



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC PETITION NO. E5 OF 2020

JOHN NJENGA MBUGUA.....1ST PETITIONER
 DAVID THARAU MUCHAI.....2ND PETITIONER
 JOSEPH KIENJE KIHARA.....3RD PETITIONER
 PATRICK THUO KUNG’U.....4TH PETITIONER
 PETER MWANGI MUKUNA.....5TH PETITIONER
 PAUL MWANGI MACHARIA.....6TH PETITIONER

VERSUS

THE CABINET SECRETARY, MINISTRY OF LANDS,
 HOUSING AND URBAN DEVELOPMENT.....1ST RESPONDENT
 THE KENYA FOREST SERVICE.....2ND RESPONDENT
 THE PRINCIPAL SECRETARY, MINISTRY OF LANDS,
 HOUSING AND URBAN DEVELOPMENT.....3RD RESPONDENT
 THE NATIONAL LAND COMMISSION.....4TH RESPONDENT
 THE DIRECTOR, LAND ADJUDICATION AND SETTLEMENT.....5TH RESPONDENT
 THE ATTORNEY GENERAL.....6TH RESPONDENT
 THE DISTRICT LAND REGISTRAR, NAKURU.....7TH RESPONDENT

RULING

1. By Notice of Motion dated 24th November 2020, the petitioners moved the court under certificate of urgency seeking the following orders:

1. *[Spent]*

2. *[Spent]*

3. *That pending the hearing and determination of the petition herein, interim and conservatory orders do issue against the respondents, their agents or anyone authorized by the respondents or acting under the respondents, stopping them from further subdividing, alienating, allocating, issuing titles or in any other way dealing with all that parcel of land comprising of Nessuit, Mariashoni, Sururu, Likia, Teret, Kiptunga, Barget. Molo Forest and Elburgon Forest.*

4. *That we be granted the earliest available date for inter-parties hearing of the instant application herein.*

5. That this Honourable Court gives certain directions as it may deem fit.

6. That the respondents be condemned to pay costs of the application.

2. Although duly served, the respondents did not file anything in response to the application, thus rendering the application unopposed. Counsel for the applicants urged the court to grant the orders sought. Needless to state, the applicants must still make out a case for the orders sought.

3. The application is supported by an affidavit sworn by John Njenga Mbugua, the first petitioner. He deposed that the petitioners have brought the petition on behalf of original residents of Nessuit, Mariashoni, Sururu, Likia, Teret, Kiptunga, Barget, Molo Forest and Elburgon Forest who are likely to be affected by evictions which he termed illegal, unjust and forceful and on behalf of the public. He annexed a copy of a list containing names of 3793 persons who he stated were evicted from Mariashoni, Kiptunga, Barget, Doswa/Gichagi and Elburgon forests in 1988 and another list containing names of 307 persons who he stated were evicted from Molo Forest (Ring'ondo) forest also in 1988. The source of the details in the lists is not stated.

4. Mr Mbugua further deposed that he and the other petitioners settled in the forests in sometime in the year 1900 together with people from the Ogiek community and that the petitioners were employed by the Kenya Forest Station to cultivate forest land. He annexed copies of some identification cards, payslips and appointment letters. He further stated that the petitioners cultivated the said forest lands and even built schools and dispensaries thereon and grew up knowing the said forest lands as their home until sometime in the year 1988 when they were forcefully evicted by the government on grounds of forest conservation without being given alternative land to settle on. That members of the Ogiek community were not evicted with them and that the government, thereafter in the year 1997, brought people from Kericho, Bomet and Baringo to settle on the said land. That following the eviction, the petitioners were forced to settle in slums around Nakuru County in abject poverty.

5. He added that the respondents are in the process of sub-dividing, alienating, allocating and issuing titles in respect of land comprising of Nessuit, Mariashoni, Sururu, Likia, Teret, Kiptunga, Barget, Molo Forest and Elburgon Forest to the people currently living there and that the process is set to be finalized on or about the 11th December, 2020 with the President issuing title deeds to a selected group of people. That since the petitioners were the original settlers of the said forests together with members of the Ogiek community, they should be considered or given the first priority together with members of the Ogiek community in the issuance of title deeds.

