Malik & 8 others v Cabinet Secretary Ministry of Interior & National Administration & 6 others (Environment and Land Petition E015 of 2024) [2025] KEELC 7513 (KLR) (30 October 2025) (Ruling)

Neutral citation: [2025] KEELC 7513 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT AND LAND PETITION E015 OF 2024

FM NJOROGE, J

OCTOBER 30, 2025

BETWEEN

GINDA WALALI MALIK & 8 OTHERS ..... PETITIONER

AND

CABINET SECRETARY MINISTRY OF INTERIOR & NATIONAL ADMINISTRATION & 6 OTHERS & 6 OTHERS & 6 OTHERS . RESPONDENT

RULING

The Application

1. On 24th June 2025, Court heard all the parties in respect of the motion dated 21/5/2025 filed by the petitioners. It is seeking the following orders:

    a. That pending the hearing and determination of the amended petition this court issues conservatory orders suspending the implementation of Gazette Notice number 6235 published on the 16th May 2025 by Cabinet Secretary for Interior and National Administration Hon. Kipchumba Murkomen and all the persons in the meantime exercising the functions of the office of the Cabinet Secretary for Interior and National Administration;

    b. The plaintiffs/applicants (sic) be granted leave to amend the application as set out in the draft amended petition here in annexed;

    c. That this honorable Court be pleased to grant leave to the petitioner (sic) to file a supplementary affidavit in support of their amended petition;

    d. The draft amended petition be deemed as duly filed and served;

    e. That the cost of an incidental to this application abided the result of the said appeal (sic)

f. Any other order that this court may deem fit to grant.

2. The grounds relied on for the application are that: whilst the present petition was pending the first respondent Gazetted the suit of land as "Protected", effectively locking out the community from the suit parcel should they be victorious in this petition; that the said Action is not justifiable and reviles the authority of this court and that the Action has been done in bad faith and is calculated to defeat the process of the court. It is stated that the proposed amendment will address the legality of the Gazettement. It is also intended, if the court allows the amendment, to challenge the Constitutionality of Section 3 of the *Protected Areas Act* in the face of Article 40(2)(a) of *the Constitution*. It is stated that the Gazettement fundamentally alters the circumstances of the suit thus necessitating the amendment. The application is supported by the affidavit of the first petitioner which reiterates the ground above.

The Responses

1st Respondent's Response

3. The first respondent filed the affidavit of David Koskei the County Commissioner, Tana River, in opposition to the application. It is dated 5th June 2025. The gist of that response is that the suit parcel of land has always been public land, that it has always been used by the first respondent in hosting critical security infrastructures, that the suit land is Protected under the *Protected Areas Act* Cap 204 Notice number 6256 dated 15th May 2025; that owing to incidents of attempted unauthorized entry into the premises there was needed to protect the critical installations within the premises to enhance national security; that consequently the Tana River County Security And Intelligence Committee, in a sitting, recommended because that Gazettement of the suit property as a Protected area; that the Action of declaring the suit property as a Protected area was not in any way meant to defeat the process of the court but to protect the country from national security threats that require immediate remedial Action; that in any event the Gazette Notice has to be laid before the National Assembly for debate and approval; that the government does not in any way infringe on the applicants right to fair trial and Article 50; that if the orders are issued as sought by the petitioners the suit land will be subject to unrestricted access by an authorized person who posed a potential threat to national security; that the instant application is intended to use up the law making functions of the Legislature, and is an attempt to invite the court to legislative and formulate debate and amend the already existing Constitutional and statutory provisions very regard to the *Protected Areas Act* Cap 204; that no bias on the part of the 1st respondent has been exhibited in his exercise of his powers; that issuance of the orders sought will amount to an unwarranted and unlawful interference with *the Constitution* and statutory mandate of the first respondent; that the proposed amendment of the petition, if allowed, does not alter the circumstances of the main suit, and there is no justification in bringing the application for amendment this late in the day. The first respondent stands to suffer much prejudice if the orders sought are issued as this will expose the country and particular communities residing around the area to security threats.

