



**REPUBLIC OF KENYA**

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

**ELC PETITION NO. E001 OF 2020**

CYRUS ROBERT SALA ZIBU.....1<sup>ST</sup> PETITIONER  
DR KLAUS-HERBERT RICHTER..... 2<sup>ND</sup> PETITIONER  
STEVE MAKAU..... 3<sup>RD</sup> PETITIONER  
PETER KIMEU MWANGANI..... 4<sup>TH</sup> PETITIONER  
LILIAN KATUNGE MUEMA..... 5<sup>TH</sup> PETITIONER  
PETER MANG'ALA ..... 6<sup>TH</sup> PETITIONER  
JUMA OLIVER MASILA.....7<sup>TH</sup> PETITIONER  
MUTUKU KATALA..... 8<sup>TH</sup> PETITIONER  
FRANCIS KIETI..... 9<sup>TH</sup> PETITIONER  
JOHN MUTUNGI.....10<sup>TH</sup> PETITIONER  
EUNICE KALONDU MALUNGU..... 11<sup>TH</sup> PETITIONER  
HENRY KIPRONO KOSGEY..... 12<sup>TH</sup> PETITIONER

*(Suing on their own behalf and on behalf of the residents of Good Hope Rehabilitation Centre and Blue Cross Kenya-Kibwezi East)*

**-VERSUS-**

DIRECTOR OF P.UBLIC PROSECUTION.....1<sup>ST</sup> RESPONDENT  
INSPECTOR GENERAL OF POLICE..... 2<sup>ND</sup> RESPONDENT  
HONOURABLE ATTORNEY GENERAL..... 3<sup>RD</sup> RESPONDENT  
HENRY MULI MUNGUTI ..... 4<sup>TH</sup> RESPONDENT

**RULING**

1. The application for determination is dated 2<sup>nd</sup> September, 2020 filed by the Petitioners/Applicants under certificate of urgency on even date. It is brought under Articles 22 and 23 of the Constitution as well as Rules 23 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013.

2. The Applicants seeks the following Orders:

**i) Spent.**

ii) Spent.

iii) **THAT the Court be pleased to issue conservatory orders to bar the arrest and prosecution of the Petitioners on account of the complaint by the 4<sup>th</sup> Respondent or any other party touching on the ownership, possession and operations of the Petitioners of or on Plot Title No. 3762 pending the hearing and determination of Court of Appeal Civil Appeal No. 199 of 2018 Nairobi.**

iv) **THAT costs of the application be provided for.**

3. The application is supported by the affidavit of Steve Makau sworn on 1<sup>st</sup> September, 2020 on his own behalf and that of his co-petitioners. The affiant deposed that together with his co-petitioners, they filed Makueni ELC Case No. 78 of 2017 and the 4<sup>th</sup> Respondent herein was the 1<sup>st</sup> Defendant in that suit. That on 20<sup>th</sup> June, 2018 the said suit was determined and judgment entered in favour of the Petitioners effectively awarding them ownership, possession and control over Plot No. 3762. That being aggrieved by the judgment, the 4<sup>th</sup> Respondent filed Nairobi Civil Appeal No. 199 of 2018. The 4<sup>th</sup> Respondent also filed an application for stay of execution of the decree at the Court of Appeal. That on 1<sup>st</sup> August, 2018 the Court of Appeal issued an order for maintenance of status quo pending the hearing and determination of the appeal. That on 24<sup>th</sup> June, 2019 the 4<sup>th</sup> Respondent in the company of his agents forcibly entered the suit property and the Petitioners reported the incident at Mtito Andei police station under entry OB No. 27/27/6/2019. A further report was made and registered under OB No. 13/29/6/2019. However, the police refused to charge the 4<sup>th</sup> Respondent with any criminal offence.

