a violation or threatened violation of his Constitutional rights with respect to the land parcel **NO WEST BUKUSU/EAST SABOTI/1612** (the suit property).

Simultaneously with the Petition, the Petitioner filed the aforesaid Notice of Motion premised under the provisions of **Articles 22 and 23(3) of the Constitution, Rule 21 of the Constitution** (Protection of Rights and Fundamental Freedom and Enforcement of the Constitution Rules 2012) and **Section 68 of the Land Registration Act**. In that application, the Petitioner seeks the following remedies: -

1. Spent
2. Spent
3. Spent
4. Spent

5. That pending the hearing and determination of the Petition herein, a temporary injunction do issue restraining the 1st Respondent whether by himself, his servants and/or agents from cutting any trees, splitting, transporting or in any other way dealing with the Eucalyptus trees on L.R NO WEST BUKUSU/EAST SABOTI/1612.

6. That pending the hearing and determination of the Petition herein, an inhibition order do issue restraining any dealings and transactions on the register of L.R NO WEST BUKUSU/EAST SABOTI/1612.

7. That this Honourable Court be pleased to issue directions in the matter herein to facilitate the just, expeditious and speedy resolution of the Petition herein.

8. That costs of the application be provided for.

The application is predicated on the grounds set out therein and also supported by the Petitioner's affidavit.

The gist of the application is that since 1997, the Petitioner has been the registered proprietor of the suit property and holds the title thereto. On 16th April 2020 he went to inspect the said property and found a group of about 20 people, ostensibly with the permission of **MATHEW WAMALWA WAFULA** (the 1st Respondent herein), cutting down Eucalyptus trees which the Petitioner had planted way back in 1999 – 2000 upon acquisition of the title to the suit property. That the 1st Respondent laid claim to the same claiming that he had been awarded the suit land by the Court a fact that surprised the Petitioner as he had never been sued in any Court of law. He therefore reported to the Police and the Local Administration and the exercise was stopped. It was then that the Petitioner discovered that the 1st Respondent had been registered as the proprietor of the suit property on 20th November 2019 allegedly on the findings of the **BUMULA LAND DISPUTE TRIBUNAL** (the Tribunal) in proceedings to which the Petitioner was not a party. The Petitioner is apprehensive that the 1st Respondent will dispose off the said trees or continue cutting more or even carry out other transactions which may affect the title and defeat his interest. That the process by which the 1st Respondent obtained title to the suit property was marred with irregularities and illegalities and it is necessary that conservatories are issued.

Only the 1st Respondent responded to the application by filing grounds of opposition and a replying affidavit both dated 28th May 2020.

In the grounds of opposition, he describes the application as frivolous, vexatious and an abuse of the Court process and further, that it does not meet the principles set out in the case of **GIELLA .V. CASSMAN BROWN & CO LTD 1973 E.A 358**.

In his replying affidavit, the 1st Respondent avers, inter alia, that in 1976 he purchased the suit property from one **MASINDE MAEYI** who had in turn purchased it from one **KASSIM NYONGESA**. That in 2004, he planted the Eucalyptus trees which are under contestation. **MASINDE MAEYI** could not transfer the suit property and so the 1st Respondent and others sued **KASSIM NYONGESA** at the Tribunal which ruled in his favour. The Tribunal's award was adopted as Judgment of the Court in **BUNGOMA CMCC LTD NO 12 OF 2009** and a title deed was issued to him dated 29th November 2019. On 14th April 2020, he started harvesting his Eucalyptus trees but on 16th April 2020, the Petitioner and some goons came and threatened to kill him and his workers claiming ownership of the suit property. The matter was reported to the police and the Petitioner is likely to be arraigned in Court soon. The 1st Respondent denies that the process through which he obtained title to the suit property was tainted with illegalities and irregularities adding that it is the Petitioner who did not obtain a good title from **KASSIM NYONGESA** and he is the author of his misfortune. That no prima facie case has been established and the 1st Respondent cannot be denied the right to carry away the timber which is going to waste or to cut down the trees. That the Petitioner started carrying away the timber and his claim is defective and, in any event, if the Petitioner succeeds, he can be compensated with costs and therefore will not suffer irreparable loss. Further, that this Petition is time barred as Judicial Review applications can only be filed within six (6) month from the time when the Tribunal delivered its decision. That the Petitioner's title was cancelled by the Land Registrar after inviting the Petitioner to surrender his title. That since it is the 1st Respondent who planted the Eucalyptus trees in 2004 and having been in continuous, peaceful occupation of the suit land since 1976, the Petitioner's title has been extinguished by operation of the law. That there are no pending investigations against him and instead, it is the Petitioner who is being investigated for threatening to kill.