3rd Respondent's Response

4. The 3rd respondent filed grounds of opposition dated 9th June 2025 which state as follows:

    a. That the application has not met the threshold for the Grant or conservatory orders as the Gazette Notice number 62 35 published by the Cabinet Secretary for The Ministry of Interior and National Land Administration (sic) on the 16th day of May 2025 is not only lawful but also necessary in the pursuit of public interest which is ensuring national security at the County and the country;

b. That the said Gazette was never made in bad faith since the disputed parcel of land has never been occupied by the petitioners nor the community and therefore there is no violation of any property rights;

c. That it is untrue that the Gazettement fundamentally alters the circumstances of the suit as alleged by the petitioners/applicants as the same has over the years been rightfully occupied by the government through the first respondent;

d. That there were no interim conservatory orders restraining the first respondent from publishing the said Gazette Notice and therefore its publication does not amount to any illegality;

e. The petitioner's applicants have failed to establish a prima facie case with chances of success and that the conservatory orders will not enhance *the Constitution* value and objects of a specific right on (sic) freedom in the Bill of rights;

f. That the application does not disclose that if conservatory orders sought or not granted the petition or its substratum will be rendered nugatory and the public interest will not be served by a decision to exercise discretion to grant conservatory orders;

g. That the balance of convenience does not favour the grant of the conservatory orders sought as the developments on the suit parcel are indispensable in ensuring national security;

h. That the annexed draft amended petition seeking to question the Constitutionality or otherwise of Section 3 of the *Protected Areas Act* is extraneous and significant country alters the substance of the petition;

i. The application is an abuse of the court process as the petitioners have sought to reintroduce a totally different petition in the disguise of an amendment;

j. That should the earnest draft amended petition be allowed the respondents will be adversely prejudiced at this stage of the matter;

k. That the application has been brought with (sic) undue delay and thus allowing the same or defeat the interests of justice.

4th 5th and 6th Respondents' response

5. The 4th 5th and 6th Respondents filed their grounds of opposition dated 5th June 2025 in which they expressed their basis of opposition to the motion as follows:

a. The application and the intended amendment of the petition are baseless, moot and therefore not justiciable;

b. The substratum of the petition remains similar and the intended amendment does not material change the cause of Action;

c. That the Gazette Notice declaring the suit property as a Protected area does not alter the use and occupation of the suit premises as it remains for use and occupation by the first respondent;

d. That the Gazette Notice issued declaring the suit premises as a Protected area was done in the public interest;

e. That there are no reasonable grounds in the application that would warrant the granting of the orders sought;

f. That the application is frivolous vexatious and an abuse of the court process and does not raise any change in the cause of Action against the respondents.

7th Respondent's Response

6. The 7th respondent filed a sworn affidavit of Mwanajuma Hiribae the CCM Lands and Physical Planning and Acting County Secretary and Head of Public Service in the County Government of Tana River. The gist of her affidavit is that the 7th respond supports both the application and the petition; that the suit land is unregistered community land within the meaning of Section 6 of the *Community Land Act* and is vested in the County Of Government Of Tana River who is the custodian for the benefit of the community; that the Actions of the first respondent in gazetting the suit property to be a Protected area violates the rights of the residents of the County and it will bar them from carrying on any Activities on the suit property which they have been carrying on since time immemorial; that the Gazettement is a scheme to defeat justice as the respondents know that the matter is pending before this court and in case of any challenges the first respondent should seek redress from the court; that the failure to involve the County Government in the matter demonstrates a deliberate disregard for the Constitutional devolution principles and is an attempt to undermine the County government authority; that there is no form of threat which has been demonstrated by the first respondent; that the first respondent only wants to cure the mistakes it committed by use of its arbitrary power; that it is in the public interest that the application be allowed as the first respondent has infringed on the rights of the petitioners as enshrined in the Bill Of Rights and the process of the acquiring of the suit land must be followed as prescribed under the law.

Submissions

Petitioners Submissions Dated 16th June 2025.

7. Counsel for the petitioners contented that the amendments sought are necessary in order to bring to the fore the core dispute of Gazettement which fundamentally alters the circumstances of the suit, and the court similarly has to consider the Constitutionality of Section 3 of the *Protected Areas Act* in the face of Article 40 (2) (a), for in his view then textual reading thereof may aid the State to arbitrary deprive a person or persons of property rights by simply declaring private or community land as a Protected area, thus depriving them of access thereto. Counsel cited Order 8 Rule 3 of the Civil Procedure Rules 2010 and Rule 18 of *the Constitution* of Kenya Protection of Rights and Fundamental Freedoms Practice and Procedure Rules 2013 to support the proposed amendment. The case of Praxedes Musunji Bulemi Versus Commissioner of Prisons & Two Others 2020 eKLR as well as Inter Tropical Timber Trading Limited Versus Kenya Power and Lighting Company Limited 2021 eKLR were cited in support of the application. Counsel stated that in the present case, the petitioners have sought to amend their petition to encompass specific facts and declarations/prayers addressing the legality of the Gazettement of the suit parcel as the declaration is strategically intended to lock out the community from the suit land should they be victorious in the petition. The said issues sought to be included arise out of the very same facts that necessitated the filing of the petition.

