



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MALINDI**

**PETITION NO. 35 OF 2019**

**IN THE MATTER OF: ARTICLES 19, 20, 21, 23,**

**24, 27 & 50 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ALLEGED CONTRAVENTION  
OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER  
ARTICLES 19, 20, 21, 23, 24, 25, 27 & 50(1), 64(B), 239(3),**

**244 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**FRESCO BUSHLANDS (K) LIMITED.....PETITIONERS**

**VERSUS**

**1. THE NATIONAL POLICE SERVICE**

**2. THE COAST REGION POLICE COMMANDER**

**3. KILIFI COUNTY POLICE COMMANDER**

**4. OFFICER COMMANDING MALINDI POLICE DIVISION**

**5. THE OFFICER COMMANDING**

**MALINDI POLICE STATION.....RESPONDENTS**

**RULING**

1. By a Chamber Summons application dated and filed herein on 11<sup>th</sup> December 2019 Fresco Bushland (K) Limited (the Petitioner) prays for: -

*3. A Conservatory order to issue restraining the Respondents either by themselves, agents or officers below their command from evicting, displacing or relocating the Petitioner, its agents/servants or employees or seizing its properties or livestock or demolishing the structures currently occupied by the Petitioner's agents/servants within Kilifi LR No. 14248 or in any way interfering with the Petitioner's rights/interests under the Lease dated 26/5/2010 pending the hearing and determination of the Petition filed herewith;*

*4. An order directed at the 2<sup>nd</sup> Respondent, the Coastal Region Police Commander, pursuant to Article 47(2) of the Constitution to disclose in writing the source of and reasons for his decision/directive/command to evict, displace or relocate the Petitioner from the portion of property known as Kilifi LR No. 14248 which it currently occupies or to seize its properties/livestock or to*

*demolish the structures/houses on the said land occupied by the Petitioner's agents/servants; and*

**5. The 2<sup>nd</sup> Respondent to personally bear the costs of this application.**

2. The application which is supported by an affidavit sworn by Nimo Abi Ahmed, a director of the Petitioner, is premised on the grounds and reasons: -

**a) That the Petitioner is a Lessee of 95,000 acres of Kilifi LR No. 14248 from Agricultural Development Corporation pursuant to a Lease Agreement dated 26/05/2010 which is in force upto date;**

**b) That on 08/12/2019 the 2<sup>nd</sup> Respondent issued Orders and or directives that all the agents, employees and/or servants of the Petitioners be evicted from the said parcel of land or portion thereof;**

**c) That the said Orders/Commands and/or directives were communicated to the 3<sup>rd</sup> Respondent who marshalled the officers under the Command of both the 4<sup>th</sup> and (5<sup>th</sup>) Respondents to move to the land and issue eviction notices to the agents and/or servants of the Petitioner;**

**d) That the officers under the command of the 2<sup>nd</sup> Respondents have been dispatched in the aforesaid area owned by the Petitioner by virtue of the aforesaid lease and they are on standby and may proceed and execute the impugned orders if not restrained;**

**e) That the 2<sup>nd</sup> Respondent also threatened to demolish the houses and or structures built and occupied by the agents, servants and employees of the Petitioners while indicating that the same would be executed without notice;**

**f) That the officers under the command of the 2<sup>nd</sup> Respondent are likely to take advantage of the 12/12/2019 holiday to swing into their intended illegal action and evict/relocate the Petitioner to harass/intimidate its agents/servants or vandalise and seize its properties and livestock; and**

**g) That it will be in the interest of justice to grant the reliefs sought herein.;**

3. The application is opposed. In a Replying Affidavit sworn by the Officer Commanding Malindi Police Division Vitalis Otieno (the 4<sup>th</sup> Respondent) the Respondents aver that the Petitioner herein had at one point in time trespassed into a parcel of land owned by its neighbor Ms Vital Bio-Energy Ltd by extending its boundaries by a distance of approximately five kilometres which led to several boundary disputes between two companies.

4. The 4<sup>th</sup> Respondent avers that the said disputes led to several cases reported at Malindi Police Station such as CR No. 497 of 2019 where the Petitioner's Ibrahim Mohamed Dubai accused four employees of the said Vital Bio-Energy Ltd of grievous harm; a case which remains on-going. The 4<sup>th</sup> Respondent further avers that in another case instituted following a complaint from Vital Bio Energy Ltd, four people have been charged in Court with the offence of forcible detainer.

5. Further to the foregoing, the 4<sup>th</sup> Respondents avers that there are currently two inquiry files Nos. 3/2018 and 15 of 2019 where investigations are on-going into allegations of grievous bodily harm against agents and/or servants of the two companies and in which some of the suspects remain at large.

6. The 4<sup>th</sup> Respondent avers that as a result of the on-going dispute, it was found necessary to send officers to the Agricultural Development Corporation farm to maintain law and order and keep peace as several meetings held to deliberate on matters to keep peace have failed.

7. The 4<sup>th</sup> Respondent further asserts that the actions taken by the Police are in keeping with their role in maintaining law and order and not for extraneous purposes.

