



**Amkeni Farmers (CBO) through its officials Raymond Taura Malindi Raphael  
Haromwandondo Chenda Kazungu Charo v National Land Commission & 2 others  
(Petition 11 of 2023) [2023] KEELC 22599 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 22599 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
PETITION 11 OF 2023  
EK MAKORI, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**AMKENI FARMERS (CBO) THROUGH ITS OFFICIALS RAYMOND  
TAURA MALINDI RAPHAEL HAROMWANDONDO CHENDA KAZUNGU  
CHARO ..... PETITIONER**

**AND**

**THE NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT  
COUNTY GOVERNMENT OF TANA RIVER ..... 2<sup>ND</sup> RESPONDENT  
WACHU RANCHING COMPANY LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The applicants in this matter seek temporary conservatory orders restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from taking further steps towards renewing the lease over land registered as L.R 13600 (Cr No 21903) to the 3<sup>rd</sup> Respondent or from taking any other action that could defeat the Petition herein.
2. The application is opposed. There is a replying affidavit in place deposited on 2<sup>nd</sup> May 2023 by one Boba Galgalo Shambaro.
3. Parties were directed to canvass this application by way of written submissions.
4. The Applicant averred that the land which is subject to this litigation measures approximately 28, 911 hectares. It is public land within the meaning of Article 62 of the Constitution and it has been dealt with in a manner that is inconsistent with the Constitution.
5. The 3<sup>rd</sup> Respondent has been holding the land since 1976- over 45 years but over that period, the 3<sup>rd</sup> Respondent has failed to comply with various conditions of the lease but to hold the land for



speculative benefits. Having failed to live up to the conditions, a fresh application has been made to renew the lease for another 99 years. This will be detrimental to the community of the County of Tana River. Besides, no public participation has been carried out as required by the Constitution before the lease is renewed.

6. Due to the foregoing, it will be imperative that temporary conservatory orders be issued pending the hearing and determination of the petition.
7. The application is opposed. 3<sup>rd</sup> respondent contended that the application does not meet the test laid in *Giella vs. Cassman Brown* [1973] E.A. This is so because the applicant has not attached any single document received in support of the motion or petition. The court would be acting in futility if it were to grant the orders sought. The identity of the land is contradictory. We have L.R. 13600 (Cr 21114) and LR 13600 (Cr 21903) and if any orders are made it shall be difficult to implement.
8. The orders sought are in vacuo, the alleged letters of allotment, with their dates and timelines for the lapse, and conditions attendant thereto are contested. The averments by the applicant are bare. The decisions of the NLC and County Government of Kilifi to be impugned have not been attached.
9. The decision in *Kenleb Cons. Ltd v New Gatitu Service Station Ltd & Another* [1990] eKLR is quoted where the court held that in an application of injunction, an applicant must not only make a full and frank disclose of all relevant facts for the just determination of the application but also must show he has a right legal or equitable, which requires protection by an injunction.
10. 3<sup>rd</sup> Respondent averred that the applicant has not shown locus standi in this matter. The Community Based Organization that has approached the court on their behalf has not shown what it stands for regarding the land in issue. There is an unsigned certificate of registration dated 25<sup>th</sup> January 2017. There is no evidence of its renewal.
11. The applicant has misstated simple facts in the matter for instance the lease, which is in operation, was granted to the 3<sup>rd</sup> Defendant in the year 1981 and not 1976.
12. The issue to decide is whether to grant conservatory orders at this stage in the trial.
13. Conservatory orders have been defined in the case of *Damour Florian Emmeric v Director of Immigration Services* [2022] eKLR to mean:

“In Civil Application No. 5 of 2014 Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others (2014) eKLR, the Supreme Court discussed, at paragraph 86, the nature of conservatory orders as follows: -

(86) “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 Applicant’s case for orders of stay.

