



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC PETITION NO. 15 OF 2019

**IN THE MATTER OF: ARTICLES 2, 3, 10, 22, 27, 35, 40, 43(1), 47, 48, 50, 66(1), 67(2), 68(C), (V), 165(6) AND 260 OF THE
CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF: THE GOVERNMENT LANDS ACT,

CAP 280 REPEALED

AND

IN THE MATTER OF: THE LAND ACT NO. 6 OF 2012

AND

IN THE MATTER OF: KENYA ROADS ACT NO. 2 OF 2007

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015

AND

IN THE MATTER OF: LAND PARCEL UNS.RESIDENTIAL PLOT A

THIKA MUNICIPALITY

AND

**IN THE MATTER OF: THE ALLEGED AND/OR THREATENED VIOLATION OF THE FUNDAMENTAL CONSTITUTIONAL
RIGHTS OF THE RESIDENTS OF UMOJA SETTLEMENT SCHEME**

BETWEEN

NGANGA NJOROGÉ.....1ST PETITIONER/APPLICANT

JOHNSON MWANGI MUIGA2ND PETITIONER/APPLICANT

JOHN MACHARIA NDUNGU.....3RD PETITIONER/APPLICANT

GABRIEL MAITHA KILONZO.....4TH PETITIONER/APPLICANT

***(Suing on their own behalf and on behalf of the residents/occupants of Umoja Settlement scheme on land parcel UNS.RESIDENTIAL
PLOT A-THIKA MUNICIPALITY)***

VERSUS

KENYA URBAN ROADS AUTHORITY.....1ST RESPONDENT

THE CABINET SECRETARY MINISTRY OF TRANSPORT,

INFRASTRUCTURE, HOUSING URBAN DEVELOPMENT

AND PUBLIC WORKS.....2ND RESPONDENT

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

AND

COUNTY GOVERNMENT OF KIAMBU..... 1ST INTERESTED PARTY

DIRECTOR OF SURVEYS2ND INTERESTED PARTY

RULING

Vide a Notice of Motion Application dated **6th November 2019**, premised to be bought under **Articles 22, 23(3), 35(1), 165(6)** of the Constitution 2010, **Rule 23(1)** of the Constitution of Kenya (protection of rights and fundamental freedoms) Practice and Procedure Rules, 2013, **Order 51 Rule 1** of the Civil Procedure Rules the Applicants sought for the following orders;-

1. Spent

2. That pending the hearing and determination of the Petition herein, a CONSERVATORY ORDER by way of stay and/or Injunction do issue restraining all the Respondents from interfering with, surveying, demarcating, trespassing on, invading, demolishing, ingress on, constructing, re planning or in any other way interfering with the Petitioners'/Applicants' occupation of land parcel UNS.RESIDENTIAL PLOT "A"-THIKA MINICIPALITY or in any manner whosoever acting on the said determination by the 1st Respondent touching on Land Parcel UNS.RESIDENTIAL PLOT 'A'-THIKA MUNICIPALITY, pending the final determination of this Petition.

3. That pending the hearing of the Petition, the Respondents be directed to furnish the Petitioner with;

a) The 1st Respondent to avail copies of the policy providing for the construction of the intended Thika By-Pass on Land parcel UNS.RESIDENTIAL PLOT 'A'-THIKA MUNICIPALITY.

b) The 2nd Interested Party to avail copies of the Survey records for Land parcel UNS.RESIDENTIAL PLOT 'A'-THIKA MUNICIPALITY.

4. That pending the hearing and determination of the Petition herein, the OCS Makongeni Police Station to ensure enforcement of the Orders sought above.