The application was canvassed by way of written submissions as directed on 3rd June 2020. The submissions have been filed both by **MR MAKALI** instructed by the firm of **J. O. MAKALI & CO ADVOCATES** for the Petitioner and **MR WANYONYI** instructed by the firm of **EMMANUEL WANYONYI & CO ADVOCATES** for the 1st Respondent.

I have considered the application, the rival affidavits and annexures thereto as well as the submissions by counsel.

Before I delve into the merits or otherwise of the application, the 1st Respondent has raised the issue of Limitation in paragraph twenty four (24) of his replying affidavit. It is his case that his Petition is time barred and ought to have been filed within six (6) months from the time when the Tribunal delivered its decision. **MR WANYONYI** has also reiterated the same in his submissions and cited the Judgment of **B. M EBOSO J** in **PENINA NDUTA KARONGO .V. SAMUEL MWAURA FELIX KARIUKI & OTHERS 2016 eKLR**. As limitation goes to the jurisdiction of the Court, I must determine that issue as a first point of call because without jurisdiction, this Court must lay down its tools – **THE OWNERS OF THE MOTOR VESSEL “LILLIAN S” .V. CALTEX OIL (KENYA) LTD 1989 KLR 1**.

With regard to the decision in **PENINA NDUTA KARONGO .V. SAMUEL MWAURA FELIX KARIUKI & OTHERS** (supra), it is clear even from the passage that counsel has picked that that was a Judicial Review Application. Such applications are circumscribed by the law set out in **Order 53 of the Civil Procedure Rules and Section 9(3) of the Law Reform Act** which set out a limitation period of six (6) months for orders of certiorari. This is a Constitutional Petition alleging a violation or threatened violation of Fundamental rights which have been set out therein. It is now well established that there is no limitation period within which an aggrieved party can move the Court for redress except perhaps where there is an inordinate delay which has not been explained. This has been held in a long line of authorities including **WAMAHIU KIHORO .V. WAMBUGU .V. AG, PETITION NO 468 OF 2014** and others. The Court of Appeal has affirmed that position in **WELLINGTON NZIOKI KIOKO .V. A G 2018 eKLR** where it said as follows after citing some of those decisions from the High Court: -

“The common thread running through those decisions is that whereas there is no time limitation in respect of Constitutional Petitions, the delay must not be inordinate and there must be plausible explanation for the delay.”

The Petitioner here has averred in paragraph eight (8) of his supporting affidavit dated 4th May 2020 that it was only after 16th April 2020 that he discovered that his title had been cancelled by the Tribunal and awarded to the 1st Respondent following proceedings to which he was not a party. This Petition was filed on 14th May 2020 and even if this Court goes back to 3rd June 2011 when the title of **KASSIM NYONGESA** was cancelled following orders issued in **BUNGOMA CMCC LTD CASE NO 12 OF 2009**, I do not consider that to be inordinate delay in the circumstances of this case. It is clear therefore that this Petition is not statute barred.

I shall consider prayers No 5 and 6 of the application together. Prayer No 5 seeks a temporary order of injunction restraining the 1st Respondent whether by himself, his servants and/or agents from cutting any trees, splitting, transporting or in any other way dealing with the Eucalyptus trees on the suit property. Prayer No 6 on the other hand seeks an inhibition order to restrain any transactions on the register to the suit property. Those two remedies serve the same purpose which is to preserve the suit property while the dispute between the parties is determined.

