



**Kesedany v County Government of Nakuru & 3 others (Environment and Land Constitutional Petition 3 of 2023) [2023] KEELC 22314 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22314 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**  
**ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 3 OF 2023**  
**A OMBWAYO, J**  
**DECEMBER 20, 2023**

**BETWEEN**

**EZEKIEL KOSGEY KESEDANY ..... PETITIONER**

**AND**

**COUNTY GOVERNMENT OF NAKURU ..... 1<sup>ST</sup> RESPONDENT**

**EGERTON UNIVERSITY ..... 2<sup>ND</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. Ezekiel Kosgey Kesedany (hereinafter referred to as the petitioner) has moved this court by way of petition seeking a declaration that the act of the County Government of Nakuru (hereinafter referred to as 1st Respondent) of Alienating, Annexing, Acquiring, Surveying, Transferring, Sub-Dividing and Registration of R. No 527 situated within Njoro Township of Nakuru District Land Registry belonging to Egerton University for purposes of setting up a County Aggregation and Industrial Park (CAIP), is unconstitutional, illegal, unlawful, invalid, null and void ab initio.
2. The petitioner further seeks a declaration that the acts of 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein are contrary to National Values, Principles of Governance, Objects and Principles of Devolved Government enshrined in the Constitution.
3. Further, he seeks an Order of *Certiorari* removing into this Honorable Court and quashing the entire Decision of the 1<sup>st</sup> respondent to Alienate, Annex, Acquire, Survey, Transfer, Sub-Divide and/or Register R No 527 situated within Njoro Township of Nakuru District Land Registry belonging to Egerton University for purposes of setting up a County Aggregation and Industrial Park (CAIP).



4. Moreover, he seeks an Order of Prohibition do issue prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein from further continuing with the Unconstitutional, Illegal and unlawful Transaction Alienating, Annexing, Acquiring, Surveying, Transferring, Sub-Dividing and Registration of R. No 527 situated within Njoro Township of Nakuru District Land Registry belonging to Egerton University for purposes of setting up a County Aggregation and Industrial Park (CAIP).
5. The petitioner prays for an Order of Prohibition do issue prohibiting the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and the 6<sup>th</sup> Respondents herein restraining and/or their agents, successors and assigns implementing any of the Unconstitutional, Illegal and unlawful Transaction Alienating, Annexing, Acquiring, Surveying, Transferring, Sub-Dividing and Registration of R No 527 situated within Njoro Township of Nakuru District Land Registry belonging to Egerton University for purposes County Aggregation and Industrial Park (CAIP)
6. The petitioner further prays for n Order of *Mandamus* compelling the 1<sup>st</sup> Respondents and/or their subordinate officers and/ or any other person acting under or through them conduct a proper public participation in relation to whole process of setting up a County Aggregation and Industrial Park (CAIP).
7. The petitioner also seeks a declaration that the Petitioner's Right to a Fair Administrative Action, Protection of Right to Property, Right of Equality and Freedom from Discrimination, Right to Human Dignity, Right to Access of Information, Freedom of Expression Environment and Social Economic Rights to a Fair Hearing enshrined and contemplated in Article 47, 27, 28, 33, 35, 42, and 44 of the Constitution of Kenya 2010 have been violated and/or infringed upon by the 1<sup>st</sup> Respondent County Government of Nakuru and a declaration that the Specific Applications belonging to certain Groups of Persons born and/ or living within Nakuru County as enshrined in Articles 53, 54, 55, 56 and 57 of the Constitution the 1<sup>st</sup> Respondent County Government of Nakuru. Moreover, a declaration that as result of Breach of the Petitioner's Rights and those of the Persons born and/or living within Nakuru County they have suffered Loss and Damages. Lastly, he prays for an Order for compensation for the apparent breach or violation of Petitioner's Rights plus costs of the suit and interest thereof.
8. The petition is accompanied with a Notice of Motion seeking a Conservatory Order restraining 1<sup>st</sup> and 2<sup>nd</sup> Respondents and/or their agents, successors and assigns herein from further continuing with any Transaction relating to alienating, Annexing, Acquiring, Surveying, Transferring, Sub-Dividing and Registration of L. R No 527 situated within Njoro Township of Nakuru District Land Registry belonging to Egerton University for purposes of setting up a County Aggregation and Industrial Park (CAIP) pending hearing and Petition.
9. Further that this Honorable Court be pleased to issue a conservatory orders restraining the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and the 6<sup>th</sup> Respondents herein restraining and/ or their agents, successors and assigns implementing any of the Unconstitutional, Illegal and unlawful transaction Alienating, Annexing, Acquiring, Surveying, transferring sub-dividing and Registration of R No 527 situated within Njoro Township of Nakuru District Land Registry belonging to Egerton University for purposes of setting up a County Aggregation and Industrial Park (CAIP) pending hearing and determination of this Main Petition plus costs of this Application be provided for.
10. The application is supported by the affidavit of the petitioner wherein he states that there is an imminent danger of Alienation and Loss of Public Land due to an Unconstitutional, Illegal and Unlawful Process executed in clandestine and secrecy devoid of compliance with Values and Principles of Governance enshrined in Article 10 of the Constitution. He states that the 2<sup>nd</sup> Respondent herein



