



Gakuru & 2 others (Suing on their Behalf and on Behalf of JWA Thika Sub-County) v County Government of Kiambu & another; National Land Commission & another (Interested Parties) (Petition E012 of 2024) [2025] KEELC 3970 (KLR) (20 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3970 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
PETITION E012 OF 2024**

JA MOGENI, J

MAY 20, 2025

**IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22,
23, 42, 43, 69, 70, 165(2) (B) AND 258 OF THE
CONSTITUTION OF KENYA 2010**

AND

**SECTION 3, 58, 59 OF THE ENVIRONMENTAL
MANAGEMENT AND CO-ORDINATION ACT NO. 8 OF
1999**

AND

**IN THE MATTER OF CLASS ACTION LAWSUIT IN
RESPECT OF ENVIRONMENTAL RIGHTS OVER ILLEGAL
UNLAWFUL AND/OR UNPROCEDURAL CONSTRUCTION
OF AFFORDABLE HOUSING UNITS ON THIKA
MUNICIPALITY BLOCK 11/343**

AND

**IN THE MATTER OF CONTRAVENTION ARTICLE 2, 3, 10,
42, 69 AND 70 OF THE CONSTITUTION OF KENYA 2010**

BETWEEN

**ROBERT N GAKURU 1ST PETITIONER
EZEKIEL MULANDI 2ND PETITIONER
ROBERT N NAGE 3RD PETITIONER**



SUING ON THEIR BEHALF AND ON BEHALF OF JWA THIKA SUB-COUNTY

AND

COUNTY GOVERNMENT OF KIAMBU 1ST RESPONDENT

**CABINET SECRETARY MINISTRY OF LANDS HOUSING AND URBAN
DEVELOPMENT 2ND RESPONDENT**

AND

NATIONAL LAND COMMISSION INTERESTED PARTY

**CHANIA THIKA RESIDENT ASSOCIATION (THROUGH JOHN KAGIRA
NAGE - CHAIRMAN, ANN KAGURE IRARI - SECRETARY & GREGORY
WAMBUI - TREASURER) INTERESTED PARTY**

RULING

1. The Ruling herein relates to two Applications, namely, the Notice of Motion Application dated the 26/08/2024 by the Petitioner, and the Notice of Motion Application dated 18/11/2024 filed by the 2nd Interested Party.
2. In respect of the Notice of Motion Application dated the 26/08/2024 , the Petitioner has sought for the following orders;
 - a. Spent
 - b. That pending the hearing and determination of this Application inter-parties, a conservatory order be issued restraining the Respondents by themselves or any other person, body or organ acting under their authority au from financing, proceedings with, excavating, erecting buildings or undertaking any other activities on all that land parcel known as Thika Municipality Block 11/343 under the Boma Yangu Housing project within Thika Sub-County, Kiambu County pending the hearing inter-parties of this Application.
 - c. That pending the hearing and determination of this Application inter-parties, a conservatory order be issued restraining the Respondents by themselves or any other person, body or organ acting under their authority au financing, proceeding with, excavating, erecting buildings or undertaking any other activities on all that land parcel known as Thika Municipality Block 11/343 under the Boma Yangu housing project within Thika Sub-County, Kiambu County pending the hearing and determination of this petition.
 - d. That the costs of this Application be provided for.
3. The subject Application is premised on the various grounds contained in the body thereof and same is further supported by the Affidavit of one, EZEKIEL MULANDI, sworn on 26/08/2024 and to which the deponent has annexed five sets of documents.
4. Upon service of the subject Application, the 1st Respondent responded thereto by filing a Replying Affidavit dated 26/03/2025 contesting the claims mounted on behalf of the Petitioner.
5. No other party other than the 1st Respondent filed any response to the said Application dated 26/08/2024.



6. Vide the Notice of Motion Application dated the 18/11/2024, the 2nd Interested Party has sought for the following orders;
 - a. Spent
 - b. That; Chania Thika Residents Association, through John Kagira Nage (Chairman), Ann Kagure Irari (Secretary) & Gregory Wambaki (Treasurer) be joined as the 2nd Interested Party in this Petition.
 - c. That costs of this Application be provided for.
7. Upon being served with the said Application no other Respondent filed a response except the 1st Respondent who filed a Replying Affidavit sworn on the 26/03/2025, in respect of which same contested and/or otherwise controverted the allegations contained therein.
8. As already stated neither of the other Respondents nor the Interested Parties filed any response to the said Application.

Applicants/Petitioners Case

9. The Petitioners are officials of Jamofastar Welfare Association made up of residents of Thika Sub-County within Kiambu County which is made up of about 50,000 residents of Jamhuri, Ofafa, Starehe, UTI, Kimathi, Magoko, Ziwani, Bondeni and Majengo Teachers' Estates all which are in the area surrounding land parcel number Thika/Municipality Block 11/343.
10. The Applicants/Petitioners' case is that the construction of affordable housing units and the government driven Boma Yangu Programme has commenced on land parcel number Thika/Municipality Block 11/343. However that the project is being undertaken illegally, unlawfully and unprocedurally as no public participation process was undertaken before the commencement of the project.
11. It is the Petitioners' case that the suit property has been earmarked for the construction of affordable housing units under the Boma Yangu Housing Initiative spearheaded by the National Government as annexure A shows and the construction of the units has since commenced with the construction of stalls.
12. That in the year 2021 the Applicants had been informed of the possibility of the construction of the units by the 1st Respondent and an agreement was entered into between the Applicants and the 1st Respondent to encourage cooperation in the areas of housing and economic development of the County. However they aver that the 2nd Respondent took over the project and the suit property which was previously held by the 1st Respondent on behalf of the people of Kiambu under unclear circumstances thus transferring the project to the National Government.
13. Further that no Environmental Impact Assessment was done by law and no license has been issued before the commencement of the project and therefore the proper Environmental Management may be overlooked while undertaking the same.
14. The Applicants depose that the 2nd Respondent has illegally, unlawfully and unprocedurally entered the suit property and commenced construction and that the Applicants were shocked by the new developments as their cooperation nor consultation was not sought before the said commencement of construction. Neither the public nor the Applicants were consulted as regards the impact of the project within the area despite the fact that the Applicants were ready to engage and provide their views.



15. It is the Applicants' contention that the 2nd Respondent by-passed the mandatory constitutional requirement to have meaningful public participation of the people and collection of views regarding the impact of the project in the locality. They further aver that they are entitled to a clean and healthy environment.
16. The Petitioners depose that they are likely to miss out on a clean and healthy environment due to failure, refusal and neglect of the 2nd Defendant in conducting environmental impact assessment, evaluation and or review before embarking on the project. That due to lack of environmental management plan and environmental impact assessment license to implement, the activities within and without the suit property the activities of the 2nd Respondent remain unregulated and are likely to cause considerable environment degradation in the area due to checks and balances critical in environmental management.
17. They state that Petitioners Constitutional rights guaranteed by Articles 2, 3, 10, 19, 20,21,22,23,42,43,69,70, 165 (2) (b) and 258 40, 42, 47 and 70 have been breached by the Respondents who allowed the impugned project contrary to the law and the Applicants/Petitioners legitimate expectations. They stated that the Applicants are likely to suffer irreparably if the orders are not granted.
18. The Application was opposed vide a Replying Affidavit dated 26/03/2025 by Waithira Waiyaki, the County Attorney for the 1st Respondent.
19. In her response she avers that 1st Respondent was at all material times the registered and absolute proprietor of all that parcel of land known as THIKA MUNICIPALITY BLOCK 11/343 situated in Thika Sub County which is located within Thika Municipality where demand for housing far exceeds supply and there is a critical need for affordable housing to accommodate the residents of the Municipality.
20. She avers that Article 43 (b) of the Constitution of Kenya, 2010 provides that every person has the right to accessible and adequate housing, and to reasonable standards of sanitation and the 1st Respondent has a constitutional obligation to comply with this clear provisions of the Constitution. Further that the provisions of the Affordable Housing Act 2024 and more specifically, Sections 41 (1) and (2) provides;

“Section 41 (1) The provisions of the Land Act shall, subject to subsection (2) apply to the allocation of public land for the implementation of affordable housing scheme and development of institutional housing scheme;

Section (2) Land held by a county government shall not be allocated unless the Board has, in the prescribed manner, carried out public participation and stakeholder engagement with the affected community within the County.”
21. In her response she deposes that in order to implement the provisions of the Constitution and the Act named herein before, the 1st Respondent entered into discussions with the National Government on how to meet the housing and accommodation needs for the residents of Thika Municipality which falls within Kiambu County.
22. Following the discussions the 1st Respondent in conjunction with the National Government agreed to set up 'Bustani Affordable Housing Project', a project spearheaded by the Director of Housing, State Department for Housing and Urban Development in the Ministry of Lands, Public Works, Housing and Urban Development.
23. She avers that prior to the establishment of Affordable Housing Project, the 1st Respondent entered into a Memorandum of Understanding between themselves and Jamofastar Welfare Association dated



- 14/07/2021 whose membership largely constitutes the Petitioners and the parties agreed to encourage cooperation between the 1st Respondent and the Petitioners in areas of Affordable Housing and Economic Development of the County as part of public engagement in line with the Constitutional requirement of public participation in decision making.
24. She avers that the 1st Respondent engaged various members of the Petitioners in several meetings where minutes were recorded and there was a general consensus to support the housing project which will alleviate the housing problem within Thika Municipality and the 1st Respondent thereafter sought and obtained all developmental and environmental approvals from various service providers including inter alia including Environmental Impact Assessment.
 25. It is the 1st Respondent's position that it has at all material times informed, involved the Petitioners and residents of Thika Municipality about Bustani Affordable Housing Project as required in law and also for purposes of demonstrating good governance. Which upon completion, will benefit the members of the Petitioner and other residents of Thika Municipality thereby, the 1st Respondent will be complying with the Article 43 of the Constitution and Section 41 (2) of the Affordable Housing Act.
 26. The 1st Respondent avers that from the Memorandum of Understanding annexed to her Replying Affidavit, it was mandated to facilitate the transfer of THIKA MUNICIPALITY BLOCK 11/343 situated in Thika Sub County and construction of Affordable Housing within Thika Municipality. That to support her contention of having to ensure public participation was conducted effectively and in accordance with the Constitution, she annexed a letter Annexure WW-1 dated 4th September 2023, in which she notified all the members of the Petitioner/Applicant's Association of a meeting whose purpose was to deliberate on the matters affecting the Association and the future of housing in Thika Municipality.
 27. Further that the meeting was held on 10th of September 2023, at the Thika Community Hall where representatives from the National Government, the County Government and the members of the Petitioner/Applicants met to discuss the 'Boma Yangu' initiative, an Affordable Housing Program. To support the averment she has annexed a copy of the minutes as annexure WW-2. In which meeting it was concluded that, "All the tenants unanimously, endorsed that the construction of the affordable housing project to start on the vacant land in Bustani grounds and the Depot Estate".
 28. That contrary to the false allegations in the Application and the Petition, the Petitioners were fully consulted in the public participation stakeholder's forum which was documented in the minutes of the meeting and all parties present were not only sufficiently informed and updated but unanimously approved the implementation of affordable housing project by the National Government.
 29. It is the 1st Respondent's case that in light of the above background and the detailed steps taken by the 1st Defendant then it is apparent that the Petition and Application before this Honourable Court is malicious, retrogressive and intended to frustrate implementation of a very noble agenda item which the 1st Respondent is obliged to undertake by the Constitution. Thus the Application is unfounded and ill-informed and lacks factual basis. That this is a government initiative designed to address the urgent need for affordable housing, implemented in strict compliance with constitutional and statutory requirements, including public participation and environmental assessments.
 30. She contends that suit property, THIKA MUNICIPALITY BLOCK 11/343, was lawfully allocated for the Affordable Housing Project in compliance with government policies and public interest considerations. Therefore the claim by the Petitioners that the land was surrendered, sold, or transferred without due process is unsubstantiated, as evidenced by the search, which confirms that the land has been legally transferred. The transfer was conducted in accordance with the constitutional



and statutory requirements and in the best interest of the public, ensuring that the land is utilized for a project that directly benefits the community through the provision of affordable housing. This aligns with the government's duty to promote social justice, inclusivity, and sustainable development under Article 10 of the Constitution of Kenya.

31. Also that the project was undertaken with full adherence to legal and procedural requirements, including an Environmental Impact Assessment (EIA), public participation, and all the necessary approvals from relevant authorities and adequate measures were taken to inform, consult, and involve all relevant parties, including local leaders, community representatives, and environmental bodies.
32. The 1st Respondent observes that the Petition is brought in bad faith and lacks merit and is designed to frustrate the Agenda of the 1st Respondent to meet the housing needs of the Residents of Thika Municipality within Kiambu County. This has been done in adherence to all the Constitutional and legal requirements and has not in any way whatsoever or at all violated Articles 10, 35, 42, 60, 62, or 69 of the Constitution of Kenya, as alleged by the Petitioner/ Applicants.
33. It is her averment that all the allegations raised by the Petitioner/Applicants are malicious, misleading, inaccurate, and unfounded, and they do not meet the constitutional threshold and the same should be dismissed with costs to the 1st Respondent. Given the circumstances the 1st Respondent urges this Honourable Court to dismiss the Application and the Petition in its entirety dated 26th August 2024 with costs to the 1st Respondent, as it lacks merit, and is based on misinformation seeking to derail a lawful public project.
34. When the parties appeared in Court on 13/02/2025 the Court gave directions on disposal of both Applications dated 26/08/2024 and the one dated 18/04/2024 where the parties agreed to dispose by way of written submissions.

Analysis and Determination

35. I have carefully considered the two Applications herein; the Supporting Affidavits thereto and annexures; Replying Affidavits; and parties' rival submissions. It is clear that 2 (two) issues emerge for consideration, namely;
 - a. Whether the Petitioners have met the threshold for grant of conservatory orders;
 - b. Whether the 2nd Interested Parties should be considered for joinder.
36. I note that the only party that filed a form of response to the Application dated 18/11/2024 are the Petitioners who however filed submissions and raised their opposition for the joinder of the 2nd Interested Party to the Petition. This however does not amount to a pleading and it would be safe to hold that actually the Application is unopposed.
37. On whether the Applicants have met the threshold for grant of conservatory orders; the Supreme Court's decision in the case of *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others* [2014] eKLR set the threshold for grant of conservatory orders in the following terms;

“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 courses.”



38. In the case of *Wilson Kaberia Njunja v. Magistrates and Judges Vetting Board & Another* [2016] eKLR, the Court summarized the requirements to be satisfied before grant of conservatory orders as follows;

“ 25. It therefore follows that an Applicant must satisfy three key principles in order to make out a case for the grant of conservatory orders that is;

- a. An Applicant must demonstrate that he has a prima facie case with 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 of the *Constitution*;
- b. Whether if a conservatory order is not granted, the petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
- c. The public interest must be considered before grant of a conservatory order.”

25. Additionally in the case of *Martin Nyaga Wambua v. Speaker of the County Assembly of Embu & 3 Others*, Petition No. 7 of 2014, the Court discussed the aspect of proof of real danger as follows;

“ 60. To those erudite words, I would only highlight the importance of demonstration of “real danger”. The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the Court. Thus an allegedly threatened violation that is remote and unlikely will not attract the Courts’ attention.”

39. On the other hand, the Black’s Law Dictionary, 11th Edition at page 1486 defines public interest as;

“The general welfare of a populace considered as warranting recognition and protection. Something in which the public as a whole has a stake; especially an interest that justifies governmental regulation.”

40. It is clear therefore that to persuade the Court to grant conservatory orders, an Applicant must demonstrate that they have a case with merit; that there is imminent and real danger of their Constitutional rights being violated if the orders are not granted; that if the conservatory orders are not granted, their Petition seeking protection of fundamental Constitutional rights and or freedoms will be rendered nugatory and the Court also ought to consider the stake of the public in the matter.

41. Applying the required elements discussed above to the instant matter, first on the question of whether there is a prima facie case, the Applicants have averred that they were not consulted or rather that there was no meaningful public participation and that the information on the project was scant.

42. The Applicants averred that the Environmental Impact Assessment was not even done. Although the 1st Respondent contested this averment but did not provide any document to lend credence to the opposition. The 1st Respondent further stated that they engaged the public and stakeholders. I noted only one annexure which had the notice dated 4/09/2023 and minutes of a meeting dated 10/09/2023. The question is how were the other stakeholders engaged? As this is an association of residences then, the probable risk involved and impact of the project may not just be in regard to Petitioners herein but so many other residents of the estate and those on abutting properties. The attendant air pollution and



apparent environmental, personal and property risks to the residents during construction needed to be discussed and mitigation measures agreed upon.

43. For the above reasons, I am satisfied that the Petitioners have demonstrated a merited case with chances of success.
44. Regarding public interest, my view is that as the impugned project affects persons beyond the Petitioners together with other residents of the 2nd Interested Party and bearing in mind that controlled development is now widespread in this County, it is important that engagements between home owners, developers, management companies and state regulatory bodies are properly guided by the Court's in regard to protection of environmental and competing property rights attendant to such interactions. For those reasons, I take the view that public interest tilts in favour of grant of the conservatory orders sought. Ultimately, I am satisfied that the Applicants deserve grant of conservatory orders.
45. The Court has suo motto reviewed the process through which an Environmental Impact Assessment study is subjected under EMCA and the Regulations made thereunder. My view is that the process undertaken by the 1st Respondent falls short of what is expected of Environmental Impact Assessment as provided for under the law and the mandatory constitutional requirement of public participation which is key for projects of this magnitude. I am not satisfied there was any adequate public participation as envisaged under the Act and the Regulations. Public participation is the single most critical requirement in public projects which are beneficial to the citizenry. Thus it is my holding and finding that the one meeting held by the 1st Respondent on 10/09/2023 for the proposed project was not adequate. The Petitioners had a right to be heard and the public hearing forums would have provided an opportunity for them to be heard. It cannot be assumed that whatever they would have had to say at the public hearings could not have affected the decision by all the Respondents. The fact is that they were not accorded a hearing or an adequate opportunity to be heard and that vitiated the process. There was no publication of the project in the manner set out under the Regulations governing the conduct of the Environmental Impact Assessment Study and thus the Applicants/Petitioners never got the opportunity to lodge their objections. The Petitioners being an organized group Residents Association concerned about the preservation, cleaning and restoration of the environment and for consultation before any new developments are undertaken or land use changed, it should have been quite easy to consult and engage with the Association based on the material and information made available by the Respondents.
46. I am satisfied that the Applicants have established they have a prima facie case with a probability of success. The process of conducting the Environmental Impact Assessment study was flawed and therefore the NEMA if issued is saddled with irregularities yet approving the proposed project cannot be justified. The conditions and principles for the grant of interlocutory injunction are as enunciated in the case of *Giella –Vs- Cassman Brown & Co. Ltd* (1973) EA 358 and an Applicant is required to establish that:-
 - a. He has a prima facie case with a probability of success.
 - b. That unless an injunction is granted damages would not be an adequate remedy and the Applicant would suffer irreparable harm,
 - c. In case of doubt as regards the above two conditions the Application is to be determined on a balance of convenience.
40. Although the said conditions/principles may not be applicable in environmental matters in a strict sense as they are applied in ordinary suits, an Applicant must nonetheless demonstrate an arguable



case that is not frivolous in environmental matters it may be difficult to determine the question of damages as the damage may not be easily ascertainable or even foreseeable. The fact being once there is damage to the environment, the damage is irreversible and thus the precautionary principle would be applicable where there are any threats to the environment to prevent environmental degradation. In environmental matters where development is concerned such as in the instant matter the Court will be concerned with whether or not it is a “sustainable development” and whether or not it is a “sustainable use” as defined under section 2 of EMCA. These principles and concepts can only be adequately established if a credible Environmental Impact Assessment Study is undertaken in respect of the project. In the present matter, it is that Environmental Impact Assessment Study that the Petitioners have a quarrel with owing to their non-involvement in the study. The credibility of the Environmental Impact Assessment Study if at all is put to question.

40. Thus I am convinced that if conservatory orders are not granted, the Petition herein may be rendered nugatory.
41. In the premises and having considered all the facts and circumstances of this matter I am persuaded the Petitioners have made out a case for the grant of a conservatory order against the Respondents.
42. For the motion on joinder since it largely unopposed and I see the nexus of the 2nd Interested Party to the petition I am persuaded to allow the joinder without belaboring the point.
43. For the foregoing reasons, I find the motion dated 26/08/2024 merited and it is hereby allowed. I also find the motion dated 18/11/2024 merited. As a result I make the following orders:-
 - a. That pending the hearing and determination of this Application inter-parties, a conservatory order be issued restraining the Respondents by themselves or any other person, body or organ acting under their authority au financing, proceeding with, excavating, erecting buildings or undertaking any other activities on all that land parcel known as Thika Municipality Block 11/343 under the Boma Yangu housing project within Thika Sub-County, Kiambu County pending the hearing and determination of this petition.
 - b. That; Chania Thika Residents Association, through John Kagira Nage (Chairman), Ann Kagure Irari (Secretary) & Gregory Wambaki (Treasurer) be joined as the 2nd Interested Party in this Petition.
 - c. That the costs of the two Applications shall be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 20TH DAY OF MAY 2025
VIA MICROSOFT TEAMS.**

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MOGENI J

JUDGE

In the presence of:

Mr. Kinyanjui for the 1st and 2nd Petitioners

Ms. Noor for the 1st Respondent

2nd and 3rd Respondents – Absent

1st Interested Party – Absent

Mr. Kariuki for the 2nd Interested Party



Mr. Melita – Court Assistant

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MOGENIJ

JUDGE

