



**REPUBLIC OF KENYA**

**IN THE ENVIROMENT AND LAND COURT**

**AT MAKUENI**

**CONSTITUTIONAL ELC PETITION CASE NO E004 OF 2021**

**IN THE MATTER OF ARTICLE 63 AND 67(E)OF THE CONSTITUTION OF KENYA RELATING TO HISTORICAL INJUSTICES OVER LAND PARCEL NO148 KIU.**

**AND**

**IN THE MATTER OF VIOLATION OF ARTICLE 43(1)(b)(c) AND (d) AND 28 OF THE CONSTITUTION RELATING TO FORCED EVICTION OF 2500MEMBERS OF AKAMBA TRIBE FROM THEIR LAND IN KIIMA KIUKALNONI IN MAKUENI COUNTY.**

**AND**

**IN THE MATTER OF ARTICLE 2(6), 19, 20, 21, 22, 23, 26, 29, 39, 40, 47 AND 48.**

**AND**

**IN THE MATTER OF ARTICLE 25OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR), ARTICLE 11 OF THE INTERNATIONAL CONVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR), ARTICLE 17 ON THE INTERNATIONAL CONVENAT ON POLITICAL AND CIVIL RIGHTS AND ARTICLE 18 OF THE AFRICAN CHATER ON HUMAN AND PEOPLES RIGHTS (ACHPS).**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS (PRACTICE AND PROCEDURE RULES 2013, RULES 3, 4, 9 AND 10).**

**BETWEEN**

**JOSEPH MUTUKU KALII, PETER KISOLO MWAVU AND PAULINE MWIKALI KAAZANO**

**(Suing as Chairman, Secretary and Treasurer of Mamukii Society) on behalf of 2500**

**SOCIETY MEMBERS SQUATTERS AND EVICTEES FROM MAKALA FARM L.R. NO 1748,**

**KIIMA KIU MAKUENI COUNTY..... PETITIONERS/APPLICANTS**

**VERSUS**

**NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT**

**CHIEF LAND REGISTRAR..... 2<sup>ND</sup> RESPONDENT**

**HON ATTORNEY GENERAL OF KENYA.....3<sup>RD</sup> RESPONDENT**

**MAKUENI COUNTY GOVERNMENT.....4<sup>TH</sup> RESPONDENT**

**STANLEY AND SONS LIMITED..... 5<sup>TH</sup> RESPONDENT**

## RULING

1. By a Notice of Motion dated 3<sup>rd</sup> May, 2021 brought under Article 22 and 23(3) of the Constitution of Kenya 2010 and Rule 2, 3 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, the Inherent Jurisdiction of the High Court and all other enabling provisions of the law) the Petitioners are seeking for the following orders: -

**i. Spent.**

**ii. That Conservatory or Interim Orders be urgently granted restraining and prohibiting the Respondents whether by themselves, their employees, servants or agents or any other person or body of persons acting by them or through them, restraining them from evicting the Applicants from the portion of land they occupy in LR 1748 Kiu otherwise known as (Stanley and Sons Ltd Farm) and from demolishing the Applicants structures and shelters or blocking their ingress in and out of their homes in LR No. 1748 Kiu otherwise known as (Stanely and Sons Ltd Farm) or interfering in any manner with their occupation of the portion they occupy in the aforesaid land pending the hearing and determination of this application inter partes.**

**iii. That Conservatory or Interim orders be granted restraining and prohibiting the Respondents whether by themselves, their employees, servants or agents or any person or body of persons acting by them or through them, restraining them from evicting the Applicants from the portion of land they occupy in L R NO 1748 Kiu otherwise known as (Stanley and Sons Ltd Farm) and from demolishing the Applicants structures and shelters or blocking their ingress in and out of their homes in L R NO 1748 Kiu otherwise known as (Stanley and Sons Ltd Farm) or interfering in any manner with their occupation of the portion of land they occupy in the aforesaid land pending the hearing and determination of the Petition herein.**

**iv. That an Order be issued against the 5<sup>th</sup> Respondent to be enforced by Makueni County Police Commander, the Officer Commanding Police Division(OCPD) Salama Police Station and the Officer Commanding Station(OCS) Salama Police Station restraining by a temporary injunction the 5<sup>th</sup> Respondent, its servants/agents or anybody acting through or by it, from selling, alienating, fencing, parting position with, or erecting any temporary or permanent structures, residential or otherwise, on the portion occupied by the Applicants in L R No. 1748 Kiu also known as Stanley and Sons Ltd Farm.**