sought an approval to subdivide the Public Land belonging to a Public University with an Ulterior Motive divorced from Principles of Land Policy enshrined in Article 60 of the *Constitution*. That the 2<sup>nd</sup> Respondent in his illegal venture has already obtained an Approval from the 1<sup>st</sup> Respondent to subdivide 640.6 Hectares of Land belonging to the University into four (4) parcels in return and/or for a consideration of alienating and conveying some of the said Parcels to the 1<sup>st</sup> Respondent herein.

11. The petitioner laments that the aforementioned exercise is unlawful for failure to comply with Section 60 of the *Universities Act* (Act No 42 of 2012) as read together with the Egerton University Charter that provides that the Assets of the said Education Institution should managed, supervised and administered in such a manner as best promotes the purpose for which the university was established.
12. The whole Transaction related to the said Public Land owned by the 2<sup>nd</sup> Respondent herein are at a very advanced stage therefore if not swiftly brought to a halt there is real, certain and looming danger of losing public land which will be very hard to recover and return it back to the State Organ.
13. According to the applicant, the whole process is laced with opaqueness and obscurity deliberately applied to conceal the illegal and irregular seizure of public land since No single public participation was conducted as the process is not gazetted nor notices put to inform the citizens and/or any relevant stakeholder(s). The applicant opines that It would be just and expedient if the Application is heard as a matter of priority to protect the Public Property from of the arbitrary and unjustifiable acts of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
14. In the replying affidavit the 1<sup>st</sup> respondent states that the application is ill conceived, an abuse of court process and the same should be dismissed forthwith with costs to the 1<sup>st</sup> Respondent. The 1<sup>st</sup> respondent explains that in order to create an all-inclusive job creating model that invests in the Kenya's rich Agro resources, the National Government through the Ministry of Investments, Trade and Industry, and Devolved Governments through the Council of Governors established the County Aggregation and Industrial Parks (herein after CAIPs project), a farmer-centric and export oriented approach to ensure small scale farmers and producers contribute to the aggregation, marketing and export exchange from across the country.
15. The 1<sup>st</sup> respondent contends that in a letter dated 6<sup>th</sup> April 2023 the Ministry of Investments, Trade and Industry wrote to all the Governors communicating the National Government's commitment to allocate Kshs 250 Million in the FY 2023.24 for the project and outlined the Minimum Conditions for Development of County Aggregation Centers and Industrial Parks. Clause 3 of the criteria and minimum conditions for development requires the County Government to allocate at least 100 acres of its land and ensure that the same is close to the nearest town/ shopping center. In light of these requirements, the 1<sup>st</sup> Respondent embarked on the process of identifying prime land that meets the said requirements.
16. That as luck would have it, the 2<sup>nd</sup> Respondent had filed an application for subdivision dated 25<sup>th</sup> May 2023, seeking permission for subdivision of LR No 527 (herein after the suit property) into four plots. The 1<sup>st</sup> Respondent's County director, land & physical planning, in a letter dated on even date, communicated to the 2<sup>nd</sup> Respondent that its application for the proposed subdivision had been considered by the Technical Committee in a meeting held on 25<sup>th</sup> May 2023 and recommended for approval, subject to certain conditions being met. Amongst the conditions to be met by the 2<sup>nd</sup> Respondent was that in the event that it surrendered any land, the same shall be registered in the name of the 1<sup>st</sup> Respondent. It is therefore false a compulsory surrender was a condition for the approval of the said subdivision application and in any event, No such surrender took place, thus No land was registered in the name of the 1<sup>st</sup> Respondent. The 1<sup>st</sup> respondent insists that the requirements in the