The principles guiding a Court while considering an application for temporary injunction were set out in the case of **GIELLA .V. CASSMAN BROWN & CO LTD** (supra) as follows: -

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

A prima facie case was defined in the case of **MRAO .V. FIRST AMERICAN BANK OF KENYA LTD .V. OTHERS C.A CIVIL APPEAL NO 39 OF 2002 [2003 KLR 125]** as: -

“ a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

In **MBUTHIA .V. JIMBA CREDIT FINANCE CORPORATION 1988 KLR 1** the Court of Appeal opined as follows: -

“The correct approach in dealing with an application for the injunction is not to decide the issue of fact, but rather to weigh

up the relevant strength of each side's proposition.”

And as was held in **FILMS ROVER INTERNATIONAL .V. CANNON FILMS SALES LTD 1986 3 ALL.E.R 776**, a Court faced with an application such as this one should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “*wrong*”.

Section 68(1) of the Land Registration Act states that: -

“The Court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealings with any land, lease or change.”

Counsel for the 1st Respondent, citing **LENAOLA J** (as he then was) in **FRANCIS WAITHAKA .V. KENYATTA UNIVERSITY 2012 eKLR**, has submitted that the 1st Respondent is not a Government agent and so this Petition seeking remedies for a violation of fundamental Rights cannot be maintained. In that case, the Judge cited with approval the holding in **TEITINNANG .V. ARIONG 1987Y LRC (const) 517** where the Court held as follows: -

“I am of the opinion that an individual or group of individuals, as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or group of individuals. Since no duty can be owed by an individual or group of individuals to another individual under the fundamental rights provision of the Constitution, no action for a declaration that there has been a breach of duty under that provision can lie or be maintained in the case before me, and I so hold.”

The decision in **FRANCIS WAITHAKA** (supra) was rendered on 2nd August 2012. However, in **JEMIMA WAMBUI IKERE .V. STANDARD GROUP LTD 2013 eKLR**, the same Judge took a different view and held as follows:-

“The emerging jurisprudence in Kenya to – day tends to lean towards the South Africa stand; that there are instances where the non – state actions can be and have been held liable for breach of fundamental rights and freedoms. The rigid position that fundamental rights and freedoms only applies vertically has been overtaken by the emerging trend in the development of human rights law and litigation.”

The same Judge took a similar view in the case of **MIKE RUBIA .V. MOSES MWANGI 2014 eKLR**. Therefore, the decision in **FRANCIS WAITHAKA** (supra) has been over – taken by emerging jurisprudence and rightly so. Every person is bound by the Constitution as provided in **Article 2**. Similarly, it is provided in **Article 20(1) of the Constitution** as follows: -

“The Bill of Rights applies to all law and binds all state organs and all persons.” Emphasis added.

One can imagine the anarchy that would follow if private individuals were to be shielded from litigation alleging a violation of fundamental rights. It is also instructive to note that this Petition has not been filed only as against the 1st Respondent but also against two other Respondents both being agencies of the Government.

Counsel for the 1st Respondent has also submitted, citing the High Court's decisions in **ABDALLAH MANGI MOHAMED .V. LAZARUS & OTHERS 2012 eKLR** and **KENYA BUS SERVICES LTD .V. ATTORNEY GENERAL & OTHERS 2005 eKLR**, that the Petitioner ought to have pursued his claim through a civil suit and not a Constitutional Petition. Each case must be considered on it's own peculiar circumstances and it is not a principle of law that a Constitutional Petition cannot be filed where there is another remedy which the Petitioner could have pursued. A party is also entitled to pursue the remedy that would be most efficacious in addressing the grievance which has been plead before the Court. In **RASHID ODHIAMBO ALOGGOH & 24 OTHERS .V. HACO INDUSTRIES LTD C.A CIVIL APPEAL NO 110 OF 2001**, the High Court had refused to determine the issues raised in a Constitutional Petition because there were other lawful avenues through which the Appellants could have ventilated their claims. In allowing the appeal, the Court of Appeal held that the High Court erred in holding that the Appellants had other lawful avenues in which they could have ventilated their grievances. Looking at this Petition, it has pleaded the Constitutional provisions on which it is premised (paragraphs 16 – 28) and the particulars of the violations or threatened violations (paragraphs 29 – 33). There is also no doubt that as drafted, the Petition meets the test as laid down in the case of **ANARITA KARIMI NJERU**