**v. That the Petition herein be set down for herein and determination before a three Judge Bench on a priority basis.**

**vi. That the costs of this application be provided for.**

2. The application is premised on the grounds on the face of the application. A summary of these grounds are: -

**i. That the Applicants are entitled to their fundamental right of equality before the law and protection against discrimination as provided under Article 27 of the Constitution.**

**ii. That the Applicants are entitled to individual and collective rights under the African Union Charter on Peoples and Human Rights (Banjul Charter) which is applicable in Kenya under Article 2(5) and 6 and as enshrined under the United Nation Convention on Elimination of all forms of racial discrimination and united Nations Declarations on Rights on Indigenous Peoples. That their right to land situated at Kiima Kiu under the principle of Native Title and the Indigenous customary law was expropriated by the British Colonialist on 1<sup>st</sup> April 1947 and a grant made to Robin Woodcraft Stanley.**

**iii. That the Applicant's right to their land existing under the customary law was not extinguished by Kenya being declared a Colony or the enactment of the Crown Lands Ordinance of 1915 hence the title granted by the Governor of the Kenya colony on 1<sup>st</sup> of April 1947 was illegal null and void.**

**iv. That the Applicant is a registered Society that has registered officials and is comprised of 2500 members of Akamba community whose ancestors, grandparents and parents occupied the land situated at Kiima Kiu locally known as Makala farm or Stanley & Sons Ltd before colonialism.**

**v. That the Akamba community lived in five villages in the disputed land namely Yoani, Kiasesini, Mwia, Kavoiheyo and Ndaatai where they kept domestic animals and were sedentary farmers. That, the Applicants have suffered unimaginable atrocities and brutal attacks from the Colonial Government and Robin Woodcraft in the effort of expropriation of their land at Kiima Kiu.**

**vi. That as a result of the historical injustices, the Applicants had become extreme beggars and internally displaced persons living in shanties without sanitation, schools and adequate food between Konza and Sultan Hamud railway line. That the Applicants fear that their deprivation and poverty will be perpetuated to the future generations of their children.**

**vii. That in order to alienate their land further, Robin Woodcraft Stanley transferred the land to the 5<sup>th</sup> Respondent.**

**viii. That the Applicants deprivation and sufferings have been perpetuated by Robin Allan Stanley who habitually uses the Provincial Administration and police to attack thus subjecting them to inhumane treatment.**

**ix. That in April 2021, police officers in an effort to assist Robin Allan Stanley the proprietor of Stanley and Sons attacked and demolished their houses and structures leaving them destitute. That several members were arrested and charged before**

**the Kilungu Law Courts which amounts to a long series of human rights violations meted out to the Applicants so as to prevent them from agitating for their land.**

**x. That the forced evictions of the Applicants from their land contravenes the United Nations Basic Principles and Guidelines on evictions and displacements.**

3. The application is supported by the affidavit of Joseph Mutuku Kali, the Chairman of Mamukii Society sworn on the same day.

#### **THE PETITIONERS CASE**

4. The Applicant avers that its organization is a registered society comprised of 2500 members made up of parents, children and grandchildren of the Akamba community who lived on the land at Kiima Kiu Ngamba Location Mukaa Sub County from time immemorial. That the land was later renamed L.R. No. 1748 by the Colonial Government. The Applicant averred that their parents, grandparents and ancestors reared domestic animals and that in pursuance of their pastoral life, they planted a medicinal tree known as Kyatha which they used to treat their livestock. That they also cultivated crops and lived in five villages located at Yoani, Mambiti, Kwa Mwikiti, Katinge and Mwia long before colonization. He averred that the graves of their ancestors, grandparents, some parents and relatives were situated on the suit land.

5. He further averred that on 7<sup>th</sup> of April 1948, the Government of Kenya Colony made a grant of their community land, an area measuring 5048 acres, to Robin Woodcraft Stanley. That from 1928 to 1946, the entire community endured brutal and vicious acts from the Colonial Government and that to date, the members have continued to agitate for their land which had resulted in skirmishes.

6. He further averred that the colonial Government pushed the members of the community to the railway line between Konza and Sultan Hamud where they are still camped, and living an impoverished life. He stated that the Railway Authorities had since issued a notice asking them to leave.

7. He further averred that on 12<sup>th</sup> of April, 2021, a contingent of police officers in the company of the assistant chief and employees of the 5<sup>th</sup> Respondent, demolished their houses on the suit land and carried away the structures to an unknown place. He further averred that some of the officials and members of their organization were arrested and charged before the Kilungu law courts with the offence of forcible detainer and malicious damage to property.

8. He further averred that the society was aggrieved by the National Land Commission and the Makueni County Government for failing to address their complaint of historical injustice by the Colonial Government which had dispossessed them of their land and awarded it to Robin Woodcraft Stanley.

9. He further averred that he had approached Ben Kilonzi, Engineer Muema, Tangai and Alfred Kalunde who are members of the Makueni County Assembly and who come from their area to present a Petition on their grievances to the Makueni County Assembly and to the National Land Commission. That following the presentation of the Petition to the Makueni County Assembly, the Chairman of the Makueni County Land Commission in the company of members of his committee and two officials from the National Land Commission visited the Applicants at Kawala Primary School and listened to their complaint. The Applicants urged the court to grant the orders sought as they had established a prima facie case.

#### **THE 4<sup>TH</sup> RESPONDENT'S CASE**

10. The 4<sup>th</sup> Respondent opposed the application vide the replying affidavit of Alex Nthiwa, the Chief Legal Officer in charge of the Department of Lands and Urban Development Makueni County Government sworn on 30<sup>th</sup> of June, 2021 who averred that the 4<sup>th</sup> Respondent was aware of the dispute between the Petitioners and the 5<sup>th</sup> Respondent. He averred that the 1<sup>st</sup> and the 4<sup>th</sup> Respondent in the company of the Makueni County Commissioner held a public participation baraza where the Petitioners who had formed Kiamuki Society to follow up on the matter requested for the review of the grant issued to the 5<sup>th</sup> Respondent in respect to the suit property as it was obtained as a result of historical injustice.

11. He further averred that after the Petitioners raised the complaint as a Petition to the 1<sup>st</sup> Respondent and requested to know the size of the suit property, the 1<sup>st</sup> Respondent requested the 4<sup>th</sup> Respondent's department of land to visit the site and ascertain the acreage. He stated that the department of lands appointed three surveyors to carry out the survey, who in turn informed the 5<sup>th</sup> Respondent through a letter dated 12<sup>th</sup> of November 2018 (annexure MCG-03). He stated that the survey was not done as the 5<sup>th</sup> Respondent resisted the survey when the surveyors visited the site. He further averred that the 4<sup>th</sup> Respondent's department of land wrote a letter dated 12<sup>th</sup> November, 2018 (annexure MCG-04) to the 5<sup>th</sup> Respondent inviting it for a consultative meeting to be held on 6<sup>th</sup> of November 2018.

12. The 4<sup>th</sup> Respondent contends it has no authority over the suit property as it is not community land since it is registered in the name of the 5<sup>th</sup> Respondent.

13. He argued that the Petitioners had not provided any documents to prove that the suit property was registered in their name or to their community in accordance with the Community Land Act. He contends that upon the expiry of the lease, the renewal of the lease to the 5<sup>th</sup> Respondent should not be granted and that the suit land should revert to the 4<sup>th</sup> Respondent. He further contends the court should revoke an order restraining the 4<sup>th</sup> Respondent from conducting a search, beaconing the perimeter boundary of L.R.NO 1748 to establish its actual acreage.

## **THE 5<sup>TH</sup> RESPONDENTS CASE**

14. The 5<sup>th</sup> Respondent opposed the application vide the supporting affidavit of Robin Alan Stanley sworn on 17<sup>th</sup> of May 2021. The 5<sup>th</sup> Respondent averred that the Petitioner society was a fictitious entity that was not comprised of 2500 members as its members did not provide their letters of authority to commence this suit. He further averred that the Petitioners suit was an abuse of the court process as it offends the provisions of Section 6 of the Civil Procedure Act as there was a pending suit being Makueni ELC No. 8 of 2020 where the issues raised therein, were identical to the issues raised in the instant Petition.

15. The 5<sup>th</sup> Respondent contends that the Petitioners right to equality before the law and protection against discrimination should be considered in the context of the 5<sup>th</sup> Respondent right to own property under Article 40 of the Constitution. The 5<sup>th</sup> Respondent averred that it has absolute ownership and indefeasible title to the suit property.

16. The 5<sup>th</sup> Respondent argued that the suit property has never been available for alienation under the principles of Native Land or under Customary Law as alleged by the Petitioners. He further averred that there was no evidence to demonstrate that the Petitioners, their parents, grandparents or their ancestors had occupied/resided or at any moment had possession of any part of the suit land hence they cannot have any legitimate or proprietary rights over the suit property.

17. He argued that on a number of occasions, the Petitioners had attempted to invade the suit property but they were repulsed by the Provisional Administration in order to maintain law and order in the society and not to attack the Petitioners as alleged. He averred that sometime in April 2020 some of the Petitioners invaded the suit property but they were ejected by the Provisional Administration and the perpetrators of the invasion were charged at Kilungu in case No. 223 of 2021 and 225 of 2021. He argued that some of the accused persons had sought to halt the criminal proceedings in Makueni Judicial Review Case No. 2 of 2021.

18. He asserts that the Petitioners do not have and have never had any proprietary interest over the suit property.

## **SUBMISSIONS**

19. The application was canvassed by way of written submissions.

20. The Petitioners/Applicants through their written submissions filed on 22<sup>nd</sup> July 2021 and highlighted on 2<sup>nd</sup> of November 2021 and 25<sup>th</sup> of November 2021 submitted that the subject matter of the Petition was the title issued to Robin Woodcraft Stanley on 7<sup>th</sup> April, 1948. Mr. Njiru, Counsel for the Petitioners submitted that the Applicants claim for indigenous customary title was superior to the radical or original title that resulted from enactment of various legislations enacted by the British Government. Counsel submitted that the Crown Land Ordinance of 1915 and the Kenya Colony (Annexation) Order in Council of 1920 declaring Kenya a British Colony, did not extinguish the Applicants Customary title to the suit land. Counsel maintains that the 5<sup>th</sup> Respondent was holding the title to the suit property in trust for the Applicants.

21. Counsel further submitted that the Mamukii community, the ancestors of the Petitioners herein, possessed the suit land under a communal system of ownership where land belonged to the entire community and that no person held an individual title. Counsel stated that the Petitioners ancestors lived in five villages where they practised their culture and erected religious shrines known as Ithembo.

22. Counsel further submitted that in a bid to dispossess them of their land, the Mamukii community were forcefully and brutally driven out of the suit land by the colonial police and on the 7<sup>th</sup> of April, 1948, the Governor of the Colony of Kenya issued a title of their land to Robin Woodcraft Stanley without their consent or involving them. That even before the title was issued, the said Robin Woodcraft in the company of armed colonial policemen carried out a brutal attack on the community and evicted and dumped them along the railway line in the dead of the night where the victims are still camped to date, living in deplorable conditions and in abject poverty.

23. Counsel further submitted that, despite the brutality meted out on the community, the Petitioners kept going back to the suit land to attend to their ancestors' graves and to visit their shrines. Counsel further submitted that the Petitioners had registered the complaint with the National Land Commission but owing to a Conservatory Order issued in Petition No. 5 of 2018, the matter could not proceed.

24. On the principles governing the issuance of conservatory orders, Counsel placed reliance on the case of **Platinum Distillers Ltd Vs Kenya Revenue Authority High Court Petition No. 83 of 2019** where Justice Korir set out the guiding principles upon which Kenyan courts make findings on interlocutory applications for conservatory orders within the framework of Article 23 of the Constitution. Reliance was further placed on the case of **Centre for Rights, Education and Awareness (CREAW) & 7 Others Vs Attorney General Nairobi High Court Petition No. 16 of 2011 eKLR**.

25. Counsel submitted that the Applicants had met the threshold for the grant of conservatory orders as the Petition discloses serious constitutional issues relating to human dignity, equality of persons before the court and non-discrimination on grounds of race, gender or culture. Counsel contends that although the historical injustices took place over 80 years ago, the suit land was still being held by the family that perpetrated the serious crime while the victims were still camped at the Railway line trying to get back their land.

26. Counsel further submitted that, the Applicants were in occupation of the suit land as evidenced by the charges of forcible detainer preferred against some of the Applicants before the Kilungu Law courts.

27. Counsel argued that the Petition relates to a serious constitutional issue of historical injustices under Article 67 of the Constitution which is also reflected in the United Nations Declaration on the Rights of Indigenous People and the African Charter and People's Right and later addressed in the case of Mbo vs Queensland.

28. He submitted that the court has jurisdiction to hear matters relating to historical injustices as confirmed by the Court of **Appeal in Mombasa CA Civil Appeal No. 8 of 2019 Safepack Limited Vs Henry Wambega & Others** where the court quoted the earlier decision of **Chief Land Registrar & 4 Others Vs Nathan Tirop Koech & 4 Others**.

29. Counsel argued that the court should consider referring the Petition to the Chief Justice for purposes of appointing a three Judge Bench as the Petition raises an important question of law.

30. The 4<sup>th</sup>, Respondent through the written submissions filed on the 27<sup>th</sup> of July, 2021 and highlighted on 2<sup>nd</sup> of November 2021, submitted that the Petitioners had not met the threshold for grant of an injunction as laid down in the case of **Giella Vs Cassman Brown Co Ltd 1973 E.A. 358**. Counsel for the 4<sup>th</sup> Respondent submitted that the Applicants had not established a prima facie case as they did not have any documents to prove that the suit property was registered in their name or to their community nor documents to demonstrate that they were entitled to the suit property. Counsel argued that the Applicants had failed to demonstrate that they were in occupation of the suit property. That in contrast, the 5<sup>th</sup> Respondent had demonstrated that he was the registered owner and occupier of the suit property. The 4<sup>th</sup> Respondent relied on the case of **Mrao Ltd Vs First American Bank of Kenya Ltd & 2 Others (2003) eKLR** in support of its submissions.

31. Counsel further submitted that the Applicants had not demonstrated that damages would not be an adequate remedy in the event that the orders were not granted. He placed reliance on the case of **Nguruman Ltd Vs Jan Boden Nielsen & 2 Others (2014) eKLR**.

32. Counsel argued that if the orders sought by the Applicants were granted, the 5<sup>th</sup> Respondent who was in possession of the suit property would be affected as it would be forced to vacate the suit property.

33. The 5<sup>th</sup> Respondent through its written submissions filed on 3<sup>rd</sup> of July 2021 and highlighted on 2<sup>nd</sup> of November 2021 submitted that the Petitioners had not established a prima facie case with a probability of success. Counsel relied on the following cases to support his submissions: -

**a. Board of Management of Uuru Secondary School Vs City County Director of Education & 2 Others (2015) eKLR.**

**b. Platinum Distillers Limited Vs Kenya Revenue Authority (2019) eKLR.**

**c. Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 Others (2014) eKLR.**

34. Counsel further submitted that for a conservatory order to issue, the Applicant must demonstrate the prejudice it would suffer if the orders are not granted. That in the instant application, the Petitioners had not demonstrated the prejudice that they would suffer if the orders were not granted. Counsel relied on the case of **Centre for Rights Education and Awareness (CREAW) & 7 Others Vs Attorney General (2011) eKLR** to support his submissions on this point.

35. Counsel further submitted that the 5<sup>th</sup> Respondent was the registered owner of the suit property whose title was issued by the Government of Kenya under the repealed Registration of Titles Act which title is now deemed to have been issued under the Land Act. He further submitted that the Petitioners had no legitimate interest in the land and their ancestral claim for the land was vague as it was not supported by any documents.

36. Counsel further submitted that under Section 26(1) of the Land Registration Act which succeeded Section 23(1) of the Registration of Titles Act, the 5<sup>th</sup> Respondent's title was absolute and indefeasible as it had not been challenged on the grounds of fraud or misrepresentation or on having been acquired illegally, unprocedurally or through a corrupt scheme.

37. Counsel further argued that the Petitioners had not presented any evidence that they have a valid historical injustice claim or presented the particulars as to when, by whom and in what manner the Petitioners forefathers were dispossessed of the suit property. Counsel placed reliance in the Court of Appeal case of **Charlse Karathe & 2 Others Vs Administrators of the Estate of John Wallace Mathare (Deceased) & 5 Others (2013) eKLR** which was quoted with approval in its decision in **Dr Joseph Arap Ngok Vs Justice Moijo Ole Keiwua & 5 Others Civil Appeal No. 60 of 1997** to buttress his submissions.

38. The 5<sup>th</sup> Respondent contends that the Petitioners have not established a *prima facie* case.

39. The 5<sup>th</sup> Respondent argued that the Petitioners having failed to establish a *prima facie* case, they could not suffer irreparable harm that could not be compensated in damages should the application be declined. He further submitted that the Petitioners had not submitted that they had ever been in possession of the suit land nor had they demonstrated the harm that they would suffer if the orders are not granted. He argued that the 5<sup>th</sup> Respondent would suffer irreparable harm if the orders were granted as he carries out large scale farming on the suit land.

40. Counsel submitted that on the contention that the petitioners have a valid historical claim, there was no evidence presented to the effect that their forefathers were dispossessed of the suit property. To buttress its submissions counsel relied on the following cases: -

**a. Henry Wambega & 733 Others Vs Attorney General & 9 Others (2020) eKLR.**

**b. Federation of Women Lawyers (FIDA Kenya) & 4 Others Vs The Attorney General & 2 Others (2016) Eklr; Parkie Stephen Munkasia & Others Vs Kedana Ranch (2018) eKLR.**

**c. Charo Kazungu Mathere & 273 Others Vs Kencent Holdings Ltd & Another (2012) eKLR.**

41. On the issue of balance of convenience, Counsel submitted that the balance of convenience tilted in favour of the 5<sup>th</sup> Respondent as he had an absolute and indefeasible title and that he was in possession of the suit property. Counsel placed reliance on the case of **John Kipkemboi Lelei Vs Eluid Kones Kiprono (2012) eKLR** in support of his submissions.

42. On the issue as to whether a three judge bench should be appointed to hear and determine this Petition, Counsel submitted that the Petitioner had not laid any basis for the request nor had they sought for the same to be referred to the Chief Justice to constitute the bench. He submits that the court had no jurisdiction to constitute a bench of three judges to hear and determine the Petition.

43. I have carefully considered the Petitioners application, the affidavits and the rival submissions and I find that the issue for determination is whether the Applicants have made out a case that warrants the grant of conservatory orders.

#### **ANALYSIS AND DETERMINATION**

44. Article 23(3) of the Constitution empowers a court to grant appropriate reliefs in any proceedings brought under Article 22 where there has been violation or threat of a violation of a fundamental right or freedom. The relief may include a conservatory order.

45. The law on the issuance of conservatory orders is well settled. Conservatory orders were defined in the case of **Judicial Service Commission Vs Speaker of the National Assembly & Another (2013) eKLR** where the court held that;

**“Conservatory orders in my view are not ordinary civil remedies but are remedies provided for under the Constitution, the supreme law of the land. They are not remedies between one individuals 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.”**

46. The principles in regard to granting of interim conservatory orders were outlined by the Supreme court in the case of **Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 Others (2014) eKLR** where the court stated as follows;

**“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. 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.”**

47. In the case of **Wilson Kaberia Nkunja Vs Magistrates and Judges Vetting Board and Another Nairobi High Court Constitutional Petition No. 154 of 2016**, the court summarized the principles in granting conservatory orders as follows: -

**a. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the constitution.**

**b. Whether if a conservatory order is not granted, the petition alleging violation of or threat of violation of rights will be rendered nugatory.**

**c. The public interest must be considered before grant of a conservatory order.**

48. The first issue for determination is whether the Petitioners have established a *prima facie* case that warrants the grant of conservatory orders. It has been held in various decisions that a prima facie case is not a case which must succeed at the hearing of the main case but which discloses arguable issues in a case alleging violation of rights.

49. A prima facie case was defined in the case of **Kevin K Mwiti & Others Vs Kenya School of Law & Others (2015) eKLR** where the court stated;

**“.....A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, the Petitioner has to show that he or she has a case that discloses arguable constitutional issues.”**

50. The Petitioners case is premised upon a claim for land based on historical injustices under Article 67(2)(d) of the Constitution. With respect as to whether the Petitioners have established a prima facie case to warrant the grant of conservatory orders, the Petitioners contend that the land Parcel No. 1748 Kiu which is occupied and registered in the name of the 5<sup>th</sup> Respondent was originally and historically occupied by the Petitioners forefathers from time immemorial. The applicant annexed supporting a copy of the title deed to his supporting affidavit. The Petitioners further contend that their forefathers built shrines and that their relatives were buried on the suit land.

51. That upon Kenya being declared a British Protectorate, the Petitioners forefathers who lived on the suit land were forcefully evicted by the colonialist and pushed to live between the Konza and Sultan Hamud railway line in deplorable conditions. The Petitioners urged the court to grant it the orders sought, based on the prevailing principles available for the grant of conservatory orders.

52. The 4<sup>th</sup> and 5<sup>th</sup> Respondents are opposed to the granting of conservatory orders on the grounds that the Applicant has not met the test for granting of conservatory orders.

53. The 4<sup>th</sup> respondent contends that the Applicants has failed to established a *prima facie* case as the suit land is registered in the name of the 5<sup>th</sup> Respondent. The 4<sup>th</sup> Respondent argued that the Petitioners did not have documents to demonstrate that the land belonged to them or that it was registered in the name of the community or that they were in occupation.

54. The 5<sup>th</sup> Respondent contends that it was in occupation of the suit land and had an indefeasible title to the suit property which had not been challenged under Section 26(1) of the Land Registration Act.

55. The Petitioners in their pleadings admitted that the 5<sup>th</sup> Respondent was the registered owner and occupier of the suit property. On the other hand, the 4<sup>th</sup> Respondent submitted that it was the custodian of community land, the 4<sup>th</sup> Respondent maintained that the suit land is not registered in the name of the community. It is therefore not in dispute that the suit property is registered in the name of the 5<sup>th</sup> Respondent.

56. In an application seeking for a conservatory order, it is imperative that the court warns itself that it is required not to make any definitive finding of fact or law. This position was enunciated in the case of Kenya Association of Manufacturers & 2 Others Vs Cabinet Secretary – Ministry of Environment and Natural Resources & 3 Others (2017) eKLR where the court stated as follows;

**“In an application for a conservatory order, the court is not invited to make any definite or conclusive findings of fact or law on the dispute before it because that duty falls within the jurisdiction of the court which will ultimately hear the substantive dispute.”**

57. It is evident from the Petitioners pleadings that the Petitioners, are contesting the manner in which the suit land was acquired and eventually registered in the names of the 5<sup>th</sup> Respondent.

58. A close perusal of the Petition reveals that the Petition raises the question of legitimacy of the title and occupation of the suit property. The Petitioners contend that the 5<sup>th</sup> Respondent’s acquisition of the suit property revolves around historical injustices committed by the Colonial Government and perpetuated by the 5<sup>th</sup> Respondent. The Petitioners averred that the community held the suit land under customary law and gave elaborate details on how the indigenous community was dispossessed of the suit land by Colonial Government.

59. It is not in dispute that the suit property is registered in the name of the 5<sup>th</sup> Respondent. The issue as to whether the suit land originally belonged to the Mamukii Akamba people, whether the Petitioners forefathers were dispossessed of the suit land and whether there exists historical injustice against the Mamukii community are issues which cannot be determined at the interlocutory stage. These are issues which should be canvassed at a full trial. At this stage, the Applicant is required to establish a *prima facie* case with a likelihood of success. If the court were to determine the issues raised, it would amount to determining the Petition at the interlocutory stage. I find that the Petitioners have not established a *prima facie* case to warrant the grant of conservatory orders.

60. Before granting conservatory orders, the court is required to evaluate the pleadings and determine whether the denial of conservatory orders will prejudice the applicants. In the case of Centre for Rights Education & Awareness(CREAW)& Another Vs Speaker of the National Assembly & 2 Others (2017) eKLR the court held that;

**“A party who moves the court seeking conservatory orders must show to the satisfaction of the court that his or her rights are under threat of violation, are being violated or will be violated and that such violations, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent the violation of rights and fundamental freedoms and preserve the subject matter pending the hearing and determination of a pending cause or petition.”**

61. The Petitioners contend that after they were driven out of the suit property by the colonial Government, they have been living along the railway line in abject poverty and in deplorable conditions. It is evident from the Petitioners pleadings and annexures that the Petitioners are not in occupation of the suit property. The Applicants claim to the suit land is based on a claim of historical injustices. This is a substantive dispute which can only be determined upon hearing the case on merit. The Petitioners claim of their rights being violated is based on historical injustice which cannot be proved at this stage. Having evaluated the material placed before me, I find that the Applicants will not suffer any prejudice if the conservatory orders are not granted as they are not in occupation of the suit property.

62. On the issue as to whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order, I find that it will be served better by preserving the 5<sup>th</sup> Respondent’s title until issues of how the land was acquired and subsequently registered is heard and determined.

63. On the issue of setting down the Petition for hearing and determination before a three judge bench, the Applicants submitted that the issues raised in the petition are so fundamental that the Petition ought to be heard and determined by a three judge bench. The 5<sup>th</sup> Respondent submitted that the court lacks jurisdiction to empanel a three judge bench.

64. Article 165(3)(b) of the Constitution grants this court the jurisdiction to determine whether a fundamental right or freedom has been denied or threatened or violated to the interpretation of the Constitution.

65. The issue is whether the instant Petition raises a substantial question of law warranting certification for empanelment of a bench under Article 165(4) of the Constitution.

66. The law as to what amounts to a substantial question of law is now well settled. In the case of Sir Chuntal Vs Mehta and Sons Ltd Vs The Century Spinning and Manufacturing Co. Ltd 1962 AIR 1314 the Supreme Court of India defined the elements of a substantial question of law were stated as follows;

**“The proper test for determining whether a question of law raised in the case is substantial would in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this court or by the Privy Council or by the Federal Court or not free from difficulty or calls for discussions of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of the law.”**

67. Back home, the guidelines for certification under Article 165(4) of the constitution were provide by the court of Appeal in the case of Omikya Omtatah Okoiti & Another Vs Ann Waiguru – Cabinet Secretary, Devolution and Planning & 3 Others (2017) eKLR as follows;

**“There are, in our view, parallels to be drawn between certification for purposes of Article 163(4)(b) of the constitution and certification for purposes of Article 165(4) notwithstanding that the drafters of the constitution, in providing for certification of matters for purposes of appeal to the supreme court under Article 163(4)(b) stipulated that a matter should be of “general public importance”. There is therefore wisdom to be gained from the pronouncements court of Kenya respecting interpretation of Article 163(4)(b).”**

68. In the case of Hermanus Phillipus Steyn Vs Giovanni Gnechi-Ruscione (2013) eKLR, the Supreme Court of Kenya pronounced principles for purposes of certification under Article 163(4)(b) some of which are relevant in the context of certification under Article 165(4). Drawing therefrom, we adopt, with modification the following principles;

- 1. For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interests;**
- 2. The applicant must show that there is a state of uncertainty in the law;**
- 3. The matter to be certified must fall within the terms of Article 165(3)(b) or (d) of the Constitution.**

69. Similarly, in the case of Maina Kiai & 2 Others Vs Independent Electoral and Boundaries Commission & Another (2017) eKLR the court outlined the ingredients that determine whether a matter is a substantial point of law.

70. Accordingly, a substantial question of law is one that is of general public importance or one that affects the rights of a large cross section of the public. A party seeking certification must lay a basis for the certification.

71. The Petitioners have not demonstrated to the court that the Petition raises a substantial point of law whose determination will have a significant bearing on the public interest. I have carefully read the Petition and I find that it does not involve public interest but the Petitioners interest on the suit land. As rightly submitted by counsel for the 5<sup>th</sup> Respondent, this court has no power to constitute a bench of three judges to hear and determine this Petition. Section 21 of the Environment and Land Court Act provides for the quorum of the court. It provides as follows;

**S.21 (1) The court shall be properly constituted for purposes of its proceedings under this Act by a single Judge.**

**2) Notwithstanding sub-section (1), any matter certified by the court as raising a substantial question of law**

**a) under article 165 (3)(b) or (d) of the constitution; or**

**b) concerning impact on the environment and land shall be heard by an uneven number of judges as determined by the Chief Justice.**

72. That jurisdiction is vested upon the Chief Justice. Be that as it may, I find that the Petitioner has not satisfied this court that the Petition raises a substantial question of law to warrant the court to refer the matter to the Chief Justice to empanel bench of uneven number of Judges

73. In light of the foregoing, the Petitioners application dated 3<sup>rd</sup> May 2021 is dismissed with costs to the Respondents.

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**HON. T. MURIGI**

**JUDGE**

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16<sup>TH</sup> DAY OF MARCH, 2022**

**IN THE PRESENCE OF: -**

Boniface Njiru for the Petitioners/Applicants.

Deya holding brief for Kuyo for the 5<sup>th</sup> Respondent.

Ms. Munywoki holding brief for Dr. Benjamin Musau for the 5<sup>th</sup> Respondent.

Court Assistant - Mr. Kwemboi