



**Wamunyinyi v Ministry of Lands, Public Works, Housing &  
Urban Development & 2 others (Environment & Land Petition  
E006 of 2024) [2025] KEELC 3364 (KLR) (24 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3364 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND PETITION E006 OF 2024  
EC CHERONO, J  
APRIL 24, 2025**

**BETWEEN**

**ATHANAS WAFULA WAMUNYINYI ..... PETITIONER**

**AND**

**THE MINISTRY OF LANDS, PUBLIC WORKS, HOUSING & URBAN  
DEVELOPMENT ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

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

**RULING**

1. The Petitioner filed this Petition contemporaneously with a Notice of Motion under certificate of urgency dated 2<sup>nd</sup> December 2024 seeking the following orders;
  1. (Spent)
  2. This Honourable Court be pleased to issue a conservatory order of injunction restraining the 1<sup>st</sup> Respondent, its officers and/or agents from proceeding with the tender process including the evaluation and awarding of tender Number MLPWHD/SDHUD/AHP/070/2024-2025 For Proposed Construction + Finance Of Proposed Kanduyi Airstrip (smart City) In Kanduyi Constituency Bungoma County With Associated Infrastructure, pending the hearing and determination of this Application..
  3. This Honourable Court be pleased issue a conservatory order of injunction restraining the 1<sup>st</sup> Respondent, its officers and/or agents from proceeding with the tender process including the evaluation and awarding of Tender Number LPWHUD/SDHUD/AHP/070/2024-2025 For Proposed Construction +finance Of Proposed Kanduyi Airstrip (smart City) In Kanduyi



Constituency Bungoma County With Associated Infrastructure, pending the hearing and determination of this Petition.

4. This Honourable Court be pleased to issue a prohibitory order of injunction restraining the Respondents, their officers and/or agents from converting land Plot Number Bungoma Township/345 Measuring approximately 36.95 acres from its current use as an airstrip to any other use including the proposed construction of the Kanduyi Smart City, pending the hearing and determination of this Application.
  5. This Honourable Court be pleased to issue a prohibitory order of injunction restraining the Respondents, their officers and/or agents from converting Land Plot Number Bungoma/ Township/345 Measuring approximately 36.95 acres from its current use as an airstrip to any other use including the proposed construction of Kanduyi Smart City, pending the hearing and determination of this Petition.
  6. This Honourable Court be pleased to grant any other or further order it may deem it and expedient in the circumstances.
  7. The Costs of this Application be provided for.
2. The said Application is supported by the affidavit of the Applicant and the following 13 grounds;
- i. On or about the 29<sup>th</sup> of October 2024, the 1<sup>st</sup> Respondent placed an advertisement on the MyGov Newspaper, seeking to invite interested bidders to participate in the tendering process in Tender Number MLPWHUD/SDHUD/AHP/070/2024-2025 For Proposed Construction + Finance Of Proposed Kanduyi Airstrip (smart City) In Kanduyi Constituency Bungoma County With Associated Infrastructure.
  - ii. On the 11<sup>th</sup> of November 2024, the 1<sup>st</sup> Respondent herein issued Addendum No. 3 informing all eligible bidders that the Tender Closing date has been extended to the 26<sup>th</sup> of November 2024.
  - iii. The Tender Number MLPWHUD/SDHUD/AHP/070/2024-2025 For Proposed Construction + Finance Of Proposed Kanduyi Airstrip (smart City) In Kanduyi Constituency Bungoma County With Associated Infrastructure speaks to the construction of a smart city comprising of 2034 number of units in 20 number of blocks, a club house, community centre, swimming pool, school and sports field.
  - iv. The proposed smart city is intended to be put up on Plot Number Bungoma Township/345 Measuring approximately 36.95 acres, land set aside for the construction and expansion of the Bungoma Airstrip (also known as Kanduyi Airstrip).
  - v. The subject property was previously owned and managed by the Kenya Airports Authority with the intention of developing an airstrip.
  - vi. On 21<sup>st</sup> of November 2024, the Petitioner herein wrote to the Principal Secretary, State Department for Housing and Urban Development seeking clarifications on whether the suit land was degazetted as land earmarked for an airstrip and whether there has been a formal process for the change of user regarding the suit land from airstrip use to residential or any other intended use. However, no response has been forthcoming.
  - vii. The public has the legitimate expectation and belief that the said parcel of land has been set aside for the construction and expansion of the Bungoma Airstrip (also known as the Kanduyi Airstrip).