4. The Petitioners further deposed that on another separate occasion, the 4<sup>th</sup> Respondent gained forcible entry into the suit property after pulling down the fence. He thereafter evicted the security guards, took over the premises and started excavations. The Petitioners reported the incident at Mtito Andei police station under entry OB No. 13/17/8/2020 but the 4<sup>th</sup> Respondent is yet to be arrested and charged for criminal offences. That prior to the takeover of the suit property by the 4<sup>th</sup> Respondent, he had filed a complaint with the DCI Kibwezi alleging that the Petitioners had trespassed on his property. That the 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> Petitioners have been summoned by the DCI to record their statements on the complaint. That since then, the Petitioners have been facing threats of criminal prosecution by the 1<sup>st</sup> Respondent on account of the 4<sup>th</sup> Respondent's complaint. That the 4<sup>th</sup> Respondent is using the criminal justice process to audit the judgment of this Court as opposed to pursuing Nairobi Civil Appeal No. 199 of 2018 at the Court of Appeal.

5. In opposition, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed a Replying Affidavit sworn by Simon Mitau, an officer of the Directorate of Criminal Investigations stationed at Kibwezi Police Station. He deposed therein that his office received a complaint from the 4<sup>th</sup> Respondent on 22<sup>nd</sup> April, 2020 who reported to be the director of Good Hope Children's Home. The 4<sup>th</sup> Respondent reported that he bought parcel No. 3762 at which the children's home now stands from one Timothy Mutuku. He produced a copy of the sale agreement and a certificate of ownership of parcel No. 3762. That on 28<sup>th</sup> February, 2018, Mr. John Mutungi (the 10<sup>th</sup> Petitioner) came to the children's home and asserted that he was the new director of the children's home chasing the 4<sup>th</sup> Respondent away. That the 4<sup>th</sup> Respondent reported the incident under OB No. 16/22/04/2020 and recorded his statement on the same.

6. The affiant deposed further that he commenced his investigations against Malia Joicy Muli, David Ndunda Nyungu, Eunice Kalondu Malungu, Timothy Mutuku Matenge, Thomas Mbaluka Mbutu, Henry Koskey and John Mutungi. He also recorded their statements. That it was not brought to the attention of the DCI that a decree had been issued vide Makueni ELC Case No. 78 of 2017 at the time the 4<sup>th</sup> Respondent filed his complaint. That by virtue of the Constitution of Kenya and the National Police Service Act No. 11A of 2011, the 2<sup>nd</sup> Respondent is mandated to investigate any complaint which has been filed and also has the power to summon any person who may assist with such investigations. That at this moment, there are no criminal charges against the Petitioners hence there can be no infringement against the rights of the Petitioners.

7. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents deposed that the petition herein is fatally defective as it fails to demonstrate with reasonable precision the manner in which the alleged constitutional provisions have been violated. Additionally, it is deposed that the application is premature because it is based on unfounded apprehensions. That there is no prima facie case with a likelihood of success and the Petitioners have not demonstrated any real violation to their constitutional rights. That the application herein has not met the threshold to warrant the grant of conservatory orders as held in **SCK Petition No. 2 of 2013 Gatirau Peter Munya -Vs- Dickson Mwenda Githinji & others** and hence ought to be dismissed.

8. In a supplementary affidavit sworn on 15<sup>th</sup> January, 2021, Steve Makau, on behalf of the Petitioners deposed in response to the replying affidavit that despite being presented with copies of the decree in Makueni ELC 78 of 2017 by the 10<sup>th</sup> Petitioner, the 2<sup>nd</sup> Respondent has refused to consider the court order while conducting its investigations regarding ownership of the suit property. That the 2<sup>nd</sup> Respondent continues to exhibit open bias and partisanship for failing to investigate the 4<sup>th</sup> Respondent on account of making a false complaint.