.V. R 1979 KLR 154 as approved in the case of **MUMO MATEMU .V. TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE 2014 eKLR** as the Constitutional provisions alleged to have been violated or threatened with violation and the precise manner of infringement have been specifically pleaded. Whether or not there is substance in those allegations will be a matter for trial.

Going back to the test in **GIELLA .V. CASSMAN BROWN CO LTD CASE** (supra), this Court must at this stage not make any definitive findings on disputed facts. The main objective of an interlocutory injunction is to preserve the property in dispute while the issues placed before the Court are determined. It is common ground that both the Petitioner and the 1st Respondent hold titles to the suit property. The Petitioner obtained his title on 17th June 1997 while the 1st Respondent's titled was issued on 29th November 2019. The obtaining jurisprudence is that where there are two competing titles, the first in time will prevail – **WRECK MOTORS ENTERPRISES .V. THE COMMISSIONER OF LANDS & OTHERS C.A CIVIL APPEAL NO 71 OF 1997**. But that is not to say that the Petitioner's title overrides the 1st Respondent's title. There is also jurisprudence that where the root of a title is under challenge, it is not enough to dangle it as proof of ownership – **MUNYU MAINA .V. HIRAM GATHIHA MAINA 2013 eKLR**. Those are the two competing interests that this Court will be determining. Prima facie however, assuming that both titles were procedurally obtained, then the Petitioner has demonstrated, in my view, that there exists a right which has apparently been infringed as to call for an explanation (**MRAO .V. FIRST AMERICAN BANK OF KENYA LTD**).

On irreparable loss that cannot be compensated by an award of damages, there is real danger that the suit property could be alienated to third parties beyond the reach of the Court before the Petition is heard and determined. The more reason why an inhibitory order is necessary in the circumstances of this case to preserve the suit property. And even if this application was to be determined on the balance of convenience, the scales would tilt in favour of granting the orders sought by the Petitioner. I am not persuaded that this application is frivolous, vexatious or an abuse of the process of this Court.

The up – shot of the above is that the Notice of Motion dated 4th May 2020 is allowed in the following terms: -

- 1. Pending the hearing and determination of the Petition, a temporary order of injunction is issued restraining the 1st Respondent whether by himself, his servants and/or agents from cutting any trees splitting, transporting or in any other way dealing with the Eucalyptus trees on L.R NO WEST BUKUSU/EAST SABOTI/1612.**
- 2. Pending the hearing and determination of this Petition, an order of inhibition is issued restraining any dealings and transactions on the register of L.R NO WEST BUKUSU/EAST SABOTI/1612.**
- 3. Directions are issued that all the Respondents file and serve their responses to the Petition within 14 days from the date of delivery of this ruling.**
- 4. The Petitioner, if he so wishes, will have 3 days from the date of service within which to file and serve any supplementary affidavit with corresponding leave to the Respondents.**
- 5. The Petition will be mentioned before the Deputy Registrar on 29th July 2020 to confirm compliance.**
- 6. In the circumstances of this case, I direct that the Petition be canvassed by way of oral testimony.**
- 7. The hearing shall be by way of video link on 17th September 2020.**
- 8. Costs of this application shall be in the Petition.**

Boaz N. Olao.

J U D G E

6th July 2020.

Ruling dated, delivered and signed at **BUNGOMA** this 6th day of July 2020. To be delivered through electronic media with notice to the parties in compliance with the directives following the **COVID – 19** pandemic.

Boaz N. Olao.

J U D G E

6th July 2020.



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