26. The Court in Nairobi Civil Appeal 151 of 2011 Invesco Assurance Co. Ltd vs. MW (Minor suing thro’ next friend and mother (HW) [2016] eKLR defined a conservatory order as follows: -

5. 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.

27. In *Judicial Service Commission vs. Speaker of the National Assembly & Another* [2013] eKLR the Court had the following to say about the nature of conservatory orders: -

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 situ. 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”

14. Conservatory orders are usually issued sparingly to preserve the substratum of the subject matter as aptly held by *Ibrahim J. in Muslim for Human Rights (Milimani) & 2 Others vs Attorney General & 2 Others* (2011) eKLR:

“The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-a-vis the case of either parties. The principle is similar to that in temporary or interlocutory injunctive in civil matters. This is a cardinal principle and happily makes my functions and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side.”

15. As correctly submitted by the 3<sup>rd</sup> respondent each allegation by a party has to be supported for a court to lay a basis in giving injunctive orders. In *Kenleb Cons. Ltd v New Gatitu Service Station Ltd & Another* [1990] eKLR the court held as follows:

“In the application, the applicant, a limited liability company, is described as the tenant of the 1st respondent/defendant. However, no evidence was adduced to show exactly when the tenancy relationship was established and upon what terms. To succeed in an application for injunction an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right, legal or equitable, which requires protection by injunction. He must also satisfy the three tests set out in the often cited case of *Giella v Cassman Brown & Co Ltd*, 1973 EA 358; for the grant of an interlocutory injunction.”

16. When determining whether a matter discloses a *prima facie* case, a Court must consider the entire case. The pleadings, the factual basis, the respective parties' positions, the remedies sought, and the law must all be considered, albeit tentatively. In doing so, a Constitutional Court must be guided by Articles 22 (1) and 258(1) of the *Constitution*, which provide for the right to initiate Court proceedings whenever a right or fundamental freedom in the Bill of Rights is denied, violated, or infringed, or when the *Constitution* is contravened, or is threatened with contravention.

17. The petition seeks the following reliefs:



- a. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> respondents' actions of processing a renewal of a lease in the circumstances have violated the Constitution and specifically Articles 10, 35, 62,67, and 69.
  - b. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have violated sections 4,8,12,13, 14, 19, 22, 24, 25(1),26,28,29(6), 31,36, 66 and 73 Of the Land act,2012
  - c. A declaration that the 3<sup>rd</sup> respondent has violated the terms of the lease and is not entitled to a renewal of the same in the circumstances.
  - d. A mandatory injunction compelling the 1<sup>st</sup> and 2<sup>nd</sup> respondents to carry out public participation and settle those in actual possession and occupation of the suit property.
  - e. A declaration that the purpose and intent of the lease to the 3<sup>rd</sup> respondent has failed and that the subject matter should be surrendered to the 2<sup>nd</sup> respondent for purposes of having occupants of the land settled therein.
  - f. An order that the respondent jointly and severally bears the costs of the petition.
18. The nature of evidence tendered in this application is allegedly based on the annexed affidavit by one Raymond Taura Malindi, documents annexed thereto, facts which the court is mandated to take judicial notice and such other evidence as may be adduced at the hearing hereof.
19. At the hearing, other than the affidavit in support of the application, the certificate of incorporation of Amkeni Farmers Community CBO, and some photographs showing some unidentified people with a grinder on some vacant land seemingly clearing. No documentary evidence was placed before this court to support the pending motion. No single document has been tabled to support the alleged constitutional infringements. For instance, the impugned lease was never attached to the application or the petition to show when it was issued, the terms and conditions attached to it, to whom it was issued, when it is/was to expire/renewed et al. No document was produced to suggest at what forum the lease was issued/renewed. At best, the applicants have just quoted articles of the Constitution and Statutory provisions that they fear will be threatened or infringed without supporting the same.
20. Application dismissed with costs.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023.**

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**E. K. MAKORI**  
**JUDGE**