5. That this Honorable Court do give directions on the hearing of the substantive Petition.

6. Costs be provided for.

The Application is premised on the grounds stated on the face of the Application and the Supporting Affidavit of **Nganga Njoroge**, who averred that he has authority to swear the Affidavit of his Co-Petitioners/Applicants. That the Petitioners and their families represent the residents, occupants, allottees of **Land parcel UNS.RESIDENTIAL PLOT "A"-THIKA MINICIPALITY, known as Umoja Settlement Scheme.**

He further averred that the defunct Municipal Council of Thika decided to relocate the residents of Madharau Area to Umoja Settlement Scheme on Land parcel UNS.RESIDENTIAL PLOT "A"-THIKA MINICIPALITY and allotted the suit parcel of land with a letter of allotment as attached and annexed as "NN-2". Further, the suit property was previously reserved for public cemetery, but the Municipal Council changed its use to residential as evidenced on the copies of minutes of the meeting at the Municipal Council of Thika attached as "NN-3". That upon allotment, the original occupants balloted for their plots within the suit parcel of land attached as "NN-4a" is a list of the original member of Umoja Settlement Scheme.

It was his contention that on 9th October 2019, the 1st Respondent issued them with a removal notice of 30 days, that all earmarked structures should be removed failure of which the same would be forcefully removed and he attached the said letter as "NN-6".

Aggrieved by the decision of the Authority, the Petitioners'/Applicants' vide a letter dated 9th October 2019, wrote to the 1st Respondent requesting for extension of time, the same is annexed and marked as "NN-7". The 1st Respondent failed to listen to their claim based on extension of time via a letter annexed and marked as "NN-8".

It was his further contention that the Honorable Court be pleased to grant the Orders sought.

The Application is opposed and the 1st Respondent filed its Replying Affidavit dated **29th November 2019** by **Josiah Mwangi Wandurua**. He averred that the Petitioners reside as encroachers onto the portion of the corridor of the **Thika By-Pass**, yet the corridor had been planned as captured via **Survey Plan FR 136/115**, the same is annexed as “JMW-1”.

That prior to commencement of the project, the 1st Respondent conducted stakeholders’ forums and meetings and all relevant information was shared and queries resolved. Copies of minutes are annexed and marked as “JWM-3,4 &5”

The 1st Interested Party filed **Grounds of Opposition** dated **30th September 2020**, based on the following; that the suit does not disclose any cause of action against the 1st Interested Party; that the minutes relied on by the Petitioner cannot be validated as they do not bear any signatures or stamps from the 1st Interested Party and that if any allocation was done, by the Municipal Council of Thika officials, the same is defunct and the same cannot be verified by the 1st Interested party.

Parties were directed to file written submissions and the Applicants’ filed their written submissions on **8th July 2020**, through the **Law Firm of Kanyi Kiruchi & Co. Advocates**, while the 1st and 2nd Respondents filed their written submissions on **9th December 2020**, through **Mwihaki Ndundu, Advocate for the Attorney General**. The 1st and 2nd Interested parties did not file any submissions.

The Court has considered the pleadings in general, the rival written

submissions, the cited authorities and the relevant provisions of law and notes that the main issues for determination are:-

a) Whether the Applicants have satisfied the conditions for grant of a Conservatory order by way of an Injunction.

b) Whether the Grounds of Opposition as raised by the 1st Interested Party are Merited.

(a) Whether the Applicants have satisfied the conditions for grant of a Conservatory order by way of an Injunction.

The Petitioners/ Applicants have sought for conservatory orders. In the case of **Kenya Electricity Transmission Company Limited ... Vs... Kibotu Limited [2019] eKLR** the Court held that:-

“The principles to be satisfied in granting of a conservatory order was expressed by Justice Onguto J. (as he then was) in the case of Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others [2015] eKLR are as follows;-

“In summary, the principles are that the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order.”

Further the Supreme Court of Kenya also rendered itself on conservatory orders in the Case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others(2014) eKLR** as follows:-

“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 applicant’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.”

Therefore, guided by the above case law, the Court has to be satisfied that the Applicants have demonstrated a *prima facie* case, with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger and he will suffer prejudice.