8. As for the Conservatory orders sought, Counsel submitted that Article 22 grants any person the right to institute Court proceeding claiming that a right or fundamental freedom in the Bill of rights has been denied violated or infringed, or is threatened, and that Article expands the sphere of locus; that the aggrieved person does not necessarily need to personally file a claim; that the applicants have a genuine grievance and concerns as far as the community land is concerned; that the intended amended petition alleges interference and or infringement with their rights under Articles 10(1c) 10 (2)(a),(b),(c) and (d) Articles 40(3) 47 56 61 and 63 of *the Constitution*. The Act of the first respondent to Gazette suit

property as a Protected area while the question of ownership is awaiting determination is an obvious attempt to undermine the process of this court, and an intention to remove the petitioners' from the fruits of eventual judgment of this court; that to preserve the good faith of the court process, it is of utmost importance that the conservatory orders are granted to create a level ground and allow the court to address with finality the rights and responsibilities of the parties at the judgment stage.

9. Further, it is stated that the Constitutionality of Section 3 (1) of the *Protected Areas Act* Cap 204 has been brought up by the amendments. Counsel relied on the case of Center for Rights Education and Awareness CREAW & Another Vs Speaker of the National Assembly & 2 Others 2017 eKLR in support of the quest for conservatory orders. The petitioners counsel, also relying on Ndii and Others Versus AG and Others Petition E282, E397, E400, E401, E402, E416 and E426 of 2020 contends that the provisions of Article 23(3) of *the Constitution* are explicit that a court may grant any appropriate relief, including a conservatory order. The petitioners urged that no citizen is to be deprived of his land by the state arbitrarily unless that deprivation is expressly authorized by law and that public interest demands so. He relied on the case of Priest Vs Secretary of State 1982 81 LGR 193 for that proposition, asserting that the same principle is now embodied in Article 40(3) of *the Constitution*; that it is not in dispute the 1st and 2nd respondents have unlawfully encroached on a portion of the land and the neighboring unsurveyed and unregistered community land measuring approximately 2000 acres, and proceeded to fence of the same, and placed uniformed Kenya defense forces officers thereon thus depriving the community of the use and ownership of the suit property. that the property is so well manned by military personnel that there is no possibility of any access by right thinking members of the petitioner's community. He faulted the 1st respondent for failure to present in evidence of any attempt by the petitioners to enter into the property. He also pointed out that the suit property is under heavy surveillance and is surrounded by a high fence.

1st Respondent's Submissions Dated 9th June 2025.

10. The 1st respondent's counsel asserted that it is the 1st respondent's case that there have been attempts of unauthorized entry into the suit parcel of land which hosts critical security infrastructures; that this prompted the Tana River County Security and Intelligence Committee to convene meeting at which it was agreed that they would recommend to the first respondent to be declared a Protected area so as protect these infrastructures which are essential in enhancing national security.

11. Counsel identified and addressed 2 issues for determination:

    a. Whether the applicants have met with threshold for the grant of conservatory orders;

    b. Whether the applicants should be granted leave to amend the petition.

12. Regarding the first issue, counsel cited Wilson Kabaria Nkunja the Magistrate and Judges Vetting Board and Others for the principles to be considered in granting conservatory orders and Gatirau Peter Munya vs Dickson Mwenda Kithinji and Two Others 2014 eKLR for the proposition that the person moving court for conservatory orders must show to the satisfaction of the court that his or he rights are under threat of violation, are being violated, or will be violated or that such violation or threatened violation is likely to continue unless a conservatory is issued; that the mere allegation of contravention of a right or a fundamental freedom is not in itself sufficient when title grant of the conservatory orders and the petitioners must demonstrate real danger that is so imminent so evident and so true as warrant the immediate intervention of the court.

13. Counsel also cited the case of Martin Nyaga Wambora Versus Speaker of the County Assembly of Embu and 3 Others. He urged that the alleged threat to the petitioner's property is not immediate as

it is contingent to the court's decision as to whether the suit parcel is public or community land a fact which is yet to be determined.

14. Counsel for the first respondent also relied on Center for Education And Awareness (CREAW) And 7 Others vs The Attorney General 2011 eKLR for the proposition that courts should exercise caution when dealing within a request to grant conservatory orders for the reason that matters which are the preserve the main petition are not to be dealt with finality at the interlocutory stage. He urged that the orders, if so granted, would most likely injure public interest as opposed to protecting it; that the Gazettement of the Protected Area was aimed at restricting an authorized access critical security infrastructures which if compromised could weaken the 1st respondents' ability to safeguard the country against potential security threats.