9. The 1<sup>st</sup> and 4<sup>th</sup> Respondents did not file their replies to the application in compliance with the directions issued on 24<sup>th</sup> September, 2020. The Petitioners/Applicants filed their submissions on 10<sup>th</sup> March, 2021. They submitted therein that they have demonstrated a *prima facie* case with a probability of success and that they will be greatly prejudiced in the event the conservatory orders are not issued. On this submission, they relied on the cases of **Speedex Logistics Limited & 2 others -Vs- Director of Criminal Investigations & 3 others [2018] eKLR** and **Ezekiel Waruinge -Vs- Director of Public Prosecutions & 2 others [2017] eKLR**. The Petitioners further rely on the case of **Alfred N. Mutua -Vs- Ethics & Anti-Corruption Commission (EACC) & 4 Others [2016] eKLR** for their submission that due process ought to be followed by the 2<sup>nd</sup> Respondent in its investigations without exhibiting biased conduct and open disregard to the Petitioners' concerns and complaints. The Petitioners further submitted that the threatened commencement of criminal proceedings by 2<sup>nd</sup> Respondent against them is an abuse of the discretion donated to them and the failure to commence investigations against the 4<sup>th</sup> Respondent amounts to selective prosecution. On their submission that the application has merit and does not amount to abuse of court process the Petitioners relied on the case of **Kuria & 3 Others -Vs- Attorney General [2002] 2 KLR 69**.

10. In their submissions filed on 15<sup>th</sup> April, 2021, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents posit that the Petitioners/Applicants must establish a *prima facie* case to warrant the grant of conservatory orders. That this Court must evaluate the pleadings to determine whether denial of conservatory orders would prejudice the Applicants' case. On this submission, they relied on the case of **Centre for Rights Education and Awareness (Creaw) & 7 Others -Vs- Attorney General [2011] eKLR**. They went on to elaborate that the application herein does not merit the elements required to establish a *prima facie* case as enunciated in the case of **Mrao Ltd -Vs- First American Bank of Kenya Ltd & 2 others [2003] eKLR**. Lastly, they submitted that the Petitioners' allegations are premature and speculative and in no way have the Applicants demonstrated that their constitutional rights are under threat. The Respondents relied on the case of **Alfred N. Mutua -Vs- Ethics and Anti-Corruption Commission & 3 others [2016] eKLR** for this submission.

11. The apparent question for determination is whether the Petitioners have demonstrated a *prima facie* case that their constitutional rights are under threat of violation due to the pending investigations against them in regard to the complaint filed by the 4<sup>th</sup> Respondent. What is common ground before me is that the Petitioners/Applicants must demonstrate with precision that they genuinely believe on the strength of the material that has been placed before me that the ongoing investigations against them are without justification or reason.

12. I have perused the complaint filed by the 4<sup>th</sup> Respondent to wit OB No. 16/22/04/2020. The gist of the complaint per annexure SM2 relates to the running of operations at Good Hope Children's Home. In my assessment, there appears to be some row at the helm of management of the children's home. The 4<sup>th</sup> Respondent has complained over the hostile manner in which the 10<sup>th</sup> Petitioner has taken over the directorship of the institution. However, that question is separately distinct from the subject of the instant application and the subject of the pending Civil Appeal No. 199 of 2018 in as far as it concerns the ownership of Plot Title No. 3762 has been called to question.

13. By virtue of this Court's judgment dated 20<sup>th</sup> June, 2018, my findings were that Plot Nos. 3762 and 3763 were registered in the name of Good Hope Children's Home. The evidence of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents specifically annexure SM4 confirms the above. I reiterate that the directorship of the children's home and the ownership of the property at which the children's home has been built are very distinct questions. Needless to state, the 4<sup>th</sup> Respondent in his individual capacity has no right to claim ownership of Plot No. 3762. Consequently, his complaint to the 2<sup>nd</sup> Respondent in as far as it concerns the ownership of Plot No. 3672 is unwarranted and unjustified. Boardroom squabbles ought to be settled within the confines of the institution linking the Petitioners and the 4<sup>th</sup> Respondent without involving the 2<sup>nd</sup> Respondent unless where it lawfully necessary. The Petitioners have established a *prima facie* case and demonstrated that their fundamental rights are likely to be threatened on account of the 4<sup>th</sup> Respondent's complaint.

14. For the said reasons, I find merit in the Petitioners' application. I hereby grant conservatory orders in favour of the Petitioners barring their arrest and prosecution on account of the 4<sup>th</sup> Respondent's complaint in as far as it touches on the ownership, possession and operations of Plot No. 3762 pending the hearing and determination of this Petition.

15. It is so ordered.

**SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 15TH DAY OF JULY, 2021.**

.....

**HON. MBOGO C.G.**

**JUDGE**

**Court Assistant:** Mr. Mohammed