A *prima facie* case was defined in the case of **Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2003)KLR**, to mean:-

“A case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

It is not in doubt that the suit property is registered in the name of **Umoja Settlement Scheme through a Letter of Allotment dated 10th May 1996**, therefore members of the said scheme holds all rights and interest over the said property. Being the registered owners, it follows that they have sufficient interest in the matter that involves the suit property.

Further, it is also not in doubt that by a letter dated **9th October 2019**, the 1st Respondent issued them with a removal notice of 30 days

that all earmarked structures should be removed failure of which the same would be forcefully removed.

It is alleged by the Petitioners/ Applicants that the whole process was done without following due process and done in a clandestine way. Given that the Petitioners/Applicants have a title to the suit property and there is a notice for demolishing of their property, the Court finds that the Applicants have established a **prima facie** case.

On whether the Applicants will suffer prejudice, it is not in doubt that vide a letter dated **16th October 2019**, by 1st Respondent, the same failed to extend time on the Applicants' request on their letter dated **9th October 2019**. If the 1st Respondent is allowed to demolish and/or institute forceful removal of the Applicants/Petitioners, there is no doubt that the Petitioners/ Applicants will suffer prejudice as their efforts to recover the suit property, if indeed the Court is to find that their rights were violated will be next to impossible. Therefore, the Court is satisfied that if **conservatory orders** are not issued then the Applicants will, suffer irreparable harm more so because land is unique in nature and it cannot be substituted. See the case of **Muslims for Human Rights (MUHURI) & 2 Others...Vs...Attorney General & 2 Others, HC Petition No.7 of 2011**, where the Court held that:-

“A Conservatory Order would enable the court to maintain the status quo or existing situation or set of facts and circumstances so that it would still be possible that the right and freedoms of the claimant would be capable of protection and enforcement upon determination of the Petition and the trial was not a futile academic discourse of exercise.”

Therefore, this Court finds and holds that the Petitioners/ Applicants are deserving of the **conservatory order** sought.

(b) Whether the Grounds of Opposition as raised by the 1st Interested Party are Merited

The 1st Interested party has raised 6 grounds of opposition to the Applicants Application. The Court is of the considered view that the grounds raised require production of evidence and/or calling of witnesses. Where verification is required, it is incumbent upon a party alleging to call for evidence thus, the same can be determined in full trial. Therefore, the Grounds of Opposition as raised by the 1st Respondent are found not merited.

Further the Applicants have sought for Orders that **the 1st Respondent to avail copies of the policy providing for the construction of the intended Thika By-Pass on Land parcel UNS.RESIDENTIAL PLOT 'A'-THIKA MUNICIPALITY and Secondly, that the 2nd Interested Party to avail copies of the Survey records for Land parcel UNS.RESIDENTIAL PLOT 'A'-THIKA MUNICIPALITY.**

It is not in doubt that the said documents are necessary for the effective adjudication of the matter. For these reasons, the Court finds and holds that the Applicants are entitled to the orders sought; that the said documents should be availed noting that this is a Constitutional matter, where rights are alleged to be violated and therefore, the documents should be availed to enable the Court decide on the issues raised in the Petition effectively.

The Applicants have sought for **conservatory orders** pending the hearing and determination of the Petition. In exercise of the Court's inherent powers and in the interest of justice, the Court orders that **Conservatory Orders** be issued herein pending the hearing and determination of this Petition.

Having carefully considered the available evidence, the Court finds and holds that the Petitioners'/Applicants' Application dated **6th November 2019**, is **merited** and the same is allowed in terms of prayers **no. 2, 3 and 4. Further, the costs of this application shall be in the cause.**

Further, the Court directs that the Petition herein be set down for hearing expeditiously so that the issues in dispute can be determined once and for all.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 15TH DAY OF JULY 2021.

L. GACHERU

JUDGE

15/7/2021

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Warutere for the 1st, 2nd, 3rd and 4th Petitioners/Applicants

M/s Ndundu for the 1st, 2nd and 3rd Respondents

No appearance for the 1st and 2nd Interested Parties

L. GACHERU

JUDGE

15/7/2021