



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT GARISSA**

**PETITION NO. 1 OF 2021**

**BETWEEN**

**MOHAMMED HAJI HUSSEIN.....1<sup>ST</sup> PETITIONER**

**ABDIAZIZ HUSSEIN ABDI.....2<sup>ND</sup> PETITIONER**

**ADAN KULAW DAHIR.....3<sup>RD</sup> PETITIONER**

**UGAS FADIT MOHAMED.....4<sup>TH</sup> PETITIONER**

**ALI ISAACK ABDILLE.....5<sup>TH</sup> PETITIONER**

**MOHAMED KORIYOW FARAH.....6<sup>TH</sup> PETITIONER**

**BARE ULOW SHIHAW.....7<sup>TH</sup> PETITIONER**

**VERSUS**

**MANDERA WATER AND SEWERAGE COMPANY LTD....1<sup>ST</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF MANDERA .....2<sup>ND</sup> RESPONDENT**

**THE WATERFUND.....3<sup>RD</sup> RESPONDENT**

**AND**

**THE COUNTY COMMISSIONER, MANDERA**

**COUNTY.....1<sup>ST</sup> INTERESTED PARTY**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> INTERESTED PARTY**

**THE EUROPEAN UNION.....3<sup>RD</sup> INTERESTED PARTY**

**RULING**

**Summary of facts**

The Petitioners herein filed their Petition on 1<sup>st</sup> February 2021 alleging that their rights to communal ownership of land were about to be infringed by the proposed development of the Bokolow Banyoley 120,000M<sup>3</sup> Earth Pan and Associated Water Supply Works within the Barwaqo area of Mandera County. On the same date, they filed a Notice of Motion dated 1<sup>st</sup> February 2021 supported by the affidavit of Mohamed Haji Hussein, seeking conservatory orders against the Respondents who allegedly were in the process of developing an earth pan and associated water works on the Barwaqo area of Mandera County, in which the Petitioners claim right of ownership, use and occupation in the nature of community land ownership. The Petitioners sought the following orders:

***(i) That the application be certified as urgent and heard ex parte in the first instance;***

***(ii) That pending the inter partes hearing of the application, the Court be pleased to issue conservatory orders restraining the Respondents whether by themselves, their employees, servants, agents, proxies or howsoever from commencing construction on the proposed Bokolow Banyoley 120,000M<sup>3</sup> Earth Pan and Associated Water Supply Works within the Barwaqo area of Mandera County.***

The Petitioners averred that the ownership of the Barwaqo area of Mandera County is contested and had not yet been resolved. That a failure to grant the orders would attract other communities and settlements into the disputed area, further delaying and complicating the resolution of the land ownership dispute. The Petitioners also raised fears that the construction of the earth pan and water supply works so close to the proximity of the area to the Kenya-Somali border had the potential of attracting al-Shabaab militants and destroying the chance of their land claim getting resolved.

The Court considered the Petitioner's application, certified the matter as urgent and was satisfied on the grounds set out that the conservatory orders sought ought to be granted. The conservatory orders sought were granted on 5<sup>th</sup> February 2021.

On 23<sup>rd</sup> February 2021, the 2<sup>nd</sup> Respondent filed a Notice of Motion application supported by the affidavit of one Adan Kullow. In it, they made the following prayers:

***1. That the application be certified as urgent;***

***2. That the Court be pleased to review, vary, discharge and/or set aside the ex-parte conservatory orders issued on 5<sup>th</sup> February 2021;***

***3. That the Petition dated 1<sup>st</sup> February be struck out and dismissed with costs;***

***4. That the costs of the application be provided for.***

The 2<sup>nd</sup> Respondent's ground their application upon the fact that the ex-parte conservatory orders granted to the Petitioners were obtained through material misrepresentation and non-disclosure of material facts, to wit: That the Bokolow Banyoley 120,000M<sup>3</sup> Earth Pan and Associated Water Supply Works is being constructed on Farm Nos. 38 and 39 located in Bokolow Banyoley farms which is private land registered in the name of Ahmed Lakicha; and that the Madera County Commissioner did not issue any directive stopping the construction and development of Bokolow Banyoley 120,000M<sup>3</sup> Earth Pan and Associated Water Supply Works as alleged by the Petitioners. They have filed a letter dated 12<sup>th</sup> February 2021 from the Land Administrator Mandera East confirming ownership of the land by Ahmed Lakicha. Also filed are Registration Receipts No. 16046 and 13401 issued to the said Ahmed Lakicha upon the payment of the land rent for farms 38 and 39 respectively.

The supporting affidavit also discloses another preliminary objection relating to a defect in the Petitioner's Supporting affidavit to the Notice of Motion Application. They note that the affidavit is signed by a stranger, one Billow Hussin Abdi, who is not a party to the suit. Their take is that the defect is incurable and the affidavit ought to be struck out. They also raise another preliminary objection relating to the petition itself, noting that it is made by a stranger, Abdallah Ali Were, who is also not a party to the suit. They pray for the court to strike out the Petition as well.

On the same day, the 1<sup>st</sup> Respondent filed their replying affidavit in opposition to the Petitioner's Notice of Motion Application of 1<sup>st</sup> February 2021. The affidavit is deponed by one Abdikadir Mohamed Tache. The affidavit raises three points in the nature of preliminary objection. First, that the conservatory orders were obtained by disclosure of material facts, that is, that the land upon which the project was being mounted was public community land, when infact the land was private land, owned by one Ahmed Lakicha who then surrendered the land to the 1<sup>st</sup> Respondent as a donation. Secondly, that, the Petitioners lack locus to file the Petition seeing as they are not members of a registered community land. Lastly, as already raised, they point out the defects in the Petitioner's supporting affidavit and Petition as being incurably defective and warranting the striking out of the affidavit and Petition.

On 26<sup>th</sup> February 2021, the 3<sup>rd</sup> Respondent filed their replying affidavit in opposition to the Petitioner's Notice of Motion Application of 1<sup>st</sup> February 2021. They aver that they secured part funding of the Bokolow Banyoley Water Project from the European Union under the Ending Drought Emergencies Programme. That the Bokolow Banyoley Water Project is backed by a Financing Contract entered into between the themselves along with the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The financing programme dated 11<sup>th</sup> December 2019 was attached in support of the assertion. Under the contract, it was the obligation of the 2<sup>nd</sup> Respondent to acquire land for the project, which acquisition was done in compliance with the law. They aver that during the site handover ceremony held on 29<sup>th</sup> January 2021, the community expressed their approval of the report and no dispute at all was raised in relation to the ownership of the land. The 3<sup>rd</sup> Respondents attach the site handover report. The replying affidavit disclosed a preliminary point relating to a defect in the Petitioner's Supporting affidavit to the Notice of Motion Application. They note that the affidavit is signed by a stranger, one Billow Hussin Abdi, who is not a party to the suit. Their take is that the defect is incurable and the affidavit ought to be struck out. They also raise another preliminary objection relating to the petition itself, noting that it is made by a stranger, Abdallah Ali Were, who is also not a party to the suit. They pray for the court to strike out the Petition as well.

On 25<sup>th</sup> February 2021 in response to the Respondents applications, the Petitioners filed a Notice of Motion Application under Certificate of Urgency. They pray for the court to grant them leave to amend the affidavit filed in support of the Notice of Motion dated 1<sup>st</sup> February 2021 as well as leave to amend the Petition of even date. The Petitioners' advocates aver that they inadvertently, and through no fault of the Petitioners, indicated the deponents name as Billow Hussin Abdi instead of Mohamed Haji Hussein. They also admit that the Petitioner's names were inadvertently indicated as Abdallah Ali Were, instead of: Mohammed Haji Hussein, Abdiaziz Hussein Abdi; Adan Kulaw Dahir;

Ugas Fadit Mohamed; Ali Isaack Abdille; Mohamed Koriyow Farah and Bare Ulow Shihaw. The Notice of Motion is supported by the affidavit of Mohammed Haji Hussein. He avers that he indeed executed the supporting affidavit dated 1<sup>st</sup> February 2021 but did not realize that his name had erroneously been indicated as Billow Hussin Abdi. He further avers that the Notice of Motion had disclosed that the application was to be supported by an affidavit sworn by himself. He also notes the defect in the Petition and prays for the Court to allow the Petitioners to amend the defects.

On 26<sup>th</sup> February 2021, the Petitioners filed their replying affidavit in response to the Respondents Affidavits. They deny disclosure of material facts as alleged by the Respondents, noting that the alleged proprietor, Ahmed Lakicha is not in possession of any recognized document of proprietorship, whether a title deed, grant of indenture or lease. As such they dispute the private ownership of farms 38 and 39. They further aver that they do indeed have locus to mount the Petition, being residents of the community in which the project is to be undertaken. The Petitioners also filed their list of authorities in support of their prayer for leave to amend the affidavit and Petition of 1<sup>st</sup> February 2021.

They cited the following authorities in support of the application:

*Lyna G Ventures Ltd Vs Northern Construction Ltd [2020] e KLR; Sammy Ndug'u Waity & Another Vs Independent Electoral and Boundaries Commission & 3 Others [2017] e KLR and Swaleh Gheithan Saanun Vs Commissioner of Lands & 5 Others [2002] e KLR.*

On 26<sup>th</sup> February 2021, the 2<sup>nd</sup> Respondent filed their list of authorities to the Notice of Motion Application dated 23<sup>rd</sup> February 2021. They include: the case of *Esther Murugi Muhoi & 9 Others Vs Jane Wanjiru Kamau & 2 Others [2009] e KLR.; Francis A Mbalanya Vs Cecilia N Waema [2017] e KLR; Gideon Sitelu Konchella Vs Julius Lekaney Ole Sunkuli & 2 Others [2018] e KLR. and Maureen Nyambura Ngigi Warui Vs Board of Directors, Kenya Power and Lightning Company Limited & 2 Others [2020] e KLR.*

On 1<sup>st</sup> March 2021, the 1<sup>st</sup> Respondent filed their list of authorities, citing two decisions:

*Republic Vs Kensington Income Tax Commissioners, Ex Parte Princess Edmond De Poliganac (1917) 1 K.B. 486 and The Owners of Motor Vessel 'Lillian S' Vs Caltex Oil (K) Ltd Civil Appeal No. 50 of 1989.*

#### **Issues for determination**

The 1<sup>st</sup> and 3<sup>rd</sup> Respondents replying affidavits to the Petitioner's Notice of Motion Application dated 1<sup>st</sup> February 2021; the 2<sup>nd</sup> Respondent's Notice of Motion dated 23<sup>rd</sup> February 2021 and the Petitioners' Notice of Motion Application dated 26<sup>th</sup> February 2021 disclose the following matters for determination:

- 1. Whether the Petitioners have locus to institute the present suit against the Respondents;**
- 2. Whether the defect in the Petitioners' affidavit accompanying the Notice of Motion Application dated 1<sup>st</sup> February 2021, to wit, that the affidavit is signed by a stranger to the application, curable;**
- 3. Whether the defect in the Petitioners' Petition dated 1<sup>st</sup> February 2021, to wit, that the Petition is brought in the name of Abdallah Ali Were, instead of: Mohammed Haji Hussein, Abdiaziz Hussein Abdi; Adan Kulaw Dahir; Ugas Fadit Mohamed; Ali Isaack Abdille; Mohamed Koriyow Farah and Bare Ulow Shihaw, curable;**
- 4. Whether the conservatory orders ought to be set aside on the grounds that they were obtained by concealment of material facts by the Petitioners, principally that the land upon which the project is to be developed is private as opposed to communally owned.**

#### **Legal analysis and opinion**

##### **1. Whether the Petitioners have locus to institute the present suit against the Respondents.**

It is trite law that the question of *locus standi* impacts the question of whether or not a court has jurisdiction to entertain a matter and ought therefore to be determined at the earliest opportunity.

In the case of *John Wekesa Khaoya Vs Attorney General, Petition No. 60 of 2012; [2013] e KLR*, the court noted the effect of the promulgation of the 2010 Constitution on the question of *locus standi* as follows:

*"...The locus standi to file judicial proceedings, representative or otherwise, has been greatly enlarged by the Constitution in Articles 22 and 258 of the Constitution which ensures unhindered access to justice..."*

The Supreme Court decision in *Mumo Matemu Vs Trusted Society of Human Rights Alliance & 5 others [2014] e KLR* finally determined the issue of *locus standi* in its pronouncement thus;

*"...by virtue of Articles 22 & 258 of the Constitution every person has the right to institute proceedings claiming that the Constitution has been contravened; that a person in that regard, includes one who acts in the public interest and further, pursuant to Article 260 it also includes a company, an association, or other body of persons whether incorporated or unincorporated."*

The thrust of the Petition is that the Petitioners; constitutional rights under Articles 29, 40(1), 47, 60(1), 63(3&4) have been infringed by reason of the Respondent's actions in the development of the Bokolow Banyoley 120,000M<sup>3</sup> Earth Pan and Associated Water Supply Works within the Barwaqo area of Mandera County, in which they reside. As such, the Petitioners do indeed have *locus standi* to mount the present petition.

**2. Whether the defect in the Petitioners' affidavit accompanying the Notice of Motion Application dated 1<sup>st</sup> February 2021, to wit, that the affidavit is signed by a stranger to the application, curable.**

The Respondents have pointed out and the Petitioners (and more specifically the deponent of the affidavit accompanying the Notice of Motion Application dated 1<sup>st</sup> February 2021) admitted that the name appearing in the *jurat*, being that of Billow Hussin Abdi renders the affidavit defective. This is because, **Order 19 Rules 3 and 4** of the Civil Procedure Rules require that the deponent be a person able to prove the matters to which he swears. Billow Hussin Abdi is thus, without question, a stranger to the affidavit and to the Petition at large.

The question for determination then, is whether this defect, is one that is curable, so that the court is able to allow the Petitioners leave to amend the same, or whether the defect is fatal, requiring the court to strike out the affidavit. As highlighted, all the parties have been diligent in addressing the court on this matter. Having looked at the authorities presented, the following issues are emergent.

First that the court does indeed have power to cure defects in an affidavit. **Order 19 Rule 7 of the Civil Procedure Rules, 2010.**

***Irregularity in form of affidavit***

*The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by mis-description (sic) of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.*

Secondly, that the defects amenable to be cured are those that do not go to the substance of the affidavit itself.

See the case of **Kwik Fit Tyres & Autocare V Mohamed Salim Juma & 2 Others [2010] e K.L.R.**

**Rule 7 of Order XIX** reads as follows:-

*“7. The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by mis-description of the parties or otherwise in title or other irregularity in the form thereof.”*

This rule gives the court the power to cure a defect which is an irregularity which does not go to the substance.

Certain defects have been held to go to the substance of an affidavit and thus to be incurable:

In the Supreme Court case of **Gideon Sitelu Konchella Vs Julius Lekaney Ole Sunkuli & 2 Others [2018] e K.L.R** cited by the 2<sup>nd</sup> Respondent:-

*“Where multiple replying affidavits appeared to be unsigned, undated and commissioned, the court held that the defects were incurable. The Court in making its decision also noted the centrality of a replying affidavit as the principal document setting out the respondent's reply”.*

In East African Court of Appeal Case of **Premchand Raichand & Another Ltd Vs Quarry Services & Others [1969] E.A. 514** where the court was also considering several defects and omissions, it stated thus:

*“It has repeatedly been said by this court that affidavits based on information must disclose the sources of information...This is not merely a matter of form but goes to the essential value of the affidavit...But since the source of the information may have been unreliable, the affidavit can have no evidential value...The defects in the applicants affidavits have nothing to do with the misdescription of parties, which I must hold to be parties in the suit not the deponents...The irregularities herein are not restricted to the form but go to the evidential value of the affidavits themselves...”*

In **Maureen Nyambura Ngigi Warui Vs Board of Directors, Kenya Power and Lightning Company Limited & 2 Others [2020] e K.L.R.**

*“Where an affidavit was commissioned by the Advocate who drew up the affidavit, the Court held that the defect was incurable on the basis of the mandatory and strict wording of Section 4 of the Oaths and Statutory Declarations Act (Cap 15) Laws of Kenya”*

In **Francis A Mbalanya Vs Cecilia N Waema [2017] e KLR:-**

*“The Court was invited to assess whether a failure to seal and mark annexures rendered an affidavit fatally defective. In that case, while the court in fact struck off the offending annexures, it allowed for the filing of a supplementary affidavit to introduce the marked and sealed annexures”.*

Lastly, in the case of **Esther Murugi Muhoi & 9 Others Vs Jane Wanjiru Kamau & 2 Others [2009] e KLR** also cited by the 2<sup>nd</sup>

Respondent, the court struck out an affidavit for being signed by a person other than the deponent. The Deponent was Esther Muthoni Muhoi, while the person named in the Jurat was Esther Murugi Muhoi. It must be noted though that in this case, the court had allowed the deponent to file a supplementary affidavit, but that affidavit did not clarify the confusion because no identification card was annexed to show that the deponent and executor of the affidavit were one and the same person.

In the present case, the deponent vide a supporting affidavit to the notice of motion dated 25<sup>th</sup> February 2021 lodged by the Petitioner's advocate avers that he in fact is the one who executed the affidavit, so that the deponent and the person who appended their signature on the jurat were one and the same person. The advocates admit that they are the ones who inserted the wrong name in the jurat, that of Billow Hussin Abdi. The person who signed the affidavit was thus one who was capable of proving the matters therein contained, as required by **Order 19 Rule 3(1) of the Civil Procedure Rules, 2010**. The question then is whether an error on the name of the person signing the jurat is a question of form or substance.

As already discussed the case of **Esther Murugi Muhoi & 9 Others Vs Jane Wanjiru Kamau & 2 Others [2009] e KLR** bears facts remarkably similar to the present one. In that case, the court allowed for the filing of a supplementary affidavit as noted in an attempt to cure the defect, and only struck out the affidavit where the necessary identification card was not attached in the supplementary affidavit.

The question of the manner in which defects in a verifying affidavit have been handled is demonstrated in the following cases:

In **Jackline Ombongi Vs Agnes Nyanchama & another [2016] e KLR**

*“There is a long line of court decisions that hold the view that an error in a verifying affidavit ought not to lead to the striking out of the plaint as the defect in such a verifying affidavit can be cured by the filing of a supplementary affidavit. For my part I see no reason to depart from the well-trodden path to break new ground.”*

In the case of **Nairobi HCCC No. 810 of 2001 (unreported) Microsoft Corporation Vs Mitsumi Computer Garage Ltd & Another, Ringera, J.** again held that:

*“An error in a verifying affidavit where a party has attempted to comply with the rule requiring verification of a plaint and which error neither goes to the jurisdiction of the court nor prejudices the defendants should not lead to striking out of the plaint. In the case he allowed for the filing of a fresh verifying affidavit.”*

In the case of **Geology Investments Ltd –vs- Rogonyo Njuguna & Others Nairobi HCCC No. 1067 of 2002 (unreported) F. Azangalala, J.** (as he then was) in following the holdings in the above cited authorities observed thus:-

*“From the authorities, I see a trend to sustain suits rather than strike them out. This is as it should be as courts lean in favour of doing substantial justice to parties rather than straight jacket adherence to rules of procedure. In the present suit there is a verifying affidavit save that the advocates who drew the same did not state their names and their place of address. An omission of this nature should not lead to striking out of the plaint as such action would not serve the ends of justice. I accordingly dismiss the defendant's application to strike out the plaint.”*

In **Microsoft Corporation vs. Mitsumi Computer Garage Ltd & Another Nairobi (Milimani) HCCC No. 810 of 2001 [2001] KLR 470; [2001] 2 EA 460, Ringera, J** ( as he was then) expressed the same viewpoint as follows:

*“...Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not to be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue...The purpose for verifying the contents of the plaint may be attained by rejecting a defective affidavit and ordering that a fresh and complying one be made and filed on the record.”*

In the present case, the defect in the affidavit is not one going to the jurisdiction of court or one that would prejudice the Respondents. Further, the Petitioners have admitted their mistake and have even filed a draft amended supplementary affidavit.

See the decision in **Premchand Raichand & Another Ltd – v – Quarry Services & Others [1969] E.A. 514**

*“...Further I am of the view that even when the court would admit or receive such an affidavit as is allowed under Order XVIII Rule 7, the decision of the court would depend on the decree of the non-compliance, I also think that the party wishing the court so to receive an affidavit would humbly request the court to do so and not try to convince the court that the defects do not matter.”*

Lastly, it must be appreciated that the defect was occasioned by the Petitioner's counsel, who has owned up to the mistake. As such, the error ought not to be visited upon the litigants themselves.

The Court of Appeal decision **Luke Cheruiyot & 37 others v National Oil Corporation of Kenya [2015] e KLR** citing with approval the Court of Appeal decision in **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another[1980] e KLR** is instructive:-

*“Our consideration of the proceedings does not disclose any special circumstances which made the learned Judge depart from the normal practice of not visiting counsel’s mistake upon his client nor did the learned Judge advert to any fundamental prejudice the respondent would suffer if the suit was maintained. As has been said before, the function of the Courts is not to instill discipline to erring counsel but to administer justice to litigants and others who seek their services.”*

In the circumstances, I am inclined to grant leave to the Petitioners to file a further or supplementary affidavit within 14 days hereof.

**3. Whether the defect in the Petitioners’ Petition dated 1<sup>st</sup> February 2021, to wit, that the Petition in brought in the name of Abdallah Ali Were, instead of: Mohammed Haji Hussein, Abdiaziz Hussein Abdi; Adan Kulaw Dahir; Ugas Fadit Mohamed; Ali Isaack Abdille; Mohamed Koriyow Farah and Bare Ulow Shihaw, curable.**

The starting point in considering whether a Petition can be amended is **Rule 18 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** (hereafter “the *Mutunga Rules*”). The Rule Provides as follows:

*“A party who wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the court.”*

It is thus clear that parties are allowed to amend their pleadings, but that the amendment must be sanctioned by the leave of court. The Court in **Ann Muthoni Karanu vs La Nyavu Gardens Limited NBI ELC 181 of 2014 [2015] e KLR** noting the discretionary power conferred on court to decide whether or not to grant the leave sought highlighted the following test to be applied:

*“The overriding objective (of the Civil Procedure Rules) is that the court should deal with cases justly, that includes, so far as is practicable, ensuring that each case is dealt with not only expeditiously but also fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party caused by the amendment can be compensated for in costs, and the public interest in the administration of justice is not significantly harmed.”*

The Court of Appeal in **Central Kenya Ltd –v- Trust Bank Ltd [2002]2 EA 365** set out the purpose of allowing for parties to amend pleadings and the considerations that ought to guide the Courts discretion:

*“The Court of Appeal held that amendment of pleadings and joinder of parties was aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his cause of action and that a party should always be allowed to make such amendments as are necessary for determining the real issues in controversy or avoiding a multiplicity of suits. The court then went on to state that the amendments or joinder would be allowed provided (i) there had been no undue delay, (ii) that no vested interest or accrued right was affected and (iii) no injustice or prejudice would be occasioned to the other side that could not be properly compensated for in costs.”*

In the present instance, the court’s discretion ought to be exercised in favour of the Petitioners, as allowing them to amend the names of the Petitioners will not occasion undue delay to the Respondents and will enable the Petitioners to avoid a multiplicity of suits.

**4. Whether the conservatory orders ought to be set aside on the grounds that they were obtained by concealment of material facts by the Petitioners, principally that the land upon which the project is to be developed is privately owned as opposed to communally owned.**

It is the Respondents’ case that the parcel of land upon which the projects is developing belong was previously private land which was later surrendered to the 1<sup>st</sup> Respondent. The Petitioners maintain that the land has at all times been community land and that the alleged privatization and surrender is steeped in illegality as no recognized document of title is held by the alleged former proprietor, Ahmed Lakicha. The question of the ownership, occupation and use of the Suit Property forms the crux of the Petition and ought therefore to be heard and determined in the main suit. As such, the question as to whether or not the Petitioners failed to disclose material facts relating to the ownership, occupation and use of the Suit Property would be prematurely dealt with at this stage, and as such, will have to await hearing of the main suit.

However, at the time when the court granted the conservatory orders, it was led to believe that the project was only at the proposal stage and had not been implemented. However, it has subsequently come to light that the project is in fact at an advanced stage. Moreover, the Court was also led to

believe that the suit property was communally owned. The replying affidavits and the subsequent application seeking to discharge the conservatory orders has thrown a spanner into the works, in that it is alleged that the Suit Property was alienated to a private individual who thereafter donated it to 1<sup>st</sup> Respondent for the purposes of developing the earth pan and related water works for the benefit of the community. It is further deposed that an advertisement for the tender for construction of the project was done by the 1<sup>st</sup> Respondent on 1<sup>st</sup> September 2020 and that after a rigorous and lawful procurement process, the tender was awarded to the successful bidder, who has already commenced construction work. The effect of the orders issued would be to deny the members of the community the much needed water and to stall the project which a donor has offered to finance. In light of the stage of development of the project, the court is required to take into account, not only the issues considered in rendering the orders, but now additionally, the question of public interest.

In **Nairobi Constitutional Petition No. 206 of 2016 Satinderjit Singh Matharu v. Armajit Singh Gahir & 5 Others**, the Court observed as follows:

*“6. Despite varied nomenclatural expressions, the principles upon which the High Court considers application for conservatory orders in constitutional litigation are now settled by several decisions on the point, and may be condensed as follows:-*

1. The applicant must demonstrate **prima facie** case, or an **arguable** case, for the grant of the relief sought.
2. The applicant must stand to suffer an **irreparable harm**, injury or loss not remediable by any other relief; and
3. As a remedy in constitutional litigation, the conservatory order calls for consideration of the **public interest in the matter**, and the balance of convenience between the petitioner's and the respondent's case must favour the grant of the conservatory order."

Again in **Muslims for Human Rights (MUHURI) & 4 Ors. v. Inspector General of Police & 2 Ors., Mombasa PETITION No. 62 of 2014 of 22<sup>nd</sup> December 2014**, where the Court held as follows:

*"The emerging principles for the grant of injunction or conservatory orders under the constitutional litigation, as I understand them, are firstly, that the applicant must demonstrate an arguable case - sometimes called prima facie arguable case - the reference to arguable case distinguishing it from the prima facie test of the Giella v. Casman Brown (1973) EA 385 traditionally applied in regular civil cases; secondly, that the applicant must show that the petition would be rendered nugatory or that the damage that would be suffered in the absence of the conservatory order would be irreversible; and, thirdly, that in constitutional cases, the public interest in the matter would be considered and generally upheld".*

While the Petitioners have an arguable case as to the method of alienation of the alleged private land and registration of Ahmed Lakicha as its proprietor, the question of public interest seems to outweigh the communal land rights claimed by the Petitioners. Given the stage at which the project is at and the fact that the community stands to benefit greatly from the water and associated projects, it would appear that the balance of convenience tips in favour of the Respondents and public interest on the whole.

The Court of Appeal decision in **Dellian Langata Limited Vs. Simon Thuo Muia & 4 Others [2018] e K.L.R** is instructive:

*"What is more, this appears to have been a case of an individual attempting to trump and negate the rights of the public in view of the fact that the other sub-divided plots such as sub-plot E were meant for development of schools and other public amenities. We must hold that the interest of the public overrides that of an individual. We echo the sentiments of this Court in **East African Cables Limited Vs. The Public Procurement Complaints, Review & Appeals Board And Another [2007] e KLR** expressing the philosophy behind the view that public interest should take precedence in the following words:-*

*"We think that in the particular circumstances of this case, if we allowed the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action, we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable."*

On the premises, it is my considered view that the conservatory orders granted on 5<sup>th</sup> February 2021 be set aside and that the Petitioners be given 14 days within which to file the further/supplementary affidavit and the amended petition.

Given that the defects in the affidavit and petition, which form the bulk of the preliminary issues raised, were occasioned by the Petitioner's advocates, it is my view that the Petitioners bear the cost of the application.

In the final analysis, I grant the following orders:

1. **The conservatory orders granted on 5<sup>th</sup> February 2021 be and are hereby set aside.**
2. **The Petitioners are granted 14 days from today to file and serve an amended petition and a further or supplementary affidavit.**
3. **The costs of this application to be borne by the Petitioners.**

**READ AND SIGNED IN OPEN COURT, VIRTUALLY, AT KERUGOYA THIS 12TH DAY OF MARCH 2021.**

.....

**E.C. CHERONO**

**ELC JUDGE**

12/3/20121

Before

Hon. E.C. Cheronno (Judge)

Kabuta – Court clerk

Mr. Duware – I am for the 1<sup>st</sup> Respondent

M/S Agwata – I am for the 2<sup>nd</sup> Respondent

M/S Asiro holding brief for Khaemba for Petitioner

COURT

**RULING IS DELIVERED VIRTUALLY IN THE OPEN COURT AT KERUGOYA THIS 12TH DAY OF MARCH, 2021.**

.....

**E.C. CHERONO**

**ELC JUDGE**