15. Counsel argued that in any event, if the court allows the petition, the implementation of the Gazette Notice can be discontinued and the applicants will be able to enforce their property rights.

16. Citing the case of Ephantus Njuki Kamumo Versus Lawrence Mugo and 6 Others 2024 Eklr, Counsel for the first respondent urged that the objective of the petition would not be lost if the conservatory orders are not granted since the court will still have to address itself to the issues in the main petition. Counsel relied on Black's Law Dictionary for the definition of "public interest" and cited Gatirau Peter Munya (supra) for the proposition that the purpose of conservatory orders is to facilitate orderly functioning within public agencies as well as to uphold the adjudicatory authority of the court in public interest; that suspension of the Gazette Notice as urged by the petitioners would gravely undermine the public interest and posed a direct threat to national security. He stated that Section 3 of the *Protected Areas Act* as read with its preamble empowers the first respondent to take special precautions by declaring an area as a Protected area to prevent unauthorized access and to enhance public safety and order. Counsel cited the case of Law Society of Kenya Versus the Attorney General and Four Others Petition E307 of 2024 where the applicants had sought for suspension of the application and operation of a Gazette Notice and any deployment and or administration and operations of the Kenya Defense Forces pursuant to the Notice. He stated that the court, while considering the need to preserve the national security, agreed with the respondents that the military intervention to support the national police was necessary to maintain order, peace and public safety and protect critical infrastructure as this was aligned with *the Constitution* and relevant statutes, and that the court also recognized that military personnel, due to their training may not be adequately equipped to handle civilian populations, and that their primary focus is on armed combat.

17. Finally, Counsel submitted on the proposed amendment saying that it is devoid of merit, brought inordinately late and that no potential prejudice has been demonstrated to be likely to occur if the orders sought are not granted as sought. Counsel for the first respondent relied on Chepyegon Versus Joshua Cheburet Kiptum Trading As Josesta Enterprises 2024 eKLR and stated that the applicant in their draft amended petition have included a new prayer for "timely and just compensation to the community for use and acquisition of the suit property," having had ample opportunity to raise the said prayer at the appropriate stage but failed to do so; that the attempt to introduce a new prayer at this stage is an afterthought and contrary to the overriding objective of expeditious and cost effective and fair disposal of cases as provided for under Section 3 of the ELC Act. He submitted that the delay in bringing the new prayer into the petition has not been explained, yet the circumstances giving rise to that prayer ought to have been with the applicant's knowledge at the time of firing the original petition. It is stated that they attempt to introduce it at the present stage amounts to an abuse of the court process. That the said prayer would occasion prejudice to the first respondent who has prepared and conducted their case based on the original petition, and introduction of the new reliefs at this stage would derail the timely conclusion of the matter.

3rd Respondent's Submission

18. The 3rd respondent filed submissions dated 9th June 2025, also addressing the two principal issues identified by the 1st respondent in his submissions analyzed above.

19. Citing Board of Management of Uhuru Secondary School Versus City County Director of Education and Two Others 2015 eKLR the 3rd respondent urged that the petitioners have not met the threshold for the grant for conservatory orders sought.

20. On the second issue, counsel for the 3rd respondent also submitted that leave to amend the petition should not be granted because the proposed amended petition seeks to question the Constitutionality of Section 3 of the *Protected Areas Act*, which is a new cause of action which significantly alters the substance of the petition, contrary to the intent of the Mutunga Rules.

21. Oral highlighting of submissions was done by all the counsel for the parties who have entered appearance in the matter on 24/6/2025.

Issues For Determination:

22. The issues arising for determination in the present application are twofold as follows;

    a. Whether the amendment proposed by the petitioners should be allowed;

    b. Whether conservatory orders ought to be granted suspending the implementation of the Gazette Notice number 6235 of 16th may 2025 published by the Cabinet Secretary for Interior and National Administration Hon Kipchumba Murkomen.

23. Regarding the first issue it is now trite that amendments of petitions is allowed by Rule 18 of the Mutunga Rules which states as follows:

> " 18. A party that wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the Court."

24. The Rules elaborate no further. It is upon this court to extrapolate the civil procedure rules and the decisional law into the scenario for the sake of filling in the lacuna. The civil procedure rules provide for amendment of pleadings with leave of court after pleadings have closed. Order 8 rule 1 provides as follows:

> "(1) A party may, without the leave of the court, amend any of his pleadings once at any time before the pleadings are closed."

25. The present case has progressed a great deal so this court is inclined to consider the proposed amendment under Order 8 Rule 3 which provides as follows:

> "(1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings."

26. InNakumatt Holdings Limited & another v Ideal Locations Limited [2018] KECA 514 (KLR) the court stated that as a general rule, amendment to pleadings ought to be allowed freely where such amendments facilitate the determination of the issue in dispute.

27. The following were stated as the principles for the amendment of pleadings in the Nakumatt Case (supra):

> " 9. In exercising its discretion to either allow or disallow an amendment, a Court is guided by a number of considerations. Mulla, The Code of Civil Procedure, 18th Edition, Vol.2 at pages 1751-1752 sets out the following useful guidelines when dealing with amendments of pleadings: -
>
> "On the basis of the different judgments, it is settled that the following principles should be kept in mind in dealing with the applications for amendment of the pleadings-
>
> i. All amendments should be allowed which are necessary for determination of the real controversies in the suit;
>
> ii. The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;
>
> iii. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts would not be allowed to be incorporated by means of amendment;
>
> iv. Proposed amendment should not cause prejudice to the other side which cannot be compensated by means of costs;
>
> v. Amendment of a claim or relief barred by time should not be allowed;
>
> vi. No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time;
>
> vii. No party should suffer on account of the technicalities of law and the amendment should be allowed to minimize the litigation between the parties;
>
> viii. The delay in filing the petitions for amendment of the pleadings should be properly compensated by costs;
>
> ix. Error or mistake, which is not fraudulent, should not be made the ground for rejecting the application for amendment of pleadings."
>
> 10. In addition, the Court should not consider the merits of the proposed amendment in allowing or rejecting an amendment. This is because the merits are to be determined at the hearing of the suit or in this case the appeal. See also this Court's decision in Anders Bruel T/A Queenscross Aviation vs. Nyambura Musyimi & 2 others - Civil Appeal No. 96 of 2015 (unreported)."

28. Amendments will generally be allowed by court where they can be made without occasioning any injustice to the other side.

29. In St. Patrick's Hill School Limited v Bank of Africa Kenya Limited [2018] KEHC 2539 (KLR) the court held as follows:

> " The law as regards the grant of leave to amend are well settled. The general rule on this subject is that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other party can be compensated by costs. (See Eastern Bakery v Castelino (1958) EA 461). The main principle is that an amendment should not be allowed if it causes injustice to the other side (see "Chitaley, P.BB"). On the same subject, in the case of Abdul Karim Khan v Mohamed Roshan (1965) EA.289 (C.A), the court laid down the principle that the courts will not permit an amendment that is inconsistent with original pleading and entirely alters the nature of the defence or plaint."

30. As distilled from the fore stated decisional law, the main principles to be considered in the present application for amendment are therefore as follows: The proposed amendments

a. should not alter and be a substitute of the cause of action on the basis of which the original list was raised and should not have inconsistent and contradictory allegations in negation to the admitted position of facts;

b. should not cause prejudice to the other side which cannot be compensated by means of costs;

c. should be allowed in order to minimize the litigation between the parties;

d. should be allowed which are necessary for determination of the real controversies in the suit or should facilitate the determination of the issue in dispute.

31. The proposed amendments were prompted by an act on the part of the 1st respondent, the Gazettement of the suit land while the present petition was still pending before court. From the petitioners' perspective herein, they felt aggrieved that the 1st respondent was out to intimidate them by acting as he wished regarding the suit land notwithstanding that the dispute they lodged before the court is still pending determination. They saw bad faith on the 1st respondent's part in the Gazettement of the land. They are of the view that the 1st respondent wishes to lock them out of the land in the event they emerge successful in the present litigation. They see it as a ploy to defeat the court process.

32. The court had ordered submissions to be filed and the petitioners filed theirs on 2/5/2025. However, on 16/5/2025 the 1st respondent's Gazettement galvanized them into filing the present application on 23/5/2025 and no other submission of the main petition were filed by other parties. All the filings consequent to that application revolve around its disposal. Bearing in mind that the 1st respondent undertook the Gazettement that precipitated the application for amendment and that the present application came only several days after the said action, it can be said without any contradiction that the applicants therefore came before this court at the earliest with their application prior to the hearing of the petition. This court is therefore at liberty to inquire into whether or not the proposed amendments correspond to that Gazettement and if they ought to be allowed.

33. As to whether they alter the cause of action on the basis of which the original list was raised, or whether they contain inconsistent and contradictory allegations, this court is of the view that the original cause of action was the de facto occupation of the petitioner's land by the 1st respondent. I find all the other

proposed amendments to be in rhythm with the original cause of action except the proposal in prayer no (f) to the effect that

> "(f) A declaration that Section 3(1) of the *Protected Areas Act*, Chapter 204, Laws of Kenya is antithetical to and violates the provisions of Article 40(2)(a) and Article 47 of *the Constitution*, and thus is unConstitutional, so far as it allows the state to declare ANY land a protected area, and deprive of the lawful proprietors the property rights, absent any due process envisaged under Article 47."

34. In this court's view the determination of Constitutionality or otherwise of the 1st respondent's occupation of the suit land, or even the declaration of illegality of the Gazettement, is not predicated on a declaration of unConstitutionality of Section 3(1) of the *Protected Areas Act*, Chapter 204, Laws of Kenya. Whether or not the Gazettement under the Act was effected after the petition was filed is of no consequence because that provision of the law existed even prior to the filing of the present petition and even before the Gazettement complained of. Inclusion of such a prayer is to this court an afterthought that substantively alters the nature of the original action and that should not be permitted. Besides, in the eyes of this court, the exclusion of such a prayer in the present action will not in any way prejudice the trial of the entire petition. The court will nonetheless still be able to inquire into the legality or otherwise of the occupation of the suit land by the 1st respondent without it. Save for that prayer, this court finds that all the other proposed amendments in the draft amended petition attached to the supporting affidavit are proper and fit for consideration under the remaining principles above.

35. Regarding whether the proposed amendments may occasion prejudice to the other side which cannot be compensated by means of costs this court, having stated that the petition had not yet been heard herein above by the time the application for amendment was filed, is of the view that no prejudice will be occasioned to the other parties save delay in the finalization of the petition and which can be compensated for by way of costs at the end of the litigation.

36. As to whether (c) the proposed amendments should be allowed in order to minimize the litigation between the parties and (d) are necessary for determination of the real controversies in the suit, or should facilitate the determination of the issue in dispute this court's answer is in the positive for two reasons. The petition revolves around alleged illegal occupation of community land said to belong to the applicants. While cautioning myself that the determination on dispute regarding the status of the land has not been made yet, the law is that under Article 63(3) of *the Constitution*, any unregistered community land shall be held in trust by County governments on behalf of the communities for which it is held. Article 63(4) provides that Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively. The same is reiterated in the Community Lands Act, an Act of Parliament to give effect to Article 63(5) of *the Constitution*; to provide for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of County governments in relation to unregistered community land and for connected purposes, and which at sections 4(4) and 4(5) provides as follows:

> "(4) Subject to Article 40(3) of *the Constitution* and the *Land Act* (Cap. 280), no interest in, or right over community land may be compulsorily acquired by the State except in accordance with the law, for a public purpose, and upon prompt payment of just compensation to the person or persons, in full or by negotiated settlement.

(5) Subject to the provisions of section 46 of this Act, any person who immediately before the commencement of this Act had a subsisting customary right to hold or occupy land shall upon commencement of this Act continue to hold such right."

37. Having regard to the above Constitutional and statutory provisions, it is thus the case that the rights, if proved, of the persons who claim ownership of the land, can not be extinguished contrary to the law and *the Constitution*. The 1st respondent is already in occupation and use of the suit land. The question that may arise is whether that occupation and use is legal or otherwise and what remedies are available for the petitioners if the same is unConstitutional.

38. For the above reasons, this court finds that the proposed amendments, excluding prayer no (f) in the draft attached to the supporting affidavit, should be allowed.

39. The second issue is whether conservatory orders ought to be granted suspending the implementation of the Gazette Notice Number 6235 of 16th May 2025 published by the Cabinet Secretary for Interior and National Administration Hon Kipchumba Murkomen.

40. On a preliminary basis, this court must emphasize that the question of unConstitutionality of otherwise of the Gazettement, as is sought by the petitioners in the draft amended petition, can be determined independent of any finding of unConstitutionality of Section 3(1) of the *Protected Areas Act* under which the land was Gazetted.

41. I have already stated that the petitioners' feel aggrieved and suspect that that the 1st respondent is out to intimidate them by acting as he wished regarding the suit land notwithstanding that the dispute they lodged before the court is still pending determination; that the petitioners think that he acted in bad faith; that they are apprehensive that he wishes to lock them out of the land in the event they emerge successful in the present litigation; that it is a ploy to defeat the court process. That is the background to the prayer seeking a conservatory order to suspend the implementation of the Gazette Notice Number 6235 of 16th May 2025.

42. The *Protected Areas Act* is a statute to prevent the entry of unauthorized persons into areas which have been declared to be protected areas enacted in 1949 with its commencement date being 8th September 1949. The petitioners claim that the 1st respondent encroached on the suit land in august 2024. In paragraph 6 of David Koskei's replying affidavit to the petition it is averred that the 1st respondent has been in occupation since 2006. If that is the case, then, all along, the 1st respondent did not, for reasons unknown to this court, Gazette the suit land until 16th May 2025 after the filing of the present petition.

43. In the Act, "Protected Area" means any area, place or premises in relation to which an order made under Section 3 is in force. Section 3 provides as follows:

"(1) If, as respects any area, place or premises, it appears to the Cabinet Secretary to be necessary or expedient in the interests of public safety and public order that special precautions should be taken to prevent the entry of unauthorized persons, he may, by order published in the Gazette, declare such area, place or premises to be a protected area for the purposes of this Act; and, so long as the order is in force, no person shall, subject to any exemptions for which provision may be made in the order, be in such protected area without the permission of the prescribed authority or such other person as may be specified in the order.

(2) Any order made under subsection (1) shall be laid before the National Assembly at its next sitting."

44. I have noted, and the petitioners similarly point out, that there is no any evidence that there are any persons who attempted to enter the suit land. On their part, the petitioners have in their submissions averred that they are aware that the suit property is well manned by army personnel such that there is "no possibility of any access by right thinking members of the petitioner's community." They also state that the land has a high fence around it. They dismiss the claim that there was any need to prevent any attempt at accessing the property.

45. The Supreme Court in Civil Application No 5 of 2014 Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others observed the nature of conservatory orders to be 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."

46. In Centre For Rights Education And Awareness (CREAW) & 7 Others V Attorney General [2011] KEHC 4297 (KLR), it was stated in a ruling relating to an interlocutory prayer for a conservatory order, the court would not delve into a detailed analysis of facts and law, and at that 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*". This court agrees with that position.

47. The prayer for conservatory orders is in a way interlinked with the relief for conservatory orders made in a previous application in this matter. In the ruling dated 19/12/2024 on that application this court stated as follows:

> " 29. My understanding of the dicta set out by the Supreme Court in the Gatirau Peter Munya case above is that it recognized the need, in conservatory orders applications in cases affecting the workings of public agencies, for the courts not only consider the whether the applicant has established a prima facie case, but also to balance the merits of the case with public interest and Constitutional values and apply proportionality in their decisions thereon. Notably, the very admission of the applicants as quoted verbatim herein above confirms that there are security related operations on the suit land and raises public interest concerns as to what would happen to issues security in the region perchance conservatory orders were granted as prayed for? It is noteworthy that the drafting of the prayers for conservatory orders, taken into consideration in conjunction with the admission of the presence of security personnel and possibly security installations of importance on the suit land, leaves this court with no doubt that if granted, those orders would require immediate cessation of security activities on the suit land and compel the 1st and 2nd respondent's personnel to vacate, and this despite the absence of any insight at the moment as to the future planning needs relevant to the region.

This court finds that in the given circumstances, it would be against public interest to grant conservatory orders as sought.

30. Further the submission at the hearing by Mr Kihara that for the time being the only activity being undertaken was the rehabilitation of the runway already constructed on the land to make it safe and useable especially during the impending rains which may have made the terrain impassable, rendered this court to believe that there was no need to extend the conservatory orders earlier made in the matter.

31. However, the broader picture has emerged with occupation being admitted by both sides, there is a triable issue as to whether the land really is community land or has been converted to public land by virtue of the provisions of Article 62(1)(b). This is a subject which, even if there are several other issues for determination in the petition, ranks so importantly among them, such that the grant or denial of issuance of the conservatory orders sought can revolve around it alone."

48. The issue then before the court and forming the basis for application for a conservatory order was whether the 1st and 2nd respondents should be restrained from interfering with the 7th respondent's use ownership and utility of the land that they had fenced off. In contrast, the issue before court now is if a Gazette Notice declaring the land protected area should be suspended.

49. I have examined the provisions of Section 3 of the *Protected Areas Act* and have found no restrictions regarding the class of lands subject to be declared as protected, whether private, public or community.

50. Both Section 3 and Section 4 of the same act provides for permission to enter a protected area. Section 4 provides specifically as follows:

"4. Permission to enter protected area

Where, in pursuance of Section 3, any person is granted permission to be in a protected area, that person shall, while acting under such permission, comply with such directions for regulating his conduct as may be given by the prescribed authority or person granting the permission, or by the police officer in charge of the district."

51. Persons found in a protected area without authority or unlawfully can be removed. Section 6 of the Act provides as follows:

"6. Removal of unauthorized person

If any person is in a protected area in contravention of this Act, or, being lawfully in a protected area, fails to comply with any direction given under this Act, then, without prejudice to any proceedings which may be taken against him, he may be removed from the area by any police officer or any person authorized in that behalf by the prescribed authority."

52. Further Section 7 provides as follows:

"7. Power of arrest after challenge

(1) Any person in a protected area who fails to stop after being challenged twice by a sentry, or by a person authorized in that behalf by the prescribed authority, may be arrested.

(2) A sentry or person authorized in that behalf by the prescribed authority may use any arms against any person who by force prevents or attempts to prevent the lawful arrest of himself or of any other person in a protected area:

Provided that—

(i) resort shall not be had to the use of arms under this section unless the sentry or person authorized has reasonable ground to believe that he or any other person is in danger of grievous bodily harm, and that he cannot otherwise effect such arrest;

(ii)the use of arms under this section shall be, as far as possible, to disable and not to kill."

53. Section 8 provides as follows:

" 8. Fencing of areas and warning of danger

(1) The prescribed authority in which the protected area is situate shall cause such precautions to be taken as the prescribed authority and any person deputed by the Cabinet Secretary shall deem reasonably necessary to prevent inadvertent or accidental entry into the protected area during the hours of darkness.

(2) Such precautions shall include the fencing of the protected area and the prominent display of warning Notices, and where such precautions have been duly taken no person shall be entitled to compensation or damages in respect of injury received or death caused as a result of any unauthorized entry into the protected area."

54. Ordinarily when a matter is pending before court parties are required in so far as it is within their ability to preserve the status quo of the subject matter until conclusion of the suit. Where there is a transaction that has effect on the title to land, the doctrine of lis pendens comes to the aid of the innocent party, to revert the suit property to its erstwhile status. What has occurred in this matter is not a transfer of the suit land. It is still in the 1st respondent's hands. There being no disposal of land, the doctrine is not applicable in the present application but it gives a guideline as to how a court may eventually in its judgment deal with non- transfer actions taken while a suit was still pending. In the case of Abdalla Omar Nabhan v Executor of the Estate of Saad Bin Abdalla Bin Aboud & 2 others [2013] KEELC 104 (KLR) the court, elaborating on the lis pendens doctrine, stated as follows:

" In the absence of an injunctive order, a party my dispose of a property to a third party but the final judgment or order of the court shall issue as though such a sale or transfer never took place and the judgement shall be binding on the third party. The court shall not be concerned with the developments or investments that such a third party would have put in the property because everybody is presumed to have known about the existence of a suit in respect to such a property.

It is because of this reason that a party who purchases a property and invests in it while a suit is pending, does so at his own risk notwithstanding the absence of an injunctive order duly registered against the title."

55. In the circumstances, there is no cause for alarm on the part of any party as the law is clear on the issue.

56. Looking at the provisions of the statute set out herein above, it is clear that the 1st respondent in his wisdom thought that the suit land was safer off Gazetted under the Act. The petitioners blame him for acting unilaterally rather than coming to court for orders hence their fear of intimidation and stealing a march on them in this litigation, thus pre-empting the final judgment.

57. This court however notes that occupation and fencing of the suit land by the 1st respondent having been admitted by both sides, and it would appear that the petitioners had already been excluded therefrom as at the time of filing their petition, and which was the cause for the lodging of the petition.

58. This court having considered all the documents filed herein to establish how the petitioners would be prejudiced any further by the Gazettement of the suit premises, has come to the conclusion that no further prejudice may occur to them by way of the Gazettement than that which has, if any, been perpetrated through the occupation and use of the suit land.

59. Overall, there is a prima facie case established by the petitioners against the gazettement of what they consider their land under trusteeship of the 7th respondent, but this court having declined conservatory orders in the application dated 10/10/24 and that position not having been appealed or reviewed – which implied that the 1st respondent remained in possession of the suit land - it does not seem plain to it that granting the conservatory order on paper will benefit the petitioners in any manner on the ground.

60. Whatever perception of intimidation by the 1st respondent