8. I have perused and considered the Chamber Summons and the response thereto. I have equally perused and considered the submissions and authorities placed before me by the Learned counsels for the parties-Mr. Abidha for the Petitioner and Mr. Munga for the Respondents.

9. The Petitioner before me craves the grant of conservatory orders to restrain the Respondent members of the National Police Service from evicting or relocating its servants or agents as well as livestock and other properties from the parcel of land measuring some 95,000 acres known as LR No. 14248 which parcel of land the Petitioner has leased from the Agricultural Development Corporation.

10. As was aptly captured by the Honourable Justice W. Korir in **Platinum Distillers Ltd –vs- Kenya Revenue Authority (2019) eKLR:**

*“The guiding principles upon which Kenyan Courts make findings on interlocutory applications for conservatory orders within the framework of Article 23 of the Constitution are settled. The law, as I understand it, is that in considering an application for conservatory orders, the Court is not called upon and is indeed not required to make definitive finding either of fact or law as that is the province of the Court that will ultimately hear the Petition.*

*The jurisdiction of the Court at this point is limited to examining and evaluating the material placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of conservatory orders. The Court is also required to evaluate the*

pleadings and determine whether denial of conservatory orders will prejudice the applicant.

11. In *Gatirau Peter Munya –vs- Dickson Mwenda Kithinji & 2 Others (2014) eKLR* the Supreme Court laid out the tenor and scope of such orders thus -

***“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.”***

12. In the matter before me, the Petitioner avers that on 8<sup>th</sup> December 2019, the Coast Regional Police Commander issued orders and directives that all its agents or servants be evicted from the said parcel of land or some portion thereof. It is further their case that acting on the said orders, the Kilifi County Police Commander (the 3<sup>rd</sup> Respondent) together with the Officer Commanding Police Division Malindi (the 4<sup>th</sup> Respondent) and the Officer Commanding Police Station Malindi (the 5<sup>th</sup> Respondent) marshalled Police officers under their command to move to the Petitioner’s said parcel of land whereat they issued eviction notices to the Petitioner’s employees and have remained on standby waiting to execute the orders of eviction.

13. The Respondents who are all members of the National Police Service (the 1<sup>st</sup> Respondent) while admitting that their officers are on standby at the farm owned by the Agricultural Development Corporation however deny that they have moved to the area for purposes of evicting the Petitioner. On the contrary, it is their case that the Petitioner and its neighbour by the name Vital Bio-Energy Ltd have been engaged in a series of violent disputes as a result whereof it was deemed necessary to send officers to the land for purposes of maintaining law and order.

14. From the Respondent’s Replying Affidavit, I did not see any denial that the Respondents’ officers have moved into a portion of the Petitioner’s 95000-acre piece of land. The Petitioner asserts that the purpose for the Respondents presence on its land is to evict its servants, demolish its property and move away its livestock from that Portion of land. The Respondents have not denied that that is their intention. Instead at paragraphs 3 to 5 of the Replying Affidavit the 4<sup>th</sup> Respondent justifies their action as follows:

***“3. That the history of the suit property is that two companies to wit Vital Bio-Energy (Kenya) Ltd and Fresco Bushland (Kenya) Ltd leased land from the Agricultural Development Corporation with the purpose of bio-fuel production and for grazing purposes respectively.***

***4. That Vital Bio-Energy Ltd leased 70,000 acres and Fresco Bushland Ltd leased 95000 acres.***

***5. That at some point Fresco Bushland Ltd trespassed into Vital Bio-Energy’s land by extending its boundaries upto a distance of approximately 5 Kilometres which consequently led to several disputes between the two companies.***

15. Granted that the Respondents are clothed with the duty and responsibility of maintaining law and order, it was not clear at this stage how the Respondents came to determine that the Petitioner had extended its boundary by 5 Kilometres into its neighbour’s property. In this respect, I associate myself fully with the views of Mumbi Ngugi J in *Standard Newspapers Ltd & Another –vs- Attorney General & 4 Others (2013) eKLR* that: -

***“It is a necessary incident to democracy that citizens must be protected from unjustified intrusions of privacy and property by agents of the State. Otherwise, arbitrary State actions could severely affect the personal freedoms and associated fundamental rights that are intended to be a predominant feature of a democratic society....***

***While it is true that Police have a duty to prevent the commission of crimes, they must just like everyone else, abide by the law, and there must be due process in everything that they do in the exercise of their mandate to prevent the commission of a Crime. To hold otherwise would be to say that the rules and dictates of democracy are too tedious to observe and an unnecessary inconvenience; and this would result in anarchy and negate the very core principles of our Constitution.”***

16. Accordingly, and in the circumstances herein I am persuaded that the Petitioner ought to be granted protection pending the hearing and determination of the Petition. Absent a Court order, the Respondents have no power to evict or displace the Petitioner from any portion of its property.

17. In the premises, I shall grant the Summons in terms of Prayer No. 3 thereof. The costs of the application shall abide the outcome of the Petition.

**Dated, signed and delivered at Malindi this 15<sup>th</sup> day of October, 2020.**

**J.O. OLOLA**

**JUDGE**