letter dated 25<sup>th</sup> May 2023, did not speak to any consideration, alienation and or conveyance of some part of the suit property to the 1<sup>st</sup> Respondent. Such assertions are the making of the Applicant's imagination.

17. That the assertions that the 2<sup>nd</sup> Respondent obtained the Land Control Board Consent dated 20<sup>th</sup> June 2023, one month after the application for subdivision and before the approval of the same, and not five months after approval are misguided.
18. In a letter dated 25<sup>th</sup> July 2023 the Land Administration officer, Nakuru County, communicated to the 2<sup>nd</sup> Respondent that its application had been given provisional approval to proceed with the subdivision on the condition that it surrenders the original title, new deed plans ensures that the roads are free of encroachment, pays Kshs 1000 and adhere to the NEMA regulations.
19. Consequently, on 25<sup>th</sup> July 2023, the firm of Geosurvey Engineering & Environmental Services Ltd submitted the new deed plans with respect to the subdivision to the Director of Surveys.
20. It was not until 18<sup>th</sup> September 2023 that the Ministry of Lands, Public Works, Housing and Urban Development, State Department {or Lands and Physical Planning, issued the final approval for subdivision of the suit property to the 1<sup>st</sup> Respondent.
21. In a nutshell, the 1<sup>st</sup> respondent states that due process was followed and the acquisition of the land is for public good. The petitioner in a supplementary affidavit states that the 3<sup>rd</sup> respondent appears to doubt the process of acquisition.

### **Rival Submissions**

22. In a nutshell, the gravamen of the petitioner's submissions is that he has established a prima facie case with a likelihood of success due to the fact that he has demonstrated that the County Government of Nakuru seeks to acquire the property of Egerton University without due process. That the University council has never decided to cede the land to the County Government. Moreover, in the letter between the County Government and Egerton University non-shows the intention of the subdivisions and the lease of the property. The petitioner argues that there was No public participation as required by section 87 of the County Government Act (2012) and Article 10, 174, 196 of the Constitution of 2010
23. The petitioner further submits that he intends to protect public interest in participation of Policy formulation process of County Government and Public bodies. If the conservatory orders are not given, then the petition will be rendered futile if the process of acquisition proceeds. Moreover, that the petition will be an academic exercise.
24. The gist of the 1<sup>st</sup> respondent's submissions is that there is need for this court to be cautious when dealing with the issues herein. That the current case is a mismatch for the grant of conservatory orders. On the question of prima facie case, the 1<sup>st</sup> respondent argues that the applicant's fears of the threatened alienation of public land are ameliorated by the assurance granted by the 3<sup>rd</sup> Respondent in its letter dated 5<sup>th</sup> October 2023 which the Applicant has relied on heavily. In the said letter, the procedure for procuring the sub-division for purposes of undertaking the CAIP project has been laid by National Land Commission and none of it involves public participation. In any case, if that procedure is not followed, the 3<sup>rd</sup> Respondent has the mandate to decline the approval sought and as such there exists an internal mechanism to deal with the said procedural infraction, if present.
25. On the second principle, the respondent argues that the applicant has failed to demonstrate the constitutional principle that it seeks to advance by seeking the grant of conservatory orders in this case. The Applicant has attempted to bring about public participation in a project that is an initiative of



the National Government through the Ministry of Investment, Trade and Industry. Being a National Government project, public participation was undertaken at that level and any attempt to undertake the same at the County level would defeat the purpose of the Fourth Schedule of the Constitution on distribution of functions between the National and County Governments. Further, this Project is not peculiar to the 1<sup>st</sup> Respondent as other thirteen counties selected to form the first cohort of CAIP have undertaken the said process without issues of public participation being raised. This Court cannot be hoodwinked into sanctioning an unconstitutional exercise.

26. On the third principle, the respondent argues that the issues raised in the Petition herein have been addressed by the 3<sup>rd</sup> Respondent and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have taken active steps in compliance with the procedure for procuring the sub-division with the aim of undertaking the CAIP project. There is No place for public participation at the current stage of the project as such; there exists No need for the granting of conservatory orders. The Applicant has not demonstrated what they wish to have preserved. In any case, the 3<sup>rd</sup> Respondent advised that since progress had been made in acquisition, the University could consider to formally lodge a request to the National Land Commission for consent forwarding the mother title alongside sub-division documentations for processing at the Ministry of Lands, Public Works and Urban Development.
27. Lastly, the public interest of this case is in continuing the project as this project is time-bound and the National Government as the strategic lead partner has scheduled the release of funds in support of the project, however, the said release is anchored on budgetary timelines and the timely compliance of each County Government with the milestones set. The continued delay of this project is a stumbling block to this great development in the County of Nakuru as the National Government will not release the required capital.
29. The fact that this is in the general good of the public cannot be overemphasized. Additionally, the educational benefits that this project presents to the students of the 2<sup>nd</sup> Respondent which majorly deals with agriculture is beyond peradventure. It presents a center for practical learning, attachment and absorption of the said students upon qualification.
30. These interests are weighed against the interest of the Petitioner who is using this Petition to settle political scores against the 1<sup>st</sup> Respondent while hiding under the constitutional principle of public participation. We urge this court to reject this attempt to degrade the sanctity of a Court process in the whims of personal gain which does not fall in the province of Conservatory orders. It is on these grounds that 1<sup>st</sup> respondent urges this Court to dismiss this application which is lacking in merit. The 1<sup>st</sup> Respondent has adhered to the rule of law and the grant of conservatory orders would be tantamount to halting an otherwise sound legal process on the basis of public participation, an important constitutional value that has in this instance been misapplied.

### **Analysis And Determination**

31. The Petitioner seeks conservatory orders restraining the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents from implementing any of the unconstitutional, illegal and unlawful transaction alienating, annexing, acquiring surveying, transferring, subdividing and registration of of LR No 527 situated within Njoro Township of Nakuru District Land Registry belonging to Egerton University for purposes of County Aggregation and industrial Park pending the hearing and determination of the petition. The petitioner relied on the Supreme Court Decision of *Gitirau Peter Munya v Dickson Mwenda Kithinji and others* (2014) eKLR where the court laid down the principles for the grant 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 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.

32. Ibrahim, J (as he then was) in *Muslim for Human Rights (Milimani) & 2 others v Attorney General & 2 others* (2011) eKLR., stated as follows: -

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.

33. As I’m dealing with an application for conservatory orders I must strike the delicate balance of ensuring that I do not delve into issues which are in the realm of the main Petition. I will, therefore, restrain myself from dealing with such issues.

34. In *Board of Management of Uhuru Secondary School v City County Director of Education & 2 others* [2015] eKLR, the Court summarized the principles for grant of conservatory orders as: -

- (i) The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.
- (ii) The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
- (iii) Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.
- (iv) Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.

35. This court finds that the applicant has established a prima facie case with a likelihood of success as the 1<sup>st</sup> respondent and 2<sup>nd</sup> respondent are alienating public land without involving the National Land Commission who are the managers of public land. the *Constitution* of Kenya 2010 is very clear on the role and power of the National Land Commission. The creation of the NLC was realised with the promulgation of the *Constitution* of Kenya, 2010. the *Constitution* dedicated an entire chapter to the subject, Land and Environment. Article 62 stated the guiding principles of land policy, with Article 62 classifying land into three categories: public, community and private. Article 62 defines public land, and states how it will be administered:

- (2) Public land shall vest in and be held by a County Government in trust for the people resident in the County, and shall be administered on their behalf by the National Land Commission, if it is classified under-



- (a) Clause (1) (a), (c), (d) or (e); and
- (b) Clause (1)(b), other than land held, used or occupied by National state organ.
- (3) Public land classified under clause (1)(f) to (m) shall vest in and be held by the National Government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.”

36. Article 67 provides for the establishment of the NLC and its functions:

- “(a) to manage public land on behalf of the National and County Governments;
- (b) to recommend a national land policy to the National Government;
- (c) to advise the National Government on a comprehensive programme for the registration of title in land throughout Kenya;
- (d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;
- (e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;
- (f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;
- (g) to assess tax on land and premiums on immovable property in any area designated by law; and
- (h) to monitor and have oversight responsibilities over land use planning throughout the country.
- (3) The National Land Commission may perform any other functions prescribed by National legislation.”

The above provisions entrust the management of public land held by the National Government to the National Land Commission. This fact appears to have been overlooked by both the Egerton University and the County Government of Nakuru and the Ministry of Lands Public Works, Housing and Urban Development, State Development for Lands and physical planning. Public land falls within the administrative competence of the National Land Commission who are required to safeguard it from abuse of the kind associated with history of this country.

37. On public participation, this court finds that the land that is in dispute is public land belonging in the name of Egerton University who are holding it on behalf of the public and therefore should be managed by the National Land Commission in a transparent manner on behalf of the public. Any decision to alienate public land or convert it to private land must undergo public participation. It is not clear whether there was public participation.

38. The High Court in *Robert N. Gakuru & others v Governor Kiambu County & 3 others* [2014] eKLR while referring to the South African decision in *Doctors for Life International v Speaker of the National Assembly & others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC) adopted the following definition of public participation: -



39. According to their plain and ordinary meaning, the words public involvement or public participation refers to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process.
40. The *Black's Law Dictionary* 10<sup>th</sup> Edition defines 'consultation' as follows: -  
The act of asking the advice or opinion of someone. A meeting in which parties consult or confer.
41. In a Three-Judge bench the High Court in consolidated Constitutional Petition Nos. 305 of 2012, 34 of 2013 and 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR the Court addressed the concept of consultation in the following manner: -  
" .... A public participation programme, must...show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account. (emphasis added)
42. The Court of Appeal in *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* (*supra*) while dealing with the aspect of public participation in lawmaking process stated as followed: -  
" The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have No meaning.
43. I do find that the petition raises fundamental issues of public interest and protection and therefore if conservatory orders are not granted the petition may be rendered futile and an academic exercise. The upshot of the above is that I do grant a Conservatory Order restraining 1<sup>st</sup> and 2<sup>nd</sup> Respondents and/or their agents, successors and assigns herein from further continuing with the any Transaction relating to alienating, Annexing, Acquiring, Surveying, Transferring, Sub-Dividing and Registration of R No 527 situated within Njoro Township of Nakuru District Land Registry belonging to Egerton University for purposes of setting up a and County Aggregation and Industrial Park (CAIP) pending hearing and Petition. Costs of the application in the petition.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 20<sup>TH</sup> DAY of DECEMBER 2023.**

**ANTONY OMBWAYO**

**JUDGE**