6. Mr Mbugua also stated that the respondents have violated the right to equality and freedom from discrimination as enshrined under Article 27 of the constitution, the right to human dignity as enshrined under Article 28, protection of right to property as enshrined under Article 40 and the right to fair administrative action as enshrined under Article 47 of the constitution. That the issue of Mau has been litigated upon severally in courts including the African Court on Human and People's Rights and the East African Court of Justice and that there is a need to have the matter settled to avoid future litigation and violation of people's rights. He added that persons who have been illegally allocated land in the forest area are in the process of obtaining title deeds thereby posing a threat to the petitioners' livelihood.

7. I have anxiously considered the application and the material on record. The applicants seek what has come to be known as conservatory orders. The Supreme Court stated in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** as follows:

[86] "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 supplicant'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.

8. To succeed in their quest, the applicants must establish a *prima facie* case with a likelihood of success and also demonstrate the prejudice to be suffered if orders are not granted. While assessing whether or not there exists a *prima facie* case, the applicants will need to demonstrate to the court inherent merit in their case viewed against the public interest and values in the constitution.

9. As Musinga, J (as he then was) stated in **Centre for Rights Education and Awareness (CREAW) & 7 Others v Attorney General [2011] eKLR**:

... At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a 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 or threatened violation of the Constitution.

10. In **Obuya Bagaka v Kenya School of Government [2019] eKLR**, the Court of Appeal noted that there is more to be considered in an application for conservatory orders beyond the test in **Giella v Cassman Brown**. The court stated:

[24] There is, however, more to consider beyond the criteria in Giella v Cassman Brown when considering an application for conservatory orders. Applying the principles set by the Supreme Court in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others (supra), considerations such as public interest should therefore be borne in mind by the court when considering whether to grant relief in the form of a conservatory order, whether at an interlocutory stage of the proceedings or upon full hearing.

11. To establish a *prima facie* case, the applicants need to demonstrate a right and a threat to that right. The Court of Appeal stated as follows in **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR**:

... The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...

12. I am not persuaded that the applicants have a *prima facie* case. To begin with, they claim that they were evicted in 1988, over 31 years ago. That is not a short period by any stretch of imagination. While there is no limitation period in respect of constitutional claims, the applicants obviously need to explain what action they have taken in the intervening period. Perhaps they will do so at the hearing of the petition itself.

13. The applicants also concede that the land which they claim is forest land. If that be the case then the land would be public land as generally defined at **Article 62** of the **Constitution** and particularly **Article 62 (1) (g)**. They would need to demonstrate their alleged entitlement to public land. I do not, at this point, see such a case. They claim that they were employed by the second respondent to cultivate forest land. It has not been shown how such employment, if any, would morph into title to land. Once again, they may establish their claim at the hearing of the petition but for purposes of the present application, I have not been shown any semblance of a valid claim for land, let alone public land. In any case, public interest would militate against granting conservatory orders in such circumstances as are presented in this application.

14. It is alleged that the respondents are in the process of sub-dividing, alienating, allocating and issuing titles in respect of the suit land and that the process will be finalized on 11th December, 2020 with the President issuing title deeds to a selected group of people. No material has been placed before the court to show that those alleged actions are taking place or are about to take place. Surely, there would be some material or notice or correspondence to show that a presidential action or function of that nature is about to take place. More importantly, the applicants concede that there are persons who will be beneficiaries of the alleged issuance of titles. None of those persons who have an obvious right to a hearing prior to issuance of adverse orders have been joined to the petition.

15. In view of the foregoing discourse, I am not persuaded that the applicants have a *prima facie* case. That being the case, Notice of Motion dated 24th November 2020 is dismissed. Costs shall be in the cause.

Dated, signed and delivered at Nakuru this 10th day of December 2020.

D. O. OHUNGO

In the presence of:

Ms Amulabu holding brief for Mr Otieno for the petitioners/applicants

Mr Eredi for the respondents/respondents

Court Assistants: B. Jelimo & J. Lotkomo