



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

PETITION NO. E006 OF 2021

ABDULLAHI MOHAMMED FARAH.....1ST PETITIONER

OSUBA OMAR FARAH.....2ND PETITIONER

MOHAMMED DUBAWE ABDILLE.....3RD PETITIONER

ABDULLAHI SHEIKH HUSSEIN.....4TH PETITIONER

[suing on their own behalf and on behalf of all residents of

Neboi and Gabaqoley areas in Mandera East Sub-County]

VERSUS

THE COUNTY GOVERNMENT OF MANDERA.....1ST RESPONDENT

THE INSPECTOR-GENERAL OF THE

NATIONAL POLICE SERVICE.....2ND RESPONDENT

RULING

1. The petitioner herein filed Notice of Motion dated 23rd July 2021 seeking the following Orders;

a. Spent

b. Spent

c. That pending the hearing and determination of the petition filed herewith a conservatory Order be issued to stay the implementation and/or taking of any further steps to implement the threatened demolitions and/or forced eviction of the petitioners and other residents of Neboi and Garbaqoley areas in Mandera East Sub County by the Respondents, their agents and/or any person acting on their instructions.

d. That the costs of the application be provided for.

2. The application is based on the grounds set out in the application and the supporting affidavit of **Abdullahi Mohammed Farah** who swore on his behalf and on behalf of the 2nd, 3rd and 4th Petitioners and other Residents of Neboi and Garbaqoley Areas.

3. He averred that the **Neboi and Garbaqoley communities** comprising 338 families are predominantly nomadic pastoralists and have quietly and harmoniously inhabited unregistered communal land in Central Division, Mandera East Sub-County comprising 2000 hectares (herein referred to as the suit premises) for over 20 years. That the community derive their livelihoods from the suit land by rearing of livestock and crop farming on the suit land. (Authority and list of families produced as annexure AMF 1&2)

4. That sometime in 2020, the 1st Respondent's enforcement officers descended on the suit land with crude weapons, demolished some structures and informed residents that they ought to shift from the suit land failing which they will be forcefully evicted to pave way for development by the 1st Respondent.

5. That by a letter dated 28th September 2020 the 1st petitioner sought the intervention of the County Commissioner, Mandera County, however no action was taken by the County Commissioner. That the Assistant Chief Neboi location also wrote an introduction letter to the County Commissioner, introducing 171 member of the community (AMf-4) but the same still did not elicit any response. He averred that he proceeded to petition the Mandera County Assembly to intervene in the land dispute but the petition is yet to elicit any response nor receive any attention from the 1st Respondent (the petition to the county assembly is produced as annexure AMF-5).

6. That on 16th July 2021, County askaris in furtherance of their aforesaid threat descended on the suit land with indiscriminate violence to the residents of Neboi and Garbaqoly areas, scattering livestock and destroyed crops and demolished some of the structures erected on the suit land prior to setting them ablaze.

7. That the violent attacks were meticulously planned and coordinated to achieve maximum harm to the residents and a damage to property, forcing residents to flee for their lives. That after forcefully evicting the residents from part of the land the armed officers commanded by the 2nd Respondent commandeered the conquered areas and remain on site to date. That county *askaris* have also been seen on the suit land taking measurements to erect a perimeter wall enclosing the area previously occupied by the evictees. (photographs marked as AMF-6)

8. That in a bid to sanitize its nefarious actions, the 1st Respondent on 25th May 2021 moved the **Mandera Senior Resident Magistrates Court in Misc. Application No. E001 of 2021 Ex-Parte: Mandera County Government** and obtained an order for “**securing and clearing land reserved for Mandera bypass road**” and for “**providing of security during the construction of chain ling fencing in parcels of land reserved for livestock market, Islamic University. Secular University and Kemri Centre**” (Order marked as AMF-).

9. That the 1st Respondent must have concealed to the subordinate court the fact that the land sought to be cleared and/or secured was in fact unregistered communal land which the Neboi Community and Garbaloquey community have inhabited for 20 years. Further the Order obtained ex-parte is not an eviction order.

