



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CONSTITUTIONAL & HUMAN RIGHTS**

**PETITION CASE NO. 17 OF 2018**

**MICHAEL MIYAWA OBUL.....1<sup>ST</sup> PETITIONER**

**DOUGLAS HENRY OTIATO.....2<sup>ND</sup> PETITIONER**

**THOMAS OCHANDO OBONDO .....3<sup>RD</sup> PETITIONER**

**DAVID OTIENO ODWORI .....4<sup>TH</sup> PETITIONER**

**DALAMAS OGADA JUMA .....5<sup>TH</sup> PETITIONER**

**VERSUS**

**KENYA INFORMAL SETTLEMENTS.....1<sup>ST</sup> RESPONDENT**

**IMPROVEMENT PROJECT .....2<sup>ND</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KISUMU.....3<sup>RD</sup> RESPONDENT**

**DIRECTOR OF SURVEYS OF KENYA .....4<sup>TH</sup> RESPONDENT**

**HON. ATTORNEY GENERAL .....5<sup>TH</sup> RESPONDENT**

***( FORWARDED FOR HEARING BY D.R. KISUMU BEFORE VACATION DUTY JUDGE - SIAYA)***

**RULING:**

This matter was filed under certificate of urgency on 17.8.2018, in Kisumu High Court and owing to the recess, the file was taken to the duty Judge in Kakamega for consideration.

The Hon. Judge did certify the application as urgent but declined to issue *ex parte* orders sought in the first instance. He directed the Applicants/Petitioners to serve the Respondents and appear today before the recess duty judge for interpartes hearing.

Before me today is the Petitioners' Advocate and the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Respondents Advocates. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents made no appearance.

The Advocates present did agree as per their submissions on record that the Court does give directions for the interpartes hearing of the application before the duty Judge in Kisumu on 19.9.2018, to give an opportunity to the Respondents to file their responses and for the pleadings to close with the Petitioners/Applicants filing their further affidavit.

However, Mr. Mirembe, Counsel for the Petitioners/Applicants urged the Court to grant an interim conservatory order stopping the ongoing project being undertaken by the Respondents as the project has displaced his clients among other people who are suffering as a result.

In response, the 1<sup>st</sup>, and 2<sup>nd</sup> Respondents' Counsel Mr. Kimanga Advocate opposed the grant of any conservatory order at this stage however interim it may be as the project is near completion and that if stopped, irreparable injury will be occasioned as it is a Public project funded by World Bank and it is time bound hence any stoppage would affect the project completion date adversely. On the part of Mr. Okachi,

Prosecution Counsel, holding brief for Mr. Que Advocate for the 5<sup>th</sup> Respondent, he submitted that the agreement was clear that the Application be canvassed on 19.9.2018, with no interim orders which information he had relayed to Mr. Que Further, that the matter touches on a big project which should not be stopped. He opposed any interim conservatory order. In a rejoinder, Mr. Mirembe submitted on behalf of the Petitioners/Applicants that the ongoing project has displaced a number of people in the community and stakeholders, which injury has been ongoing for sometime. Further that only two weeks stay will not affect the Respondents negatively as the Court will have the discretion to lift the orders if need arises.

I have carefully considered the Application for interim conservatory orders as sought by Mr. Mirembe Counsel for the Petitioners/Applicants, the submissions by Mr. Mirembe, Mr. Kimanga and Mr. Okachi and the rejoinder thereto by Mr. Mirembe.

I note that Hon. Jesse Njagi did certify the Application as urgent on 17.8.2018 and directed that the Applicants/Petitioners to serve the Respondents for interpartes hearing today.

The record shows that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed Notice of Appointment of Advocates on 29.8.2018, whereas the 5<sup>th</sup> Respondent filed Memorandum of Appearance on 23.8.2018. None of them have filed their grounds of opposition or replying affidavits.

The record does not show when the Respondents were served but this being a matter filed under certificate of urgency and having been certified as urgent, it was expected that service be effected expeditiously to allow the Respondents ample time to instruct their Advocates to file responses to the application for hearing today which is nearly two weeks from the date when the matter was certified urgent.

Nonetheless, some Respondents have entered an appearance whereas others have not and in the absence of an affidavit of service on record, this Court is not in a position to decipher whether the 3<sup>rd</sup> and 4<sup>th</sup> Respondents have been served with the Application. This Court observes that the impugned project being undertaken by the Respondents has been ongoing for some time as submitted by Mr. Mirembe and there is no denial that it is a World Bank Project which is near completion.

It may be that indeed the Project affects the Petitioners positively or negatively but this Court is not persuaded that an interim conservatory Order will relieve the Petitioner's pain before the interpartes hearing especially where the project is near completion.

In the premises, I decline to grant any interim conservatory order sought.

I make the following further orders:

- (1) That there shall be no interim conservatory orders in this matter which was certified as urgent for consideration.**
- (2) That the Respondents to file and serve their replying affidavits upon the Petitioner's Advocates within 10 days from the date hereof.**
- (3) That the Petitioners' Advocates have corresponding leave to file and serve a further affidavit within 5 days from the date of service of the Replying affidavit by the Petitioners' Advocates.**
- (4) That the parties to appear before the duty Judge at Kisumu H.C. on 19.9.2018 for directions on the mode disposal of the Application and the Petition.**
- (5) That the Petitioners/Applicants' Counsel to serve the 3<sup>rd</sup> and 4<sup>th</sup> Respondents with this order forthwith for compliance with the timelines set herein.**
- (6) That costs shall be in the cause.**

**Dated, Signed and Delivered at Siaya this 30th day of August, 2018.**

**R. E. ABURILI**

**JUDGE**