- viii. The Respondents herein have not divulged sufficient information to the public regarding the subject tender, even after the Petitioner wrote to the 1<sup>st</sup> Respondent on the 14<sup>th</sup> day of November 2024, seeking information on the degazettement of the subject property as airstrip land and/or change of user of the said parcel.
  - ix. There has been no change of user or degazettement of the subject land as being airstrip land and if the same was done, it was concealed, not subjected to public participation and/or stakeholder engagement.
  - x. The Respondents have prejudiced the public's legitimate expectation that the Respondents would comply with the provisions of the Constitution of Kenya 2010 on public participation and stakeholder engagements
  - xi. It is therefore necessary that this Honourable Court be pleased to issue an order restraining the Respondents from proceeding with the tender process pending the hearing and determination of this Petition.
  - xii. It is in the interest of justice and fairness that this Application be certified as being extremely urgent and the reliefs sought herein are granted.
  - xiii. The Applicant stands to suffer substantial and irreparable harm should the tender process proceed to its logical conclusion.
3. The Application is opposed by the 2<sup>nd</sup> Respondent who file a Replying affidavit by one Brian Ikol sworn on 20/01/2025.

#### **Petitioner/applicant's Summary Of Facts**

4. In his supporting affidavit, the Petitioner/Applicant reiterated the contents of the grounds apparent on the face of the application and annexed a copy of a letter by the Applicant to the Principal Secretary, State Department for Housing and Urban Development dated 14<sup>th</sup> November 2024 and marked "AWW-3". He stated that he has been advised by his advocate on record which advice he verily believes to be true that Article 69(d) of the Constitution of Kenya requires the state to encourage public participation in the management, protection and conservation of the environment and that the same Constitution promotes openness and accountability including public participation in financial matters in all aspects of public finance.
5. The Application is opposed by the 2<sup>nd</sup> Respondent who filed a replying affidavit sworn by one Brian Ikol on 20/01/1025. According to the deponent, the 2<sup>nd</sup> Respondent is an independent constitutional commission established under Article 67(1) of the Constitution and operationalized by the Nation Land Commission Act NO.5 of 2012 and has its fundamental functions, inter alia the management of public land on behalf of the National and County Government. He disassociated the 2<sup>nd</sup> Respondent from the alleged tendering process and that the alleged activities do not fall within the confines of its mandate. He stated that the Applicant has not established any nexus between the alleged tendering process and the 2<sup>nd</sup> Respondent and put him to strict proof thereof. He stated that the 2<sup>nd</sup> Respondent is not privy to the contents and the various allegations under paragraph 7 of the supporting affidavit and put him to strict proof thereof. He stated that the 2<sup>nd</sup> Respondent shall move the Court appropriately to have its name struck out as no cause of action has been demonstrated as against the 2<sup>nd</sup> Respondent.



## Analysis And Decision.

6. I have considered the Notice of Motion application dated 2/12/2024, the grounds apparent on the face thereof, the supporting affidavit and the applicable law. Despite directions to have the said application disposed of by affidavit evidence and written submissions, none of the parties had filed submissions by the time of writing this Ruling. In the application under review, the Applicant is seeking conservatory and prohibitory orders of injunction restraining the 1<sup>st</sup> Respondent by itself or its officers and/or agents from proceeding with the tender process including the evaluation and awarding of Tender Number MLPWHUD/SDHUD/AHP/070/2024-2025 For Proposed Construction + Finance Of Proposed Kanduyi Airstrip (smart City) In Kanduyi Constituency Bungoma County With Associated Infrastructure, pending the hearing and determination of this Petition. When the said application filed under Certificate of Urgency was placed before me as the duty Judge for direction, I certified it as urgent and granted temporary conservatory orders of injunction and directed the Respondents to serve the Respondents for inter-parte hearing on 16/12/2024. When the matter was called out on the said 16/12/2024, the Applicant had not filed an affidavit of service indicating that they had served the Respondents. In its discretion, this court discharged the interim orders granted in the first instance and rescheduled the said application for hearing on 13/02/2025 with directions to serve the Respondents.
7. The gist of the Petitioner/Applicant's complain is that on 29/10/2024, the 1<sup>st</sup> Respondent placed an advertisement on MyGov Newspaper seeking to invite interested bidders to participate in the tendering process in Tender Number MLPWHUD/SDHUD/AHP/070/2024-2025 For Proposed Construction + Finance Of Proposed Kanduyi Airstrip (smart City) In Kanduyi Constituency Bungoma County With Associated Infrastructure. The Petitioner/Applicant further states that on the 11<sup>th</sup> day of November 2024, the 1<sup>st</sup> Respondent herein issued an Addendum NO. 3 informing all eligible bidders that the tender closing date had been extended to the 26<sup>th</sup> day of November 2024. He contends that the proposed tender speaks to the construction of a Smart City comprising of 2034 number of units in 20 number of blocks, a club house, Community Centre, swimming pool, school and a sports field. The Applicant further contends that the proposed smart City is intended to be put on plot Number Bungoma Township/345 Measuring approximately 36.95 acres, land set aside for the construction and expansion of Bungoma Airstrip also known as Kanduyi Airstrip). The Petitioner/Applicant also states that on 21<sup>st</sup> November 2024, he wrote to the Principal Secretary, State Department for Housing and Urban Development seeking clarifications on whether the suit land was degazetted as land earmarked for an Airstrip and whether there has been a formal process for the change of user regarding the suit land from Airstrip to Residential or any other intended use but no response has been forthcoming.
8. Despite serve of Summons and all Court processes, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents did not file any response to the application. The main issue for determination in this application is whether the Applicant has established the principles for the grant of conservatory orders of injunction.
9. In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* (2014) KLR, the Supreme Court stated 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.

- (87) The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principle to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that;
- (i) the appeal or intended appeal is arguable and not frivolous; and that
  - (ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory;
- (88) these principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely;
- (iii) that it is in the public interest that the order of stay be granted.
- (89) This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through the Constitution.

Again in *Centre for Rights Education and Awareness (CREAW) & 7 Others v Attorney General* (2011) KLR, the Court stated as follows;

“It is important to point out that the argument that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the Petitioner’s application and not the Petition. I will not therefore delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the Court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”

10. What this Court is required to determine at this stage is whether the Petitioner/Applicant has established a prima facie case against the Respondents with a likelihood of success and also demonstrate that there is a real danger that he is likely to suffer violation or threatened violation of the Constitution.

Section 58(1) and (2) of EMCA provide thus;

1. Notwithstanding any approval, permit or licence granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for an (sic)financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.
2. The proponent of any project specified in the second schedule shall undertake a full environmental impact assessment study and submit an environmental impact assessment study report to the Authority prior to being issued with any licence by the Authority; provided that the Authority may direct that the proponent forgoes the submission of the environmental impact assessment study report in certain cases.

11. It is imperative to note that Regulation 17 of the Environment (Impact Assessment and Audit) Regulations 2003 (EMCA Regulations) provide for public participation as follows;



1. During the process of conducting an environmental impact assessment study under these Regulations, the proponent shall in consultation with the Authority, seek the views of persons who may be affected by the project.
2. In seeking the view of the public, after the approval of the project report by the Authority, the proponent shall;
  - a. Publicize the project and its anticipated effects and benefits by;
    - i. Posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed;
    - ii. Publishing a notice on the proposed project for two successive weeks in a newspaper that has a nationwide circulation; and
    - iii. Making an announcement of the notice in both official and local languages in a radio with a nationwide coverage for at least once a week for two consecutive weeks;
  - b. Hold at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments;
  - c. Ensure that appropriate notices are sent out at least one week prior to the meetings and that the venue and times of the meetings are convenient for the affected communities and other concerned parties; and
  - d. Ensure, in consultation with the Authority that a suitably qualified co-ordinator is appointed to receive and record both oral and written comments and any translations thereof received during all public meetings for onward transmission to the Authority.
12. With regard to change of user, it is in the public domain that the suit Plot No. Bungoma Township/345 Measuring Approximately 36.95 acres was set aside as an Airstrip. That is confirmed in the averments given by the Petitioner/Applicant on oath that the suit property is currently used as an Airstrip which has not been controverted by the Respondents. That therefore leaves this Court to make an irresistible conclusion that indeed the suit property is set aside for the construction and expansion of the Bungoma Airstrip (also known as Kanduyi Airtrip) and that there is no change of user to Residential or any other use. The obligation was upon the Respondents and the approving Authority to ensure that there was public participation before any change of user was approval and/or granted. Section 58 (7) and (8) of the Physical Planning and Land Use Act, 2019 provides as follows;
  - (7) A person applying for development permission shall also notify the public of the development project being proposed to be undertaken in a certain area in such a manner as the Cabinet Secretary shall prescribe.
  - (8) The notification referred to under sub-section (7), shall invite the members of the public to submit any objections on the proposed development project to the relevant County executive Committee Member for consideration.
13. It is trite that where a public land has been set aside for a particular use or purpose, the Government has no authority or power to change the user unless it gives notice of the application for change of user to be published in newspapers of nationwide circulation and also on the suit property. Once again the burden was on the Respondents to demonstrate that they complied with the law on publication



of the Notice of the application before the approval was granted to them. The Respondents have not placed any evidence in the form of newspaper advertisements of the application for change of user from construction and expansion as an Airstrip to Residential or any other user/purpose. Whether they conducted public participation as by law required is a matter of fact to be established by evidence and none has been availed by the Respondents. In the absence of evidence that the notice of the application for change of user was advertised in the newspapers and also placed on the suit property, the Petitioner/Applicant's contention that there was no public participation in the issuance of approval for change of user of the suit property is well founded.

14. In view of the foregoing, I am satisfied that the Petitioner/Applicant has established a prima facie case against the Respondents and has further established that the Respondents are proposing to carry out development without adhering to the Constitution and statutory provisions thereby exposing the environment to degradation and threatening the Petitioner/Applicant's right to a clean and health environment. The other issue is whether the Petitioner/Applicant will suffer irreparable harm unless the conservatory order sought is granted. From his supporting affidavit, the Petitioner/Applicant has demonstrated that his constitutional right to a clean and health environment is likely to be violated if the orders are not granted. That ground alone in my view is sufficient harm. In any event, petitions for enforcement of a right to clean and health environment need not establish that they will suffer irreparable harm before an order aimed at preventing a likelihood of environmental harm or damage is given. Article 70 sub-article 3 of the Constitution buttresses this point and provides as follows;

“(3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury. This being an application seeking conservatory orders for enforcement of a right to a clean and health environment, the Petitioner/Applicant is not required to prove irreparable loss before the court can grant the orders sought.

15. The upshot of my finding is that this court is satisfied that a case has been made out for the grant of the conservatory order sought in the Notice of Motion application dated 2/12/2024 pending the hearing and determination of the main petition. Consequently, I make the following final orders;

1. A conservatory order of injunction be and is hereby issued restraining the 1<sup>st</sup> Respondent, its officers and/or agents from proceeding with the tender process including the evaluation and awarding of Tender Number MLPWHUD/SDHUD/AHP/070/2024-2025 For Proposed Construction + Finance Of Propsed Kanduyi Airstrip (smart City) In Kanduyi Constituency Bungoma County With Associated Infrastructure pending the hearing and determination of this Petition.
2. A prohibitory order of injunction be and is hereby issued restraining the Respondents, their officers and/or agents from converting land parcel No. Bungoma Township/345 Measuring Approximately 36.95 acres from its current use as an Airstrip to any other use including the proposed construction of the Kanduyi Smart City pending the hearing and determination of this Petition.
3. The costs of this application to be costs in the cause.

**READ, DELIVERED AND SIGNED AT BUNGOMA THIS 24<sup>TH</sup> DAY OF APRIL, 2025.**

**HON. E.C CHERONO**

**ELC JUDGE**

In the presence of;



Applicant/Advocate-absent.

Respondents/Advocate-absent.

Bett C/A.