10. He averred that the demolition and eviction was illegal for the reasons;

- a. The 1st Respondent has no proprietary rights over the suit premises hence the demolitions and eviction of the residents amount to an unlawful compulsory acquisition of the suit land.
- b. No lawful eviction notice was issued to the residents.
- c. The forced eviction was carried out without any legitimate court Order.
- d. The decision to evict the residents was made without prior consultation of the residents and without granting them an opportunity to be heard which was in violation of Article 47 of the Constitution.
- e. That the Respondent evicted the residents of Neboi and Garbaqoley without providing them with alternative shelter.

11. In justification for the conservatory Orders sought the petitioner averred that the ongoing demolition of the houses and the forced eviction raises a humanitarian crisis, the elderly women and the children have been forced to put in dilapidated temporary structures fully exposing them to the weather hazards hence their rights under Article 43, 53 and 57 of the Constitution continue to be grossly violated and/or under great threat of violation.

12. The application was not opposed by the 1st Respondent despite service of the application being effected upon it. The petitioner/applicant also filed a notice of withdrawal dated 26th October 2021 withdrawing the suit against the 2nd Respondent.

Analysis and Determination

13. I have very carefully considered the Petitioner’s Notice of Motion and the supporting affidavit. From the above only one single issue arises for determination namely; **a) Whether the Petitioner/Applicant has made out a case to warrant the grant of interim orders pending the hearing and determination of the petition herein?**

14. In **Centre for Rights Education and Awareness (CREAW) & another v Speaker of the National Assembly & 2 others (2017) eKLR** the Court was emphatic that: -

“A party who moves the court seeking conservatory orders must show to the satisfaction of the Court that his or her rights are under threat of violation; are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending case or Petition.”

15. In **Law Society of Kenya v Office of the Attorney General & another; Judicial Service Commission (Interested Party) [2020] eKLR J.a Makau** held that the principles required to be satisfied before granting conservatory orders or interim conservatory orders comprises of the following: -

- a) First, an Applicant must demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice.**

b) The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.

c) Thirdly, the court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.

d) The final principle for consideration is whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.

16. I wish to adopt the principles set out above. Applying the same to the circumstances of this case, I do find that the petitioner herein has raised a prima facie case, the photos attached depicting the destruction of homes belonging to the residents of Neboi and Garbaqoley community, the consolidated efforts by the petitioner to seek remedies from the relevant government agencies and indeed from the 1st Respondent to no avail proves that if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.

17. The applicant has depicted the humanitarian crisis associated with the alleged eviction done by the 1st Respondent. I have considered the 1st Respondents authority and weighed the same against its actions I have also considered the eviction of the residents of Neboi and Garbaqoley without affording them prior notice and appropriate shelter. I associate with the fears of the applicants that more evictions may be done by the 1st Respondent. It is therefore my finding that the grant of the conservatory relief will enhance the constitutional values and objects of the petitioner's rights in Article 47, 21, 53 and 57 of the Constitution of Kenya 2010. I equally find that the public interest lies in favour of the petitioners and the same would be served by granting of the conservatory Order.

18. The upshot of my analysis is that the Petitioner's application dated 23rd July 2021 is meritorious. I proceed to grant the following orders:

a. That pending the hearing and determination of the petition filed herewith, a conservatory Order be and is hereby issued staying the implementation and/or taking of any further steps to implement the threatened demolitions and/or forced eviction of the petitioners and other residents of Neboi and Garbaqoley areas in Mandera East Sub County by the Respondents, their agents and/or any person acting on their instructions.

b. Costs of the application to be costs in the cause.

DATED, DELIVERED VIRTUALLY AND SIGNED AT GARISSA THIS 26TH DAY NOVEMBER, 2021.

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E.C. CHERONO

ELC JUDGE

IN THE PRESENCE OF;

1. MR. OSUGO HOLDING BRIEF YUSSUF ALI FOR PETITIONERS/APPLICANT

2. RESPONDENT/ADVOCATE: ABSENT

3. FARDOWSA: COURT ASSISTANT