



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC PETITION NO. E002 OF 2021

IN THE MATTER OF PETITION UNDER ARTICLES

20,21,22 & 23 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF INFRINGEMENT OF FUNDAMENTAL

FREEDOMS AND RIGHTS OF THE PETITIONERS UNDER

ARTICLES 10,11,27,28,35,40,43,44,47, 50 & 56 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF LAND ADJUDICATION ACT (CAP. 284)

MORIJO-LOITA RESIDENTS ASSOCIATIONS.....PETITIONER

SHADRACK KIOK.....2ND PETITIONER

JACKSON MANCHA.....3RD PETITIONER

TAIKO OLE NTIBANY.....4TH PETITIONER

ALEX OLE KULUO.....5TH PETITIONER

JULIUS TUARARI.....6TH PETITIONER

SEKETO SUMPATI.....7TH PETITIONER

TAMPUA KISAICA.....8TH PETITIONER

NTASIKOI OLARUSAL.....9TH PETITIONER

NOLTERITOI ENOLE NKURRUNA.....10TH PETITIONER

OLOKULA OLOLOSO.....11TH PETITIONER

DAVIS LESHAN OLOLOOTORONKEN& 547 OTHERS....12TH PETITIONER

VERSUS

NAROK SOUTH LAND ADJUDICATION &

SETTLEMENT OFFICER.....1ST RESPONDENT

CHAIRPERSON LOITA-MORIJO LAND

ADJUDICATION COMMITTEE.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. What is before this court for determination is a Notice of Motion application dated 24th of February, 2021 and filed in court on 26th February, 2021 by the petitioners herein and is brought pursuant to articles 20,21,22 and 23 of the Constitution, Rules 19, 23 and 24 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms) High Court Practice and Procedure Rules 2013 and inherent jurisdiction of the court seeking the following orders: -

1. **Spent.**

2. **spent**

3. **spent**

4. **That this Honourable court be pleased to grant order directing and/or compelling the respondents to issue the Petitioners certified copies of:**

i. **The adjudication by-laws and any amendments thereto in respect of Morijo-Loita adjudication section.**

ii. **Minutes of the meetings at which the adjudication by-laws and any amendments thereto were discussed and approved by members of the adjudication section.**

iii. **Notices calling for meetings of members of the adjudication section to discuss the terms of the adjudication by-laws and any amendments thereto.**

iv. **The gazzeted map of Morijo-Loita adjudication section showing the proper boundaries of the section and total size of land available within the section for purposes of the adjudication process.**

v. **A written confirmation of the total acreage of land within the Mirojo-Loita adjudication section and showing what portion of the total acreage is within Loita forest.**

vi. **Minutes of meeting showing discussions regarding the manner in which the part of Loita forest shall fall within the adjudication section will be owned and/ or handled pursuant to the adjudication process.**

vii. **Register of members/landowners of the adjudication section.**

viii. **Minutes of the meeting of the community at which the issue of appointment of members of the 2nd respondent was discussed and agreed upon.**

ix. **Spatial plan prepared to govern the adjudication process in the adjudication section.**

5. **That the honourable court be pleased to grant conservatory orders restraining the respondents from proceeding with the adjudication process in Morijo-Loita adjudication section pending the hearing and determination of this petition.**

6. **That the honourable court be pleased to grant conservatory order restraining the respondents from withdrawing any monies from or in any manner transacting on bank account number 01141987843100 Cooperative Bank Narok Branch to which the Petitioners contribute monies intended for the adjudication process in Morijo-Loita adjudication section pending hearing and determination of this Petition.**

7. **That the respondents do pay costs of this application.**

2. The application is premised on the grounds that the petitioners are the lawful residents of Morijo-Loita adjudication section and the beneficiaries of the land in the adjudication section and the respondents are undertaking the adjudication process in Morijo-Loita adjudication section in blatant disregard, contravention and breach of the petitioners' constitutional rights and fundamental freedoms by refusing and neglecting to provide the petitioners with crucial documents, information and materials that are being used to undertake the adjudication process. That instead of providing the petitioners with the documents and information sought, the respondents chose to lie to the petitioners that they had not commenced the adjudication process and that the petitioners' complaints were premature. The Petitioners also claim that there was a notice from the respondents dated 10th February, 2021 informing them to check whether their names were in the list. The petitioners are not aware of what criteria was used by the respondent to determine who are the genuine land owners and what acreage of land every resident is entitled to.

3. The application is supported by the affidavit of Shadrack Kiok, the 2nd petitioner herein sworn on 24th February, 2021. The 2nd petitioner deponed that on or about 2019, the 1st respondent commenced adjudication exercise by appointing members and operationalizing the 2nd respondent. That the petitioners thereafter learnt that the 2nd respondent had privately created certain by-laws which the 2nd respondent intended to use to guide the adjudication process. That the adjudication by-laws is the most critical document in the adjudication process because the provisions contained therein directly affect the fundamental rights of all residents of the adjudication section. It is his position that the petitioners were not involved in the process of the development of the adjudication by-laws as they were not consulted, no public participation was conducted in the development of the by-laws intended to guide the adjudication process. The petitioners have repeatedly requested the respondents to avail the by-laws that will guide the adjudication process but the respondents have been adamant. That by letters dated 20th July, 2020 and 14th August, 2020, the petitioners through the law firm of Kiplenge Kurgat Advocates wrote to the respondents requesting for a copy of the by-laws and amended by-laws to wit their response was met with baseless allegations that they were raising complaints because they had not been appointed to the land adjudication committee. Subsequent letters followed after dated 21st October, 2020 and 25th November, 2020 which the petitioners were not furnished or supplied with the information they had requested.

4. The 2nd petitioner further deponed that the petitioners continued to hear rumors that the respondents were proceeding with the adjudication process and were secretly creating a register of the members of the adjudication section using the secret by-laws and the amended by-laws to do so. That this process culminated with a notice from the respondents dated 10th February, 2021 informing the petitioners that they had created a list and asked the petitioners to individually inquire whether their names were on the list. It is his position that the respondents have kept the actual purported list of land owners secret and have refused to disclose the full list of the land owners to all residents of the adjudication section. That some of the petitioners have confirmed that their names have been excluded from the secret list of landowners thereby proving that the respondents are keen to deny the petitioners their right to land. The 2nd petitioner avers that the refusal by the respondents to publish the list of landowners is a confirmation that the respondents are proceeding with the adjudication process in a clandestine manner breaching their constitutional rights and fundamental freedoms, that the respondents have been high handed, rude, abusive and dismissing the petitioners as uneducated people not entitled to receive the information and documents sought regarding the adjudication process. The 2nd petitioner also deponed that the respondents have resorted to verbal threats and blackmail against the petitioners by warning that any resident of the adjudication section who raises any complaint about the adjudication process shall be excluded from the register during allocation as a way of punishment.

5. The 2nd petitioner further deponed that the 1st respondent has attempted to threaten and or blackmail the petitioners into silence because the 1st respondent wrongfully believes that the petitioners need its consent or permission in order to file a constitutional petition for the enforcement of their constitutional rights and fundamental freedoms. It is his averment that the 2nd respondent was appointed and operationalized without any or adequate participation as required by the constitution. That the most important issue to the community is the manner in which the portion of Loita forest that falls within the adjudication section will be owned and whether the community will still be able to continue using the forest for cultural and religious practices and that such issue can only be addressed in the adjudication by-laws developed by the 2nd respondent.

6. The 2nd petitioner further deponed that the members of the 2nd respondent were appointed in breach of the constitutional imperatives that require gender balance in appointments to public bodies. That in an attempt to remedy this breach through a complaint in their letters dated 22nd September, 2020, 21st September, 2020 and 18th September, 2020, the 2nd respondent appointed female relatives of existing members of the 2nd respondent so as to give a false gender balance. That the operation and work of the 2nd respondent are financed through monetary contributions by the petitioners which the 2nd respondent has breached the trust and good will. Further that the 2nd respondent is utilizing the monies to perpetuate illegalities and breach of the petitioners' constitutional rights and freedoms. The petitioners are apprehensive that following the filing of this petition the 2nd respondent will misuse or embezzle the funds contributed by the petitioners and as such the 2nd respondent's bank accounts should be frozen pending the resolution of the issues in dispute in this petition.

7. The 2nd respondent filed a replying affidavit in opposition to the application sworn by Malano Saiguran on 17th March, 2021. The 2nd respondent deponed that the 2nd petitioner is incompetent to swear the affidavit on behalf of other petitioners given that some petitioners have sworn affidavits to the contrary. The 2nd respondent deponed that the exercise of the creation of the by-laws was carried out in a transparent and fair manner as per the law. That public participation meetings were conducted in different villages where members discussed at length on the by-laws to guide the adjudication process. That the purported outline of the issues addressed by the adjudication by-laws as presented by the respondents is misleading and that the petitioners have free access to all the documents, they need provided they follow the procedure to request for them from the custodians. The 2nd respondent further deponed that public participation was carried out in the 24 villages with the supervision of the land adjudication and settlement officers. It is his position that a perusal of the letter in response to the petitioners demands by the district land adjudication and settlement officer, the petitioners were invited to access the documents from the land adjudication office and therefore access has never been an issue.

8. The 2nd respondent deponed that the members register is available for public inspection. As such the petitioners have not provided proof of blackmail and threats as alleged. The petitioners have also not exploited the statutory dispute resolution mechanisms contained in the Land Adjudication Act. The petitioners have also not demonstrated sufficiently how the respondents have breached their constitutional rights and the appointment of the 2nd respondents committee members. That his appointment alongside that of the other committee members was carried out after intensive public participation forums and elections at the 24 villages in Morijo and his appointment was subsequently confirmed by the first respondent.

9. On the issue of Loita forest, the 2nd respondent deponed that the issue relating to preservation of Loita forest for cultural and religious practices has been sufficiently addressed and the petitioners are unnecessarily alarmed and that the allegation that utility of the Loita forest can only be addressed in the adjudication by-laws is false. It is his averment that the Loita forest management is distinct and the adjudication process accords the same respect. In addition, Loita forest is a shared resource by a number of adjudication sections within Loita as such any laws regarding the management and preservation of Loita forest is a joint responsibility by the Community Adjudication sections. The 2nd respondent further deponed that the petitioners have not proved that there is any appointment of the committees members relatives and that the members of the committee agreed to appoint five women into the committee in compliance with the constitutional requirements of

gender balance after it became apparent that there were no women appointed during the public participation exercise.

10. The 2nd respondent further deponed that the members monetary contribution is an obligation to facilitate the operations of the committee in the adjudication process and if the court is persuaded to freeze the accounts, the actions will impact on the operations of the adjudication process and possibly halt the same to the detriment of the entire members. For these reasons, the 2nd respondent avers that the petitioners have not satisfied the threshold required by the law on grant of conservatory orders sought.

11. The 1st and 3rd respondents filed a replying affidavit in opposition to the application sworn on 7th May, 2021 by Josephine N.Njoroge. She deponed that Morijo adjudication section was lawfully and procedurally declared through a notice dated 26th October, 2011 and commencement of the adjudication process stalled as a result of injunction order issued in Constitutional Petitioner No. 11 of 2011 which was later allocated Petition Number 16 of 2017 in the ELC Court and judgment delivered on 2nd October, 2019. Thereafter, the adjudication work resumed and a Land Adjudication and committee of 24 persons was appointed after public participation in which land owners from the 24 villages nominated persons to represent them in the said committee. There was an issue with gender balance as none of the women offered their candidature for nomination. The same was rectified and 5 women were appointed.

12. That after consultation with the Deputy County Commissioner, it was prudent to have a public participation exercise to give land owners a chance to nominate their representatives and they went ahead and appointed such persons to the Land Adjudication Committee. She further deponed that there is no spatial plan in existence prepared to govern the adjudication process in Morijo-Loita section and neither is it a requirement under the Land Adjudication Act. That since the land owners do not reside on their specific parcels of land, a list of land owners had to be prepared before embarking on demarcation and survey as part of the land adjudication process as such by-laws were formulated to guide the committee in formulating the list of land owners.

13. The 1st respondent further deponed that the by-laws do not describe the boundaries of the adjudication section as alleged and this is done by a declaration notice of the adjudication section which was done in 2011 as per section 5 of the Land Adjudication Act before the formulation of the by-laws. As such, the proper boundaries and acreage of Loita Forest has not been determined at this point and the land owners of Morijo adjudication section together with Entasekera and Olorte adjudication section will point out the boundaries of the forest during demarcation and survey as the forest straddles the three adjudication sections.

14. That it is only after public land and community land is demarcated and set aside that land available to be demarcated among individual land owners can be determined. It is therefore false for the petitioners to claim that they were not involved in the process of formulation of the by-laws as by a letter dated 30th July, 2020, the Chairman of the Land Adjudication Committee-Morijo Loita section confirmed that barazas were held to discuss and agree on the by laws at two general meetings held on 17th and 18th January, 2020.

15. The 1st respondent further deponed that the major function of the by-laws is to inform on the criteria to be used to determine whether or not one qualifies to be a land owner in the section. Also, once the list of land owners is complete, the same is put up for scrutiny and individuals may file cases to the committee to dispute any entries. The list of landowners was prepared by the committee member of each respective village before being compiled as list of the landowners of the entire adjudication section.

16. That the list of land owners was opened for inspection for a period of 14 days in a meeting held on 17th February, 2021 at Morijo Trading Centre and was attended by the Deputy County Commissioner, the Sub County Land Adjudication and Settlement Officer, the Sub County Police Commander-Narok South, the Chief-Morijo, the Assistant Chief-Morijo and the Assistant Chief Olgar'ua and the land owners of the section. There were 255 committee cases filed before summons could be issued to the parties for hearing and on 1st March, 2021, her office was served with a court order for status quo pending hearing and determination of the application. The 1st respondent averred that her office complied with the court order and put on hold the adjudication process of Morijo adjudication section.

17. The 1st respondent deponed that there is nothing secretive, suspicious or unlawful about this stage or any other stage in the adjudication process and if at all some names were excluded from the list, then the petitioners would have filed a case with the land adjudication committee as a result of being excluded.

18. That the claims by the petitioners are baseless, malicious and far-fetched as due process was followed and secondly, the second, third, fourth and ninth petitioners offered themselves for nomination but the landowners opted for other persons to represent them in the committee. That for reasons best known to themselves, the petitioners are reluctant and unwilling to follow the law and procedures of land adjudication and as such their constitutional rights and fundamental freedoms have not been curtailed in any way and neither are they at risk of being violated during this process.

19. Finally, the 1st respondent deponed that the adjudication work in the section is not meant to disenfranchise any land owner and further delays in the process is likely to affect at least six thousand land owners of Morijo who have had the process delay for more than nine years.

20. The petitioners filed written submissions dated 30th June, 2021. The petitioners submitted that in blatant breach of Article 35 of the Constitution, the respondents have failed, refused and neglected to provide the petitioners access to documents information and material which is in their possession and which the petitioners require to enable them exercise and enforce their constitutional rights and fundamental freedoms. They rely on the case of **Katiba Institute versus Presidents delivery unit & 3 others [2017] eKLR**.

21. The petitioners further submitted that they were not involved in the process of appointment and/or operationalizing of the adjudication committee despite the crucial role the committee plays in the adjudication process. That the petitioners learnt of its existence after it assumed office and began doing its work in violation of article 10 (2) of the Constitution. That the respondents failed to conduct any or adequate public participation prior to the appointment of the adjudication committee. That the 1st respondent chose to unilaterally appoint members of the committee without subjecting the process to a credible public participation exercise. In any case, the petitioners raised complaints with

the 1st respondent regarding the short notice period which was ignored. They rely on the case of **Richard Owuor & 2 Others versus The Cabinet Secretary, Ministry of Agriculture Livestock, Fisheries and Cooperatives & 7 Others [2021] eKLR**, **IEBC versus NASA & 6 others, Civil Appeal No. 244 of 2017** and **Mui coal Basin Local Community & 15 Others versus Permanent Secretary Ministry of Energy & 17 Others [2015] eKLR**.

22. The petitioners further submitted that the secretive manner in which the respondents are conducting the adjudication process will lead to fraud and irregular allocation of the land to strangers and members of the adjudication committee to the detriment of the petitioners' rights to property as envisaged in Article 40 of the Constitution. That the adjudication by-laws define and determine key constitutional rights of the members of the adjudication section and that the petitioners have a right to see and interrogate contents of the by-laws so as to establish whether it adequately safeguards their legal and constitutional rights in the adjudication process. It is their submission that the respondents have not deemed it necessary to provide the by-laws despite the fundamental issues that the document addresses.

23. The petitioners further submit that in admitting that the boundaries of public and community settlement land in the adjudication section have not been established, it lends credence to the petitioners' case that the adjudication process cannot be deemed to be fair and transparent to the petitioners. As such the petitioners have a right to know how much land is available for distribution to the residents of the adjudication section because it will in turn affect how much land each resident will get through the adjudication process. That the issue of how much land should be set aside for community settlement and for public purposes should be subjected to debate by the residents, decided upon and codified in the adjudication by-laws. Of great importance is the portion of the Loita forest which the community will use for cultural and religious practices as they have done for hundreds of years.

24. The petitioners further submitted that the process adopted by the respondents in the compilation of the register of members is not participatory and is left to the whims of a few individuals. That there were no consultations and public participation in the process of compilation of the register of members contrary to the constitutional requirements. That by refusing to make the entire register of members public for inspection and interrogation, the respondents are not only infringing on the petitioners constitutional rights but they are also creating a conducive environment that would enable them engage in corrupt practices such as inclusion of non-residents into the register without detection by the residents.

25. The petitioners further submit that the operation and work of the 2nd respondent is financed through monetary contributions made by the petitioners and the 2nd respondent is utilizing the monies contributed by the petitioners to perpetuate illegalities and breach of the petitioners' constitutional rights and fundamental freedoms. The petitioners are apprehensive that following the filing of this petition, the 2nd respondents will misuse or embezzle the funds and it is in the best interest of the petitioners' fund that the bank accounts of the 2nd respondent be frozen pending the resolution of the issues in this petition.

26. The 2nd respondent filed written submissions dated 15th November, 2021. The 2nd respondent raised 5 issues for determination namely: -

i. Whether the applicants have established a prima facie case in order for them to be granted the conservatory orders they are seeking.

ii. Whether the applicants will suffer irreparable harm not capable of being compensated by damages.

iii. Whether the balance of convenience tilts in favour of the applicants.

iv. Whether the applicants have exhausted all the dispute resolution mechanism as provided in the Land Adjudication Act cap 284 Laws of Kenya.

v. Who will bear the costs of this application.

27. The 2nd respondent submitted that considering an application for conservatory orders, the court is not required to make any definitive finding either of fact or law as that is the province of the court that ultimately hears the petition. That the jurisdiction of the court at this point is limited to examining and evaluating the material placed before it to determine whether the applicants have made out a prima facie case to warrant grant of conservatory orders. The 2nd respondent relied on the case of **Centre for Rights Education and awareness (CREAW) & 7 others versus Attorney General Nairobi [2011] eKLR**, **Kevin K Mwiti & Others versus Kenya School of Law & Others** and **Kenya Association of Manufacturers & 2 Others versus Cabinet Secretary-Ministry of Environment and Natural Resources & 3 Others [2017] eKLR**. The 2nd respondent further submitted that the applicants claim for conservatory orders are mainly that they are not getting access to information and documents pertaining the adjudication section whereas the same have been annexed by the 2nd respondent in his replying affidavit. It is the 2nd respondent submission that the petitioners have refused to follow the right procedure as is provided for in law in requesting to access documents held either by the 1st respondent or the 2nd respondent. The 2nd respondent is also not aware of any case where the 1st respondent has refused to hand over copies of the documents in its possession.

28. The 2nd respondent further submitted that the applicants have not demonstrated the rights likely to be infringed and as such this application is an abuse of the due process of this court. The 2nd respondent relies on the case of **Kenya Commercial Finance Company Ltd versus Afraha Education Society [2001] vol.1 EA 86**.

29. The 2nd respondent further submitted that the Land Adjudication Act provides for various administrative remedies that ought to be exhausted before approaching the court for further remedies. That an aggrieved objector is required to lodge an appeal to the minister under section 29 of the Act. The petitioners have failed to adhere to the laid down procedure and this court should down its tools as it is against the spirit of the dispute mechanism laid out in the Land Adjudication Act.

30. The 1st and 3rd respondents filed their written submissions dated 14th November, 2021. The 1st and 3rd respondents have raised 4 issues for determination namely: -

- a) **Whether grant of conservatory orders sought by the applicant are merited.**
- b) **Whether the respondents have infringed on the petitioners right to property to warrant orders sought.**
- c) **Whether the petitioners/applicant have sought or utilized remedies provided under the land adjudication act.**
- d) **Who should bear the costs of the application.**

31. The 1st and 3rd respondents submitted that the petitioners have failed to persuade with reasons as to why they should be granted interim conservatory orders by this court. That conservatory orders can only be granted on merit bearing in mind the public interest vis a vis the interest of certain individuals in the adjudication section. They rely on the case of **Gatirau Peter Munya versus Dickson Mwenda Githinji & 2 Others, Petition No. 2 of 2014 [2014] eKLR.**

32. The 1st and 3rd respondent further submitted that the petitioners seem to be fishing for information rather addressing the issues in the petition. That the adjudication process is incomplete but the applicants are suspicious of the respondents without any justifiable cause. They submitted that the respondents have complied with their legal mandate and the petitioners do not have a basis for their allegations. Further that they have complied with section 5 and 6 of the Land Adjudication Act.

33. They also submitted that article 10 (2) of the Constitution of Kenya does not define what adequate public participation constitute. They rely on the case of **British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) versus Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control alliance & Another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party) [2019] eKLR** which set out the guiding principles of public participation. They submitted that a two weeks' notice is sufficient time to conduct public participation.

34. The 1st and 3rd Respondent further submitted that the respondents have the mandate of hearing objections raised as per section 26 of the Land Adjudication Act. That the petitioners failed to utilise the available remedies and that this petition should be dismissed to give opportunity for the appropriate remedies to be utilized. That the court should be used as the last resort. They rely on the case of **Geoffrey Muthinja Kabiru & 2 Others versus Samuel Munga Henry & 1756 Others [2015] eKLR.**

35. Upon perusal of the pleadings and the written submissions filed by the parties herein, the issues for determination are as follows: -

1. *Whether the petitioners are entitled to grant of conservatory orders.*
2. *Whether the petitioners have exhausted the remedies available to warrant the grant of conservatory orders.*
3. *Who is entitled to costs.*

36. The threshold to warrant a party the grant of conservatory orders was established by the Supreme Court in the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** 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 principles 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 appellants, or intending appellants, 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.”

37. The starting point is to determine whether the petitioners have established a prima facie case with a likelihood of success. In the case of **Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General [2011] eKLR** it was held that:

“It is important to point out that the arguments 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.”

38. When a court is called upon to determine whether a prima facie case has been established, it should not delve into a detailed analysis of the facts and law but should focus on determining whether the Petitioners have put forward a case that is arguable and not frivolous. In the case of **Board of Management of Uhuru Secondary School v City County Director of Education & 2 others [2015] eKLR** the Court posited that:

“26. It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis...”

39. The jurisdiction of the Court at this point is limited to examining and evaluating the material placed before it, to determine whether the petitioners have made out a prima facie case to warrant grant of conservatory orders. The Court is also required to evaluate the pleadings and determine whether denial of conservatory orders will prejudice the petitioners.

40. The petitioners have pointed out denial of access to information, documents and materials intended to guide the adjudication process and that refusal by the respondents to provide such information will lead to allocation of land in a manner contrary to the Petitioners legal rights, constitutional rights, cultural and religious practices and traditions. The petitioners are speculative that the members of the 2nd respondent have put in place a scheme intended to allocate themselves substantial acres of land and take control of the portion of Loita forest. In my view, the petitioners cite real danger of the use of the Loita forest which they are apprehensive, members of the 2nd respondent will allocate themselves. However, it is the petitioners burden to prove that there exists real danger which is imminent, evident, true and factual. In other words, the petitioners must show that the probability as opposed to mere possibility of the danger occurring is real and imminent. As regards access of information and documents, I have perused the documents relied on the petition and by a letter dated 5th August, 2020 addressed to Kiplenge & Kurgat Advocates, the 1st respondent informs the petitioners to confirm with the land adjudication committee on the by laws and any amended by-laws. Also, by a letter dated 30th July, 2020 the 2nd respondent informs the petitioners that the draft of the by-laws is in possession of each committee village member and in their office and is available for every member of the community to access. It is clear to me that information has been made available and can be accessed from the relevant offices.

41. On whether there was adequate public participation of the nomination to the Land Adjudication Committee, the petitioners claim that there was no adequate public participation as required by the constitution. This issue cannot be decided at this interlocutory stage as the Court need to interrogate the principles of public participation which can only be aptly decided at the hearing of the main petition.

42. The Land Adjudication Act provides mechanisms for dispute resolution. **Section 9 (2) of the Land Adjudication Act provides that ‘The adjudication officer shall hear and determine-**

(a) Any petition respecting any act done, omission made or decision given by a survey officer, demarcation officer or recording officer; and

(b) Any objection to the adjudication register which is submitted in accordance with section 26 of this act’

43. Section 30 (1) of the Land Adjudication Act, Cap 284 of the Laws of Kenya provides as follows:

“Except with the consent in writing of the adjudication officer, no person shall institute, and no Court shall entertain, any civil proceedings concerning an interest in land in an adjudication Section until the adjudication register for that adjudication section has become final in all respects under Section 29(3) of this Act.”

44. Arising from the above, I find the instant application to be premature for the reasons that the petitioners have failed to exhaust the dispute resolution mechanism contained in the Land Adjudication Act. The petitioners have also failed the test for the grant of conservatory order. The upshot of the foregoing is that the Notice of Motion dated 24th February, 2021 is hereby lost for lack of merit. Same is hereby dismissed. The orders on status quo are hereby vacated. The costs of the application shall abide the outcome of the petition. It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL ON 27TH APRIL, 2022.

Mbogo C.G

Judge

In the presence of: -

CA: Timothy Chuma