



Masha & another (Legal Representative of the Estate of Charo Shutu Masha) v Mwangi & 8 others (Environment and Land Petition E010 of 2025) [2025] KEELC 6478 (KLR) (30 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6478 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND PETITION E010 OF 2025
FM NJOROGE, J
SEPTEMBER 30, 2025**

BETWEEN

**KATANA SHUTU MASHA 1ST PETITIONER
MASHA SHUTO FONDO 2ND PETITIONER
LEGAL REPRESENTATIVE OF THE ESTATE OF CHARO SHUTU MASHA**

AND

**JOB MWANGI 1ST RESPONDENT
RODGERS KAIBUNGA 2ND RESPONDENT
ABUBAKAR ALI AHMED DAHMAN 3RD RESPONDENT
REUBEN KIOKO 4TH RESPONDENT
KENYA AIRWAYS LIMITED 5TH RESPONDENT
NATIONAL LAND COMMISSION 6TH RESPONDENT
DIRECTOR OF SURVEY KENYA 7TH RESPONDENT
CHIEF LAND REGISTRAR 8TH RESPONDENT
ATTORNEY GENERAL 9TH RESPONDENT**

RULING

1. The application before the Court is a Notice of Motion application dated 24/3/2025 wherein the Petitioners pray for the following orders: -

1.Spent;



2. Spent;
 3. That upon inter partes hearing, this Honourable Court be pleased to issue a conservatory order maintaining the prevailing status quo in respect of the property known as Plot M5 Malindi, and, in particular, restraining the 1st to 5th Respondents, whether by themselves, their agents, servants, or any other person acting on their behalf, from evicting or in any way interfering with the estate of Charo Shutu Masha's peaceful occupation, possession, and use of the said Plot M5 Malindi;
 4. That Costs of and incidental to this Application be provided for.
2. The application is based on the grounds set out in the notice of motion. It is further supported by a joint affidavit sworn on 24/3/2025 by Katana Shutu Masha and Masha Shuto Fondo, the legal representatives of the estate of the late Charo Shutu Masha, pursuant to a Limited Grant ad Litem annexed as "KM-1". They aver that the late Charo Shutu Masha was a long-standing resident of Plot M5, Malindi (hereinafter also referred to as "the suit property"), having settled there prior to Kenya's independence and remained in continuous occupation until his demise in 2003.
 3. It is their case that the deceased established a family homestead at the center of the parcel and directed his descendants to construct homesteads around it. He further demarcated portions of the land for communal farming and burial purposes, with several family members interred there. He was also interred on the same land. Photographic evidence of the graves is annexed and marked as KM-2(1) to (6).
 4. The Applicants contend that the occupation of the suit property by the estate has been open, uninterrupted, and known to both the public and regional administrative authorities. They assert that despite this, the Commissioner of Lands (now succeeded by the National Land Commission) began irregular alienation of the parcel in the early 1990s. The process resulted in unlawful allotments being issued in favour of the 1st to 5th Respondents, and other individuals unknown to the Applicants, without due regard to the longstanding occupation by the estate.
 5. In response, the late Charo Shutu Masha initiated a series of complaints before local and regional administrative authorities, including the Chief, District Commissioner, and Provincial Commissioner. These authorities issued letters (annexed as KM-3 to KM-9) affirming the family's occupation and recommending that the suit property be secured in favour of the deceased. A report dated 26/6/1995 by the Land Officer II (Coast), annexed as KM-10, expressly recommended that the deceased should continue occupying the land undisturbed, and that no third party should be allowed to interfere until the process of documentation in his favour was finalized.
 6. Although the deceased actively pursued title documentation until his death in 2003, the process remained incomplete. The estate has, however, remained in actual occupation to date. A series of follow-up letters between 1995 - 2003, annexed as KM-12 to KM-22, is tendered in support.
 7. The Applicants also allege irregularities in the allotment documents relied upon by the Respondents. Notably, the letter of allotment issued to the 5th Respondent refers to a parcel in Trans Nzoia, yet it is being used to assert ownership over the suit property in Malindi. Additionally, the attached Part Development Plan (PDP) was neither properly executed nor approved by the relevant authorities. These documents are annexed as KM-23 and KM-24.
 8. It is further deponed that the estate has previously been subjected to several criminal proceedings, including charges of trespass and forcible detainer, but these matters were resolved in favour of the estate. Copies of select cases are annexed as KM-25.



9. The trigger for the present application is a police visit on 21/3/2025, during which officers ordered members of the estate to vacate the suit property, allegedly acting on "orders from above." This has been followed by meetings at the District Commissioner's office, with threats of forcible eviction should the estate fail to comply. The Petitioners allege that the estate comprises vulnerable members, including eighteen widows, who are now facing imminent displacement and the distressing prospect of graves of loved ones being desecrated. The Applicants assert unless conservatory relief is granted, the Petition may be rendered nugatory.
10. The 5th Respondent, Kenya Airways PLC, opposes the Petition and Application through a lengthy Replying Affidavit sworn on 24/4/2025 by Evans Gatobu, its Facilities Manager, duly authorized by its Board of Directors. The affidavit offers a comprehensive rebuttal to the Petitioners' claim over the parcel known as L.R. No. 5785, situated in Malindi, and asserts that the Petition is a disguised attempt to relitigate issues already conclusively determined by this Honourable Court in Malindi ELC No. 10 of 2008 – *Kenya Airways Ltd v Japhet Noti Charo Shutu*.
11. The 5th Respondent avers that it is the lawful and registered owner of L.R. No. 5785, measuring approximately 1.20 hectares. It was granted a letter of allotment on 6/5/1991, duly complied with all conditions, and a title deed (Grant No. CR 25914) was issued on 15/7/1994. All supporting documents, including the allotment letter, deed plans, and evidence of payment, are exhibited in a bundle marked EG-001.
12. The deponent explains that in 2008, the 5th Respondent discovered that Japhet Noti Charo Shutu, a descendant of the late Charo Shutu Masha, had encroached on the suit property and commenced construction thereon. This prompted the filing of ELC No. 10 of 2008, seeking injunctive relief, eviction, and a declaration of title. Interim injunctive orders were issued by Hon Justice Sergon on 7/3/2008. By a ruling of 23/10/2009, Justice Omondi found that Japhet had no registered interest and was merely relying on a letter of allotment, while the 5th Respondent held a valid Certificate of Title. The learned judge issued an injunction restraining Japhet from interfering with the land pending the determination of the suit.
13. Judgment was delivered on 14/3/2019 by Justice Olola, confirming the 5th Respondent's title, granting a permanent injunction, and dismissing Japhet's counterclaim. Japhet appealed via Mombasa Civil Appeal No. 32 of 2020 and sought stay of execution. The stay application was dismissed on 8/6/2022 by Justice Millicent Odeny, citing non-compliance with the principles under Order 42 Rule 6 of the *Civil Procedure Rules*. The Court of Appeal later granted a conditional consent order on 11/12/2024, requiring Japhet to furnish a bank guarantee of Kshs 2,994,277 within 45 days to preserve status quo. Japhet failed to comply, and the conditional stay lapsed on 18/2/2025.
14. The Petitioners herein subsequently filed an Application dated 11/11/2024 in ELC No. 10 of 2008 seeking joinder, stay of execution, review, and a rehearing of the suit. This Application was dismissed on 19/3/2025, with the Court finding inter alia that the Petitioners had no identifiable stake or current occupation of the suit property and were raising issues previously canvassed by Japhet. The Court also held that the Petitioners' evidence only demonstrated that the family of the late Charo Shutu were squatters on government land, and no prescriptive rights could accrue to them.
15. The 5th Respondent further states that the allegation that the 5th Respondent's parcel is situated in Trans Nzoia was conclusively determined and dismissed in the 2019 judgment and is now the subject of Civil Appeal No. 32 of 2020. The deponent maintains that in light of the foregoing decisions, the Petitioners cannot raise issues that have been raised and addressed in respect of the 5th Respondent's title. That any grievance as against the ruling delivered on 19/3/2025 can only be subject of an appeal and not by filing fresh proceedings.



16. He adds that the key correspondence dated 26/6/1995 (KM-10) explicitly states that no right accrued to the family of Charo Shutu over the suit land, and the land had already been planned for and partially titled in favour of third parties. The correspondence produced by the Petitioners unequivocally refer to the family of the late Charo Shutu Masha as squatters on the suit property. The deponent states that no execution has been sought against the current Petitioners, and no police officers were deployed by the 5th Respondent to evict them as alleged.
17. The deponent states that the Petitioners will not be prejudiced if the judgment against Japhet is executed, because they do not have any legal interest or identifiable stake in the 5th Respondent's property and are not in occupation thereof. To him, the application and petition have no legal footing and are a mischievous attempt at curtailing the 5th Respondent's right to property. He urges the court to dismiss both with costs to the 5th Respondent.
18. The Petitioners swore a supplementary affidavit on 16/5/2025 in response to the above replying affidavit. They state therein that the surviving widows of the late Charo Shutu Masha are currently in occupation of the land identified as L.R No. 5785 Malindi.
19. The application was canvassed by way of written submissions.

Petitioners' submissions

20. The Petitioners, through their written submissions dated 16/5/2025, urge the Court to allow the Application. Their counsel relies on the principles for granting conservatory orders established in *Centre for Rights Education and Awareness (CREAW) & 7 Others v Attorney General* [2011] eKLR, which require demonstration of a prima facie case with a likelihood of success and that the denial of the relief would result in prejudice. Counsel argues that the Petitioners have amply demonstrated that they are the long-standing peaceful occupants of the suit property and that the surviving widows of the late Charo Shutu are still in occupation thereof. To him, this forms the basis of a solid prima facie case.
21. Counsel points to threats of eviction issued by police officers who visited the suit property warning of forcible removal upon their next visit. He contends that the potential harm is not compensable in damages; that the suit property is not merely land but is also the ancestral home and burial ground of the family; that the disruption of graves and forced displacement of elderly widows would cause irreparable psychological and social trauma. He invokes *Giella v Cassman Brown & Co. Ltd* [1973] EA 358, asserting that where damage cannot be adequately compensated by an award of damages, injunctive relief should be granted.
22. On the issue of balance of convenience, counsel argues that it tilts in favour of maintaining status quo. He submits that the Petitioners have been in possession for decades and any dispossession would permanently alter the status of the land and undermine the Petition. He cites *Kenya Association of Manufacturers & 2 Others v Cabinet Secretary, Ministry of Environment and Natural Resources & 3 Others* [2017] eKLR, where the Court noted that public interest and justice weigh in favour of maintaining the status quo where rights are threatened.
23. In conclusion, counsel asserted that the Petitioners have shown a prima facie case with high prospects of success; demonstrated imminent irreparable harm; and established that the balance of convenience lies in preserving the status quo. He urged the court to grant the conservatory order sought.

5th Respondent's submissions

24. In the submissions dated 27/5/2025, counsel for the 5th Respondent presented one issue for determination, that is, whether the Petitioners have satisfied the requirements for grant of conservatory



orders. He relied on the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR, and submitted that in the said case, the Supreme Court held that conservatory orders ought to be granted depending 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. He submitted that the same was echoed in *Anne Mumbi Waiguru v County Assembly of Kirinyaga* [2020] KEHC (KLR).

25. To him, the Petitioners have not met the four-tier threshold set out by the Supreme Court; that they have failed to establish an inherent case by not proving any legal claim over the suit property. He argues that the documentary evidence relied upon by the Petitioners reveals that it is not the widows are in occupation of the suit property but the Defendant in ELC 10 of 2008. Counsel adds that the application and petition are devoid of any public interest as the case concerns private property dispute.
26. In the ultimate, counsel urges the Court to dismiss the application with costs.

Analysis And Determination

27. I have carefully considered the application dated 24/3/2025, the affidavits in support and in opposition, the annexures thereto, and the rival written submissions filed by the parties. The main issue for determination is whether the Petitioners have met the threshold for the grant of conservatory orders pending the hearing and determination of the Petition.
28. The guiding test has been distilled in numerous decisions. In the case of *Wilson Kaberia Nkunja -v- The Magistrate and Judges Vetting Board & others* Nairobi High Court Constitutional Petition No 154 of 2016 (2016) eKLR the court summarized three main principles for consideration on whether to grant conservatory orders as follows:
 - i. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the *Constitution*.
 - ii. Whether, if a conservatory order is not granted, the petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
 - iii. The public interest must be considered before grant of a conservatory order.
29. Therefore, it is incumbent upon the applicant to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders, he is likely to suffer prejudice. It is worth noting and should not be lost from sight that potential arguability is not enough to justify a conservatory order but rather there must also be evidence of a likelihood of success.
30. The Petitioners claim to represent the estate of the late Charo Shutu Masha, asserting that he was in occupation of the suit property (Plot M5 Malindi) prior to independence and that his family has remained on the land ever since. They have annexed several letters from local administrators acknowledging the family's historical presence and recommending preservation of their occupation.
31. However, the 5th Respondent has demonstrated that part of the suit property identified as L.R. No. 5785 Malindi was lawfully allocated to it in 1991 and a title issued in 1994. That title was the subject of litigation in Malindi ELC No. 10 of 2008, in which this Court, after a full hearing, found that the 5th Respondent held valid title and that the Defendant in that suit (Japhet Noti Charo Shutu) was a trespasser. The judgment was delivered on 14/3/2019, and no stay of execution has been granted to date.



32. It is not in dispute that the Petitioners herein were not parties to ELC No. 10 of 2008. However, they admitted that Japhet is a son of the late Charo Shutu and assert that they are raising issues on behalf of the wider estate. The Court has already considered their joinder application in that suit and, in its ruling dated 19/3/2025, it found that the Petitioners had failed to demonstrate an identifiable stake or legal interest in the property known as L.R. No. 5785. It was also held that they were not in occupation thereof.
33. I therefore find that the Petitioners have not established a prima facie case with a likelihood of success. Their claim is based on occupation of unspecified parts of Plot M5, which is evident, was subdivided and transferred to third parties long ago. For instance, the 5th Respondent's portion L.R. No. 5785 is a registered subdivision that was lawfully alienated and whose ownership was confirmed by this Court. Moreover, the Petitioner have failed to demonstrate what portions are occupied by the 1st to 4th Respondents.
34. The Petitioners allege that police officers visited the land on 21/3/2025 and threatened eviction. However, the 5th Respondent has denied sending any officers and states that it is in any case within its right to execute a valid judgment against Japhet, the person who was found to be in unlawful occupation of L.R. No. 5785.
35. The Petitioners have not demonstrated that any eviction is targeted at them or that any step has been taken to enforce against the estate as a whole. They have also failed to rebut the finding in the ruling of 19/3/2025 that the surviving widows of the deceased are not in occupation of L.R. No. 5785 and have not individually raised any grievances before the Court.
36. I find that while potential displacement of elderly dependents and disturbance of graves would amount to serious harm if proved, the present material does not show any real or imminent threat of harm to the Petitioners. In any event, the harm feared, if any, can be addressed in the course of the appeal process.
37. Further, the part of the suit property is registered in the name of the 5th Respondent. The dispute was conclusively determined in its favour in 2019, and the judgment remains valid and enforceable. The Petitioners seek to reopen that dispute under the guise of a constitutional Petition, while still contesting the same parcel through Civil Appeal No. 32 of 2020. Allowing this Application would have the effect of staying enforcement of a lawful court decree through parallel proceedings. Such an outcome would undermine the principles of finality in litigation and respect for judgments of court.
38. Accordingly, the balance of convenience tilts in favour of upholding the title and rights of the 5th Respondent, as validated by a prior determination, until and unless set aside on appeal.
39. In conclusion, I find that the Petitioners have failed to demonstrate a prima facie case, imminent irreparable harm, or that the balance of convenience favours them. This Application is, in substance, an attempt to reopen matters already determined by this Court and currently pending on appeal.
40. The upshot is that the Notice of Motion dated 24/3/2025 is hereby dismissed with costs to the 5th Respondent.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 30TH DAY OF SEPTEMBER, 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

