



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC PETITION NO. 3 OF 2021

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ARTICLES 22, 40, 63, (1), 2 (d) (i),(ii), 61

(1) AND

IN THE MATTER OF SECTION 2, 12, 14 (1) (2), 30 AND 46

AND

IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS

WEI-WEI COMMUNITY LAND OWNERS COMMITTEE (C.B.O) "Through" Its

Members Namely JOAKIM KRIWEI ALEMUSIA & 12 OTHERS.....PETITIONERS

VERSUS

MATAYO TIRINO (AREA CHIEF) & 20 OTHERS.....RESPONDENTS

RULING

(On grant of a Temporary Injunction)

THE APPLICATION

1. The Applicants herein filed a Petition together with a Notice of Motion. Both were dated **02/09/2021**. The title of the Petition indicated as it is, that is to say, that it was brought under **Articles 22, 40, 63, (1), 2 (d) (i), (ii), 61 (1)** and **Section 2, 12, 14 (1) (2), 30 and 46 (sic)**. From the title it is clear the Petitioners neither specified whether the Petition was brought pursuant to the Provisions of the Constitution of Kenya or other international instrument nor did they indicate which specific law whose sections they sought to rely on. However, for now, before me for determination is the Notice of Motion. In it, the Petitioners jointly sought orders inter alia:

3. ... spent

4. That Pending the hearing and determination of this this Honourable Court be pleased to issue a temporary injunction against the Respondents, under them from entering into MARICH CHESANGATAT/KOKWOSITOT IRRIGATION SCHEME and carry any further subdivision of the land therein, and or from taking vacant possession of the land unlawfully sub-divided amongst the first to nineteenth Respondents and/or from ploughing, planting, cultivating and/or issuing overhead sprinklers to the respondents and or their agents and from carrying any activity on the suit land.

5. THAT an order restraining the twentieth Respondent from further allocating land to the first -nineteenth respondents and their agents and all those claiming under them pending the hearing and determination of this application interpartes and this petition and the costs of the application

2. At the outset I point out that the prayers in the Application did not contain prayers numbered as **1** and **2**. Therefore, it was not an error by the Court that the numbering commenced at **3** and that should not be a cause for alarm that this Court did not point out whether or not prayers **1** and **2** had been spent or not. An error which causes inconsistency such as this and the ones pointed out in the introductory paragraph arises from either poor drafting or inadvertency. However, for purposes of the determination of the instant Application that will not go into its merits or otherwise. This is a technicality that the Court, in the interest of justice, was willing to gloss over by virtue of **Article 159(2) (d)** of the **2010** Constitution of Kenya.

3. The grounds on which the Application was premised were that: the suit land comprising approximately **3000 acres** has been a Traditional Irrigation Scheme for the local inhabitants for many years. The **first to nineteenth** Respondents and people claiming under them who hailed from other villages away from Marich Chesangata Irrigation Scheme invaded it. The Respondents had never occupied or utilized the land in the Scheme. The Petitioners invited the **twentieth** Respondent to modernize the Scheme to enhance food security for the local villagers. Upon the **twentieth** Respondent completing the first **300 acres** on the **31/7/2021**, the **first to nineteenth** Respondents, their agents/servants and villagers forcefully and unlawfully entered the land and subdivided part of it and issued numbers amongst themselves in the presence of the **twentieth** Respondent's Project Manager. A fight between the intruders and the indigenous ensued. Finally, the Respondents had threatened to go back and carry out more sub-divisions and the Petitioners were apprehensive of a likelihood of bloodshed if the encroachment continued and the Respondents were not restrained from the unlawful sub-divisions.

4. The Application was supported by the Affidavit sworn by **Joakim Kriwei Alemusia** on **02/09/2021**. In it, he claimed to be a resident of Marich Community and one of the members of Wei-Wei Land Owners C.B.O. (herein referred to as the CBO). He reiterated the contents of the grounds of the Application. He swore further that the Respondents had their own irrigation scheme known as Wei-Wei Hydro Irrigation Scheme which benefited them their villagers exclusively and not the people of Marich. In addition, he stated that the actions of the Respondents contravened the provisions of both the Constitution and Community Land Act.

THE RESPONSE

5. The Application was opposed strongly. The Respondents filed their Replying Affidavit in opposition. The **first to nineteenth** swore their Affidavit through the **third** Respondent on **13/10/2021** and filed it the same date. The **twentieth** and **twenty first** swore theirs on **18/10/2021** through one, Engineer Edwin K. Keitany and filed it on **19/10/2021** and another on behalf of the **first** and **twenty first** Respondents sworn through the **first** Respondent who was the Area Chief of Wei Wei Location. It was sworn on **18/10/2021** and filed on **19/10/2021**. The responses are summarized under the following heads:-

a. First - Nineteenth Respondents' Response

6. The **third** Respondent, one **Ngurasia Kortany Katalai**, after obtaining and filing authority to plead, swore on his own behalf and that of the **first to nineteenth** Respondents an Affidavit on the **18/10/2021**. It was filed on **19/10/2021**. Their response was that in **1986** the Government of Kenya through the **twentieth** Respondent initiated the irrigation project. Its water source was River Wei-Wei. The Project was aimed at assisting the locals to have food security. The project commenced between **1986** and **1988** and conducted in phases in which the first phase covered **20** households whose parcels of land comprised of **2½** acres each. In **1993**, it commenced the **2nd** phase which benefited **205** households whose parcels of land was **2 ½ acres** each. In **2016**, it commenced the **third** phase which was to benefit **345** households at **345** hectares each. He stated that the project is incomplete.

7. He stated further that in **2014** upon the **twentieth** Respondent being requested by the residents, it agreed to fund the **Second** project known as **Chesangat/ Marich Irrigation Scheme** whose water source would be River Muruny. The project commenced in **2014** in three phases which were complete and cultivation had begun. He deponed that for easy management of the water system the residents registered the project or a Self-Help Group known as Marich Water Users Group (herein referred to as the Self-Help Group). New officials who were the **third to nineteenth** Respondents were elected.

8. He stated further that the **first** Petitioner vied for the Chairmanship of the Self-Help Group but lost. After that he together with the **Second** to **thirteenth** Petitioners protested the results and lodged a complaint before the County Commissioner's office. The Commissioner nullified the results and ordered a fresh election to be conducted. He deponed further that the repeat elections were conducted on the **13/5/2021** under the supervision of the Assistant County Commissioner of Sigor Division. That was in the presence of the local administration which consisted of the **First** and **Second** Respondents. The First Petitioner once again lost the election while the **third to nineteenth** Respondents were elected.

9. His further deposition was that thereafter the Petitioners formed CBO but the Respondents objected to its formation. The Self-Help Group wrote a letter dated **19/10/2021** to the Sub-County Commissioner of Pokot protesting the formation of the amorphous group as their representatives. He annexed a copy of the letter and marked it **NKK 3**. He stated further on oath that the CBO was formed for a different purpose as noted in its meeting of **19/10/2021** but not to manage Chesangat Marich Irrigation Scheme. He attached to his Affidavit and marked as **NKK 4** a copy of the Minutes of the meeting.

10. His further contention was that the again on **19/10/2021** the County Commissioner called for a meeting at his grounds between the members of the CBO and the Self-Help Group. In the meeting it was agreed that the Self-Help Group proceeds with the irrigation project with the **twentieth** Respondent still supporting it while the CBO empowers people but changes its name. He stated further that on **30/07/2021** the Self-Help Group allocated irrigation to **150** households the portion of the land measuring **300 acres** which was ready for use. The allocation was done in presence of the Contractor and a representative of the National Irrigation Authority (**NIA**). The **150** households included the **first to nineteenth** respondents and that the distribution was done equitably without any discrimination.

11. In addition, the deponent averred that the project was established to benefit the residents of Korellach-Sangatat Group Ranches. He then deponed that the **first Petitioner** was from Chepareria 30 kilometers from the ranches while the **2nd** and **6th** hailed from Baringo and the **3rd, 4th, 5th, 7th, 8th, 10th-13th** from Mosol and the **9th** from Cheptulel and they were all not beneficiaries of the land situate within Korrellach-Sangat Group Ranches. He then denied the allegation that the Respondents were from other places than the area in dispute.

12. In further response, he stated that the project was in its advanced stages as the allocation of the portions of land to the beneficiaries was completed and cultivation ongoing. He swore that it would be greatly detrimental to bar the project which was in its final stage and prejudicial to the beneficiaries who largely depend on it. He reiterated that the project was among the Big Four Agenda (of Kenya) aimed at improving food security hence stopping it would cause great loss to the Respondents and other beneficiaries. He prayed for the dismissal of the Application as it had been instituted by malice and with the intention of depriving the residents of Korellach-Sangat of the benefits of the project.

b. The Twentieth and Twenty First Respondents' Response

13. On their part, the **twentieth** and **twenty first** Respondents opposed the Application through a Replying Affidavit sworn on **18/10/2021** by Engineer **Edwin K. Keitany**. He stated that he worked with the **NIA** as an Assistant Engineer in charge of Western Region and West Pokot County. His deposition was that the **NIA** was established under the Irrigation Act, **No. 14** of **2019** as the successor to the **NIB**. He deponed that the Application was frivolous, mischievous and devoid of merit as it raised no violated or threatened constitutional violations. According to him, the Chesangat Marich Irrigation Scheme was managed by the **NIA** following the successful application for technical and financial assistance in **2013**. He annexed and marked as **EKK1** a letter dated **07/02/2013** written to the **NIB** by Joseph K. Kamara, Pkopus Ngrokwang and Joakim Alemusia on behalf the residents.

14. His deposition was that pursuant to the then existing regulations, the **NIB** advised farmers to form an Association through which assistance could be channeled to them. Those from Marich area registered one known as Marich Water Users Group. They forwarded their certificate of registration to the **NIB**. He annexed it to the Affidavit and marked it as **EKK 2**.

15. He stated that that the project was initiated in **2013** and was to run to **2019**. It was to develop **1100 acres** of land by putting it under sprinkler irrigation. It comprised of three phases now complete. He stated further that as at that date the project had been managed by two Farmers' Management Committees. The First Committee oversaw the **first** and **2nd** phases (LOTS) while the second Committee elected by farmers at the beginning of the **third** phase was overseeing the implementation of **third** LOT which was ongoing. He swore further that the project was aimed at benefiting the residents of Wei-Wei location where the project was located.

16. His response in regard to the allocation of the portions to the **150** beneficiaries in the **third** phase was that the selection was done from among **525** farmers and the rest were to benefit later. He stated further that it was not true as asserted by the Petitioner that the **twentieth** Respondent's supervisor was the one who undertook the subdivision. He then denied the allegation by the Petitioners that the **twentieth** Respondent had been dealing with the Petitioner CBO. He stated that instead the **NIB** and **NIA** respectively had been dealing with Marich (Kokwositot) Irrigation Scheme which applied for technical assistance and later changed its name to Marich Water Users Group. He deponed that the National Environmental Management Authority (**NEMA**) had approved the Environmental Impact Assessment (EIA) Licence in favour of the Marich Water Users Group. He annexed and marked as **EKK 8** a copy of the EIA licence. He deponed further that the **twentieth** Respondent was being dragged into leadership wrangles that were apparent in the circumstances obtaining. He prayed for the court to allow it complete the project.

17. Furthermore, he deponed that the Petitioners abused the court process even after they chased the Contractor off the land and threatened to torch its motor vehicles. He stated that the Contractor had reported the incident to Sigor Police Station vide an Occurrence Book (OB) Number **5/8/10/2021**. He then stated that the land was community land set aside some years back and not private property as Petitioners alleged. He denied the petitioners having demonstrated a prima facie case with any probability of success and repeated that they were not even members of Wei- Wei Location. In further response, he stated that as a matter of public interest, the Contractor ought to have been allowed to proceed to complete the project. Lastly, he deponed that grant of conservatory orders (*emphasis mine*) would delay of the project lead to loss of public funds as it would lead to a breach of contract between the **twentieth** Respondent and the Contractor.

c. A Supplementary Replying Affidavit

18. After the Respondents filed their responses, they also filed a Supplementary Affidavit sworn by one, Joseph Krop Kamara, on **22/10/2021** and filed the same date. In it, he reiterated many of the facts contained in the Replying Affidavit of Ngurisiwa Kortanyi Katalai. He deponed further that prior to **2013** the residents of Wei Wei Location used to farm using furrow irrigation. But in **2013** they decided to request for assistance from the **NIB**. He stated that the residents chose officials who sent a request to the **NIB** in Nairobi through one of its local officials, one Engineer Edward K. Keitany. He then deponed that he, as the Secretary of the residents, wrote the letter, and he annexed a copy thereof marked it as **JKK1**. The letter was **7/02/2013** and bore the signatures of one Joseph K. Kamara on behalf of Marich (Kokwositot) Irrigation Scheme and witnessed by Pkopus Ngrokwang and Joakim Alemusia. From its contents it was addressed to the General Manager NIB through the District Irrigation Office, West Pokot District. He then reiterated how the residents were awarded the project as Marich Chesangat Irrigation Project which began in **2014** as Marich (Kokwositot) Irrigation Scheme and later the farmers registered the Marich Water Users Group. Further, he stated that the First and Second phases of the project went on well and the leadership changed by way of elections during the Third phase. The new officials were the **Third** Respondent as Chairperson, the **Fifth** as Secretary and Dickson P. Samwel as Vice Chairperson and the **third** to **nineteenth** Respondents as representatives of the villages of the Scheme.

d. The first and twenty first Respondents' Response

19. The **first** and **twenty first** Respondents filed their response to the Application. In the Replying Affidavit sworn on **18/10/2021** by one, **Matayo Tirono**, the Area Chief of Wei-Wei Location, he deponed that he was conversant with the project. He agreed with the depositions in

the **Replying Affidavit** sworn by Engineer Edwin K. Keitany on **18/10/2021** (summarized above) and he adopted the depositions. He added that that the Petitioners were not residents of Wei-Wei Location and for that reason they swore falsely that they were being deprived of their rights to the property. He listed the ancestries of the Petitioners and the locations they hailed from and those of the Respondents and their locations. He then contrasted the facts as deponed by the Petitioners with those by the Respondents and compared their residences in the area or Irrigation Scheme in dispute.

He stated that it was the Respondents who were members of Wei Wei Location and not the Petitioners. He beseeched the Court to decline the Application.

Applicants' Responses

20. The Applicants made various responses to the depositions by the Respondents. These are summarized as below:-

a. Supplementary Affidavit in response to the Third-Nineteenth Respondent's Replying affidavit

21. In a rejoinder to the Affidavits filed in response to the Application, the Petitioners raised a number of issues. This was done by a Supplementary Affidavit sworn by **Joakim Kriwei Alemusia**. In reply to the **third-nineteenth** Respondents' replying affidavit, the deponent stated that that Korrellach Location had two sub-locations of which each sublocation was to be constituted to a Group Ranch. The villagers of Wei-Wei Location had their own irrigation scheme known as Wei-Wei Hydro Irrigation Scheme which did not benefit the Petitioners. His contention was that the waters of River Murung used to irrigate the furrows within Marich Community, Kokwositot which is now the Marich Chesangat Irrigation Scheme and that was where the Petitioners hailed from. He too referred once again to the letter written by the three of them on behalf of March Kokwositot Irrigation Scheme. He also agreed with the Respondents that the Marich Chesangat Irrigation Scheme started in **2014**. But he differed with them on the fact that the Respondents were residents of the local area. He denied the meetings alluded to by the Respondents whose minutes were attached to their Affidavits. He then deponed that the Contractor's rights should not override the constitutional rights of the locals of Marich. He swore that the Respondents had misled the Court. Finally, he stated that none of the petitioners participated in the elections alluded to and they are not aware of any of the resolutions made therein as they were not parties to any of them. He deponed that if the allocations proceeded as they were the Petitioners risked losing their ancestral land.

b. Further Affidavit in response to the Twentieth & Twenty First Respondent's Replying Affidavit

22. On **26/10/2021**, the **first** Petitioner again swore an Affidavit in response to the **twentieth** and **twenty first** Respondents' Replying Affidavit. To him, it was the Petitioners who applied for the project to be modernized and upgraded from Marich/Kokwositot Irrigation Scheme by financing by the **twentieth** Respondent and not the Self-Help Group He argued that the Self-Help Group came into existence in **2020**. He then stated that the oral testimony by Assistant Engineer Edwin Keitany, confirmed that the Applicants for the project were Joseph Kamara, Joakim Alemusha and Pkopus Ngrokwang on behalf of Marich Kokwositot Irrigation Scheme which was within the local area where the Applicants resided.

23. He stated further that the three persons who applied for the funding in **2013** were not reading from the same script as the **first** to **nineteenth** Respondents. He deponed that the Respondents came into the project with their members and allocated portions of the disputed parcels of land to themselves and the agents to the detriment of the Petitioners. He denied the existence of Marich Water Users Group. He averred that there was a lot of corruption involved in the process of allocating plots to non-residents and investigations should have been conducted to assist poor farmers realize their rights. At paragraphs **14** and **15** of the Affidavit, he deponed that the Self-Help Group were the same Management Committee of Wei-Wei-Hydro Irrigation Board. Although he referred to a copy of the list of the Hydro Irrigation Scheme as Annexure **JKA 2**, he did not annex it to the Affidavit. Similarly, at paragraph **15** he referred to as **JKA 3** another list which he stated would show that the same people whose names were contained in the Wei-Wei Scheme had also been allocated plots in the Marich Scheme. But he did not again attach the list to the Affidavit. Lastly, he refuted the oral evidence of the Assistance Engineer, terming it as falsehood.

24. While responding to the **twentieth** and **twenty first** Respondents' Replying Affidavit the Applicants also responded to depositions by the **first** and **twenty first** Respondents' Replying Affidavit. In regard to that, the **first** Petitioner deponed that it was not true as stated by Mathayo Tirono that the entire Wei-Wei Location members applied to the **NIB**. He swore that there was no public participation for the selection of the beneficiaries of the project because it was the Assistant Manager and the Area Chief together with the local administration who picked beneficiaries of the project. Those allocated the **2 ½ acres** each from the project were not members of the six villages in which the irrigation scheme was situate. He deponed that the Marich Water Users had hijacked the process through the **first** and **2nd** Respondents. He then stated that there was a conspiracy between the manager, contractor and the Respondents to lock out poor farmers who were the rightful beneficiaries of the project. At paragraph **9** of the Affidavit he stated that the people named as the **third** to **nineteenth** Respondents chosen as the Management Committee did not hail from the locality of the six villages surrounding the Scheme but several Kilometres away. He brought an argumentative **paragraph, 14**, which was to the effect that if the deposition by the Chief was true he did not explain why the other Scheme, namely, Wei-Wei Hydro Irrigation Scheme did not benefit the entire Location.

25. The deponent asked the Court to visit the area to confirm that the Respondents do not hail from near the scheme. He stated that the Minutes whose copies were presented to Court by the Respondents as evidence of elections of the officials were their creation to paint a picture that the issue before Court was leadership wrangles because the Petitioners were never invited to any election. He refuted the evidence of Engineer E. K. Kaitany that the contractor had not handed over the project because people had already been given sprinklers. He asked the Court to uphold the Constitutional rights of the people of Korrellach Sublocation over and above those of the Contractor and Government. He stated that unless the orders sought were granted the locals would lose their ancestral land.

c. Further affidavit to the Supplementary Affidavit by Joseph Kamara

26. In response to the Supplementary Affidavit by Joseph K. Kamara, the **first** Petitioner swore a Further Affidavit on **26/10/2021**. His response was that the letter dated **7/02/2013** related to Marich Kokwositot Irrigation Scheme and not the Self-Help Group. He asserted that it was his opinion to seek support from the **twentieth** Respondent and the said Joseph Kamara was not a member of the Respondents and was only being used to manipulate the truth at the expense of illiterate locals of Marich. He then stated that the Supplementary Affidavit was full of falsehoods and meant to mislead the court regarding the actual position about the project. He stated further that Mr. Kamara failed to explain why his (Petitioner's) name and that of Pkopus Ngrokwang appeared letter if they not been together when it was written. He contended that Marich Water Users could not hold more than **50** people and never applied to be financed by the **NIA** as alleged by the Project Assistant Manager. He deponed further that Mr. Kamara had never been a member of the Respondent hence was not supposed to depone to facts he was not conversant with.

ORAL EVIDENCE

27. With the myriad of accusations and counter-accusations by way of numerous Affidavits, the court deemed it necessary to call the Project Engineer to shed light on the facts on the ground, particularly in regard to who the **NIB** as it then was had dealt with when it decided to fund the project and whom it (as **NIA**) dealt with as at the time the dispute in Court arose. One Engineer Edwin K. Keitany, the Assistant Project Engineer attended Court on behalf of and with the authority of the Project Engineer. He did so on **19/10/2021**. In summary he reiterated the facts deponed in his Affidavit and confirmed that it was the Respondents – Marich Water Users Group – who were being funded by **NIA**. He stated that at no time had the **NIA** dealt with the CBO. He stated that the Project was funded by the **National Irrigation Expanded Programme** which received funds from the **NIA**. He further clarified that by the time of the dispute the Contractor was in the process of finalizing the work in preparation for handing the project to the **NIA** which would then hand it over to the identified farmers.

SUBMISSIONS

28. Parties were directed to dispose the application by ay of written submissions which they have filed.

ANALYSIS, ISSUES, DETERMINATION

29. I have carefully considered the application, the affidavits both in support and in opposition to the Application, the oral evidence adduced, the case law and statutes cited together with rival submissions by the parties. I formulate two issues for determination herein:-

a. Whether the Applicants have met the requirements for the grant of an injunction

b. What orders to issue and who to bear the costs of the Application?

30. I start by analyzing the first issue which is whether the Applicants have met the requirements for the grant of an injunction. Although the **1st, 20th** and **21st** Respondents submitted on whether or not the Applicants had satisfied the requirements for the grant of conservatory orders, the correct position was that the Application sought orders of injunction against the Respondents. That being so, they should have submitted in relation to the grant of an injunction. Whereas to a person who is not keen injunctions and conservatory orders may mean one and the same thing, the do not. There is a whole world of difference between the two and this Court will not spend time to distinguish them. But for guidance this Court refers to the Supreme Court of Kenya case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others** where it was stated:-

[85] These are issues to be resolved on the basis of recognizable concept. The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of stay, conservatory orders and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of “stay orders” is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light.

[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. (Emphasis added).

31. That said, the Application before me was brought under **Order 40 Rule 1(a), 2, 3 and 4** and **Order 51 Rules 1** of the **Civil Procedure Rules** and **Sections 3, 3A, 1A, 1B** and **63(e)** of the **Civil Procedure Act**. This Court has held in other past decisions that where there exist express provisions over a certain issue or procedure, there is no need for a party to cite other provisions of the law. Such citation is irrelevant and redundant. It is this Court's respectful view that in the instant case it was sufficient for the Applicants to cite the Rules under which the Application was brought. The sections of the **Act** which they cited were, at best, not relevant. A Court is always obviously alive to them. Nevertheless, even if this Court noted as it did about their citation that did not prejudice the analysis of the merits of the Applicants' prayers in the instant Application.

32. I will summarize the relevance or otherwise of the Rules cited in invoking the powers of the Court. **Order 40 Rule 1** of the **Civil Procedure Rules** deals with cases where an injunction may be granted hence it is relevant. **Rule 2** deals with grant of an injunction in cases of breach of a contract or other injury. In my view that is irrelevant in terms of the facts of the instant Application. **Rule 3** deals with consequences of breach or disobedience of an order of injunction while **4** provides for the notice of the Application for injunction hence both are relevant. **Order 51 Rule 1** relates to the form of the Application hence it too is relevant. As I stated in the previous paragraph, the rest of the provisions cited have their place in other circumstances other than where the Court is moved for orders of injunction hence I will not delve into their relevance or otherwise. Having gone through the provisions I now proceed to discuss the first issue.

33. The principles for the grant of an injunction are now well settled. The starting point always tracing and outlining the principles which a party should establish by presenting facts thereon. These were stated in the seminal case of **Giella v Cassman Brown and Another (1973) EA 358**. In the case, the Court held that for an injunction to be granted, there has to be established that:-

1. The applicant has a prima facie case with high probability of success
2. That the applicant cannot be adequately compensated by an award of damages and
3. In case the court is in doubt, the matter be decided on a balance of convenience.

34. I indicated that these principles have been stated over and over in cases where orders of such a nature are prayed for. See, **Stek Cosmetics Limited v Family Bank Limited & another [2020] eKLR**. I start with the first principle on whether or not the applicants demonstrated that they have a *prima facie* case with high probability of success. A prima facie case in civil cases was defined by the Court of Appeal sitting in Mombasa in the case of **MRAO LTD V FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS CIVIL APPEAL NO 39 OF 2002**. It stated thus:-

“... in civil cases it is a case in 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”.

34. This then was the question that this Court set to inquire into, that is to say, whether the Applicants placed before me material that, as I directed my mind to it, would make me call for an explanation or rebuttal by the Respondents that they had infringed a right due to the Applicants. Right from the inception, the Applicants contended that the Respondents did not Apply for the funding from the **NIB** which, in **2019**, became the **NIA**. The basis of their argument was that the Self-Help Group came into existence in the year **2020**. They contended that by **2013** it was them (Petitioners who constituted the CBO) who applied for the funding and therefore that the **third** to **nineteenth** Respondents hijacked the Project, with the help of the **first** and **2nd** Respondents.

36. There is no doubt that the land in dispute is situate in Wei-Wei area of Korrellach Sub-location of Wei-Wei Location of Pokot Central Sub-County. It is known as Marich Chesangat/Kokwositot Irrigation Scheme. There is no issue also as to whether or not the land had been under irrigation over the years, starting with furrow irrigation methods and that in **2013** an Application was made to the defunct **NIB** whose mandate was taken over by the **NIA** to fund the project. It is also common ground that the letter which gave rise to the financing of the Project was written on behalf of **Marich (Kokwositot) Irrigation Scheme** on **7th February, 2013** by one Joseph K. Kamara as the Secretary, and witnessed by two persons, Pkopus Ngrokwang and Joakim Alemusia. The copy of the letter was annexed and marked as **JKA 2** to the Affidavit sworn by the **first** Petitioner on **2nd September, 2021** and **EKK 1** to the Affidavit of Eng. Edward K. Keitany sworn on **18/10/2021** and **JKK 1** to the Affidavit sworn by Joseph Krop Kamara on **22/10/2021**. From the facts as deponed by most if not all the deponents of the Affidavits filed for and in opposition to the Application dated **2/09/2021**, the project was to be conducted in three phases and that as at **2021** the third phase was at an advanced stage.

37. On the one hand, the Applicants asserted that they belonged to the CBO. To evidence their existence they attached and marked as Annexure **JKA 1** the copy of the Certificate of registration of the CBO to the Affidavit of Joakim Alemusia sworn on **2/09/2021**. On its face it showed that it was issued on **07/09/2020**. That was the date indicated on the Certificate the CBO was registered with the Ministry of Labour and Social Protection. On the other hand, the **third** to **nineteenth** Respondents claimed that they were members and officials of the Self-Help Group which too was registered with the Ministry of East Africa Community, Labour and Social Protection. According to their Certificate, the Self-Help Group was registered on **16/03/2020**.

38. Both the **third** Respondent and Engineers Edward K. Keitany swore Affidavits which explained how the residents of the Marich area of Korrellach Sub-location came together in **2013** and made a request to the **NIB** to have their irrigation farms funded into modernization. They then explained that a letter, dated **07/02/2013** was written by the said residents and forwarded to the **NIB** for consideration. This was the same letter whose copy I indicated in the previous paragraph as having been commonly referred to by the deponents of the three Affidavits mentioned. The address of the letter clearly shows that it was written on behalf Marich (Kokwositot) Irrigation Scheme.

39. It is clear also from the face of the that the author of the letter, one **Joseph K. Kamara**, who later deponed an Affidavit on behalf of the Respondents in opposition to the instant Application wrote the letter for and on behalf of the Marich (Kokwositot) Irrigation Scheme in his capacity as its Secretary. It also shows that the **first** and **sixth** Petitioners only witnessed to the signing and delivery of the letter by the said Joseph Kamara on behalf of the residents of the Scheme. The letter did not state anywhere that they were officials of the Scheme. That notwithstanding, both the **third** Respondent and Edward K. Keitany deponed also in detail how the letter was approved by the **NIB** and the project commenced, and later the residents were advised by the National Irrigation Scheme to change their name, and that even after they changed the name to the Self-Help Group, it was the self-Help Group that the **NIA** had been dealing with all along. They also deponed to the fact of how the residents of the Scheme held elections wherein the **first** Petitioner vied for Chairmanship and lost and he together with others petitioned the County Commissioner who nullified the results and ordered for a repeat election on **13/05/2021** and still they lost. They then stated that it was as a result of the loss that the Petitioners decided to antagonize the project.

40. Although the Petitioners deny knowledge of the elections which were alluded to by both the **third** Respondent and Eng. Edward K. Keitany, I find that there were Minutes annexed as **NKK 2** to the Affidavit of Nguriasiwa K. Katalai on **13/10/2021**. Moreover, it is telling that none of the other Petitioners ever swore an Affidavit to support or deny the depositions by the various deponents, especially the fact of them hailing from specific ancestries and locations and having contested elections and lost. In addition, the **first** Applicant in his own Further Affidavit sworn on **26th October, 2021** in Response to the first and **twenty first** Respondents' Replying Affidavit stated at paragraphs **9** follows, "the people who have been chosen as the Management Committee (**third-nineteenth** Respondents) are not residents of the surrounding Irrigation Scheme but have come from several Kilometres away" (*emphasis by underline*). The questions that follow this deposition are: chosen to where and for what, by who and when? The simple and straight answers to these questions are that the Applicants know well that there was and is a Management Committee of the residents of the former Marich (Kokwositot) Irrigation Scheme which is now the Self-Help Group. It was this Committee that had been "chosen" as alluded to by the Respondents' Affidavits, and further that the Applicants' complaints as brought out by the paragraph were that those "chosen" come from far and they were left out. As to whether that is a fact, it can only be brought out by way of evidence in the main Petition. Again, the Applicants deponed that they were not invited to the elections, I suppose, of the Management Committee. It appears to me that their complaint is that had they been invited, which is a question of fact for determination in another forum, they would have had no complaint with the officials appointed. With due respect the Applicants should not be permitted to approbate and reprobate.

41. Lastly, although the first Petitioner argued vehemently that it was the CBO that wrote the letter dated **7/02/2021** and he discounted the fact that it was done on behalf of the Self-Help Group because it was registered in **2020**, he does not explain how the CBO which too was registered on the same year, **2020** could have written the request. He did not establish the nexus between the CBO and Marich (Kokwositot) Irrigation Scheme. In any event, even by the chronology of registration of the two as I gave above, the self-help Group was registered earlier than the CBO. That of itself does not mean that that is the fact that led this Court to make a finding that the Self-Help Group wrote the letter and was the one that the **NIA** has been dealing with all along.

42. The chronology of the events from **2013** to date about the residents of Marich coming together to modernize their farming and also the change of their name from Marich (Kokwositot) Irrigation Scheme to Marich Water Users Group was explained satisfactorily and clearly by the deponents of the Affidavits I have referred to above. Therefore, there is no right the CBO can claim which it had on the land in issue which was infringed or threatened by the Respondents which this Court can call on the Respondents to answer for or explain. For these reasons, I find that the Applicants have not established a *prima facie* case as required by law.

43. On the satisfaction of the requirement as to whether or not the Applicants cannot be adequately compensated by an award of damages, it is this Court's view that the Applicants did not establish the loss they would suffer which would call the Court to consider whether or not they cannot be compensated by damages. On one hand, their contention was that they were residents of the area where the irrigation scheme was situate and which was about to be subdivided and allocated to non-residents. But their very own deposition was that the **150** portions had actually been allocated to the people who the Respondents in consultation with the **20th** Respondent identified. They also stated that the allottees had been even issued with sprinklers. On the other hand, the Area Chief of the Location, one Matayo Tirono, deponed clearly that all the Petitioners did not hail from the area. He also listed places each of them hailed from. At the same time, it was not deponed anywhere by the Petitioners that they had been using the portions of land before but have now been displaced. All that the **First** Petitioner alleged was that the residents of the area who were the Petitioners risked losing their ancestral land. The **twentieth** Respondent, on the other hand, indicated that the land in issue is Community Land and the Petitioners had no specific proprietary interest thereon. None of the petitioners annexed any evidence to their affidavits to show that any of the portions they laid claim onto fell on any one of them as their specific property through ownership by way of lease or absolute ownership. All these facts leave the Court with one conclusion: that the Applicants would and will not suffer loss that cannot be compensated by way of damages.

44. In regard to what Court should do if in doubt, the *Giella v Cassman* case give guidance that the Court has to decide the matter on a balance of convenience. What is the balance of convenience in the circumstances of this case? It was common ground that the people of Marich area agreed in **2013** and applied for modernization of their irrigation farming. They applied for funding which began in **2014**. The project was in three phases. The first two have since been completed and handed over. No one complained all along, from 2013, about how they were handled. It was the same **twentieth** Defendant who had been dealing with the issue in consultation with the Management Committees of the area residents which had been giving the beneficiaries he completed sections after the Contractor completed its work. This was same thing that was about to happen before the dispute herein arose.

45. The Contractor was on site. His contract was said to be timed and evidence has been given by way of affidavits and orally in Court that if the process is stopped by the Court, there would be a huge loss of public funds. At the same time, it was deponed by the Respondents that the project was designed to enhance food security and it would not be in public interest to stop it. For these reasons, the balance of convenience tilts in favour of the Respondents. It would not be in public interest to stop the project and cause loss of public funds. No one should do so, unless he or she obtains an order from a Court of competent jurisdiction. It was indicated by the **twentieth** and **twenty first** Respondents that the Petitioners together with their agents chased away the Contractor from the site and the matter was reported to the police vide OB. No. Number **5/8/10/2021**. By this ruling all are cautioned not to interfere with the project unless through lawful means and orders.

c. What orders to issue and who to bear the costs of the Application?

46. The upshot is that this court cannot issue the orders prayed for by the Applicants. Consequently, the Application dated **2/09/2021** lacks merit and is hereby dismissed with costs to the Respondents.

47. For management of the case, this Suit shall be mentioned on **2/02/2022** for further directions. Meanwhile the Parties are directed to file and exchange paginated trial bundles before then.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 19TH DAY OF JANUARY, 2022

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE