



**Bamburi Wananchi Cooperative Savings and Credit Society Limited
& 26 others v Attorney General & 45 others (Environment and Land
Petition E023 of 2024) [2025] KEELC 5090 (KLR) (9 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5090 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND PETITION E023 OF 2024**

**SM KIBUNJA, J
JULY 9, 2025**

BETWEEN

**BAMBURI WANANCHI COOPERATIVE SAVINGS AND CREDIT SOCIETY
LIMITED & 26 OTHERS & 26 OTHERS & 26 OTHERS & 26 OTHERS & 26
OTHERS & 26 OTHERS PETITIONER**

AND

**THE HON, ATTORNEY GENERAL & 45 OTHERS & 45
OTHERS RESPONDENT**

RULING

Notice Of Motion Dated 17th September 2024

1. The petitioners moved the court through the notice of motion dated the 17th September 2024, seeking for inter alia orders that:
 - a. The court issue conservatory orders in the form of orders of prohibition restraining the 12th to 46th respondents and or any other person operating under them from doing further construction, subdividing, selling or in any other manner disposing plot No. 312 & 392/1/ MN and or portions known as subdivisions thereof as particularized, the suit properties, pending the hearing and determination of the application.
 - b. The court to issue conservatory orders in the form of orders of mandamus compelling the OCS, Bamburi, to implement Order (a) above by ensuring that no new structures are erected, no subdivision process is implemented on the ground or any new entry by squatters is effected on the suit property until further orders of this court.



- c. That the court to certify that the petition raises issues contemplated under Article 165(4) of the Constitution and refer the same to the Hon, Chief Justice to constitute a bench consisting of not less than three (3) judges to hear and determine the petition.
- d. That pending the hearing and determination of this petition, the court be pleased to issue orders granting the petitioners leave to serve the squatters occupying the suit property by way of substituted service in the form of notice in the Standard Newspaper and Taifa Leo.
- e. Costs be provided for.

The application is premised on the forty-one (41) grounds on its face and supported by the affidavit of Anastasia Cheron, secretary to the 1st petitioner, sworn on 17th September 2024, inter alia deposing that the 2nd to 27th petitioners are former members of 1st petitioner; that as the main petition may take sometime to be heard and determined, and more squatters are coming onto the suit properties and constructing structures, it is necessary to issue the orders sought to maintain the status quo and mitigate further exposure; that plots Nos. 312 and 392 were subdivided into several portions that were transferred to the 1st petitioner's membership, but squatters have moved onto the land stopping the petitioners from taking possession of the parcels and hence these proceedings.

2. The 1st to 3rd respondents opposed the application through their six (6) grounds of opposition dated 17th February 2025, summarized as follows:
 - a. That this court as presently constituted has jurisdiction to hear and determine the issues raised in the petition.
 - b. That the petition is not a complex matter, does not raise any novel issue or substantial questions of law or genuine grievance of general public importance to deserve referral to the Hon. Chief Justice to constitute an uneven bench to hear it.
 - c. That the application is an extension of the petition, which is conceived by the petitioners to compel to compulsorily acquire the suit property contrary to the known parameters and procedures under the Land Act.
3. The application is opposed by the 6th respondent through the four (4) grounds of opposition dated 29th January 2025, summarized as follows:
 - a. That the court has original jurisdiction to hear and determine this petition under Article 165(4) of the Constitution and there is no need to refer the matter to the Hon. Attorney General to constitute an even bench to hear it.
 - b. That the Ministry of Lands and Physical Planning and the 5th Respondents have the mandate to resettle squatters under section 134(5) of the Land Act, and this petition is conceived to compel the Government to compulsorily acquire private property contrary to the parameters under the Land Act.
4. Though the 8th respondent filed notice of appointment of advocate dated the 10th February 2025, it did not file any replies to the application.
5. Directions on filing and exchanging submissions on the application were issued on the 18th February 2025. Consequently, the learned counsel for the petitioners and 1st to 3rd respondents filed their submissions dated the 11th March 2025 and 18th February 2025 respectively, which the court has considered.
6. The issues for the determinations by the court are as follows:



- a. Whether the petitioners have met the threshold for conservatory orders of prohibition against the 12th to 46th respondents to issue.
 - b. Whether the petition raises substantial questions of law to warrant it being referred to the Hon. Chief Justice to constitute an even bench to hear it.
 - c. Who pays the costs?
7. The court has carefully considered the grounds on the application, affidavit evidence, grounds of opposition, submissions by the two learned counsel, superior courts decisions cited thereon and come to the following findings:
- a. The learned counsel for the petitioners has submitted that though the petitioners are the registered proprietors of the suit properties, they are not able to enjoy the fruits of their hard work due to the large number of squatters who have moved thereon, the security concerns and the threats thereof. That unless the court stops the activities of the squatters in the interim, the suit properties will become overcrowded, and evicting such large numbers of people has political, economic and social implications which in most instances favour a non-eviction approach. That the petitioners have established a prima facie case for the orders sought to issue, and it is in the public interest and in the interest of justice that pending the hearing and determination of the petition, the court issues conservatory order to stop further subdivision, leasing, selling and construction of the suit property. The learned counsel for the 1st to 3rd respondents has submitted that though the petitioners have raised a catalogue of both legal apprehensions, speculations and conceived aspects of the suit that they characterize as being arguable, there is no prima facie case capable of earning the issuance of conservatory orders. That from the facts disclosed, there is no risk of the substratum of the petition being moved, subjected to, improperly dealt with or interfered with before the petition is heard and determined. That as such the application for conservatory order should be dismissed for want of merit.
 - b. Both counsel extensively submitted on the court’s jurisdiction in granting conservatory orders at the interlocutory stage. They have made reference to various superior courts decisions in that respect including the Supreme Court of Kenya case of *Peter Gatirau Munya versus Dickson Mwenda Kithinji & 2 Others* Civil Application No. 5 of 2014 [2014] eKLR, in which the court stated as follows on conservatory orders:

“

“(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, 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.”

The court proceeded to restate the three-factor test to be applied in determining whether to grant a conservatory order as follows:

- i. Firstly, the applicant should demonstrate an arguable prima facie case with a likelihood of success, and would be prejudiced if the order is not granted.



- ii. Secondly, the applicant must show that the petition or its substratum will be rendered nugatory if the conservatory order is not granted.
 - iii. Thirdly, the applicant should establish that public interest will be served by granting the conservatory order.
- c. This court is not expected to make any final determinations on any matter of fact and or law at this interlocutory stage, as that has to await the hearing of the petition. The foregoing notwithstanding, the court has observed from the pleadings and affidavit evidence filed that the petitioners' proprietorship of the suit properties described has not so far been disputed. The court has also noted that the petitioners' claim that the 12th to 46th respondents and others have taken possession of the suit properties has also not been disputed. Further, the petitioners' expressed fears of more people moving onto the suit properties and engaging in activities inimical of the registered proprietors' interests has not been rebutted. With the foregoing in mind, and applying the tests in the various superior courts decisions cited including *Peter Gitarau case* [supra], the court finds the petitioners have demonstrate an arguable prima facie case with a likelihood of success. They have also shown that the number of people moving and negatively dealing with the suit properties will most probably continue to increase and the court therefore finds it would be in the public interest to consider granting a conservatory order.
- d. It is trite that parties are in law bound by their pleadings, and as such the court has to only consider granting the prayers sought by the successful party(ies). Though the court has in (c) above found the petitioners have established that they deserve a conservatory order to be issued in their favour, the order sought in prayer (2) of their notice of motion was phrased to be for the period "pending the hearing and determination of this application inter-parties;" Such an order is sought in the interim to be in force as the application is heard and determined. I have perused the record and noted no conservatory order was issued when the matter came to court first on 20th September 2024, or on any other date subsequent thereto. That prayer as coached cannot be granted at this stage for its lifespan is ending today. I have also noted that there is no prayer for conservatory order to be issued pending the hearing and determination of the petition.
- e. On prayer (3) of whether the petition raises a substantial question of law to warrant it being referred to the Hon. Chief Justice to constitute uneven bench to hear it, the learned counsel for the petitioners has inter alia submitted that it does. The counsel relied on the case of *Wycliffe Ambetsa Oparanya versus Director of Public Prosecution & Another* [2016] eKLR, and submitted the petition raises issues that are novel, cross cutting and of great importance, including discrimination under Article 27(1), (2), (4) & (5) of the *Constitution*; Kenya Kwanza Coalition political promise in the 2022 election to acquire vacant private land to distribute to the landless that derives legitimacy under Article 10(2) of the *Constitution*; whether the Kenya Kwanza Coalition manifesto constitutes an enforceable social contract under the *Constitution*; and whether the purchase of private land occupied by squatters by the government under Article 40 of the *Constitution*, and distributing it to squatters was central in the Kenya Kwanza Manifesto, 2022 to facilitate the squatters to achieve social economic rights envisaged under Article 43 of the *Constitution*. The learned counsel for the 1st to 3rd respondents submitted inter alia on the principles to be considered in certifying a matter to be raising a legal issue of substantial importance to include;



- i. The applicant satisfying the court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;
- ii. The applicant must show that there is a state of uncertainty in the law, or that the issue raised is novel;
- iii. The applicant has an obligation to identify and concisely set out the specific substantial question(s) of law attributed to the matter sought to be so certified.
- iv. The matter must fall within the terms of Article 165(3)(b) or (d) of the Constitution .
- v. The applicant should the issues raised are complex and requires a substantial amount of time to be disposed of.

The counsel submitted that the petition is a dispute of ownership of the suit properties between the petitioners and respondents and there is nothing complex or novel about it. That the issues of ownership of land in dispute can clearly be heard before a court presided by one judge, as it does not amount to a substantial and considerable jurisprudential question to warrant it being referred to the Hon. Chief Justice for empanelling of an even bench.

- f. Having given due considerations to the rival submissions by the two learned counsel, and appreciating that indeed, this petition is primarily a dispute over ownership and possession of the suit properties between the petitioners and 12th to 46th respondents and others, and taking judicial notice that this court and others in this region have many suits of similar nature, some decided and others pending, the court finds the petition does not meet the test of a substantial question of law that would qualify being referred to the Hon. Chief Justice for empanelling uneven bench under Article 165(4) of the Constitution , to hear it.
 - g. Though in constitutional petitions costs may ordinarily not be awarded especially in public interest litigations, this petition is on private property rights, and as the petitioners have failed in their application, they should bear the costs to the 1st to 3rd and 6th respondents.
8. Flowing from the above conclusions in respect of the notice of motion dated the 17th September 2024, the court finds and orders as follows:
- a. The said application has no merit.
 - b. The application is dismissed.
 - c. The petitioners to bear the costs for respondents who defended the application.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 9TH DAY OF JULY 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Petitioners : Mr Munyiithya

Respondents : Mr Penda For 1st To 4th Respondent



M/s Anguche For 6th Respondent
Shitemi-court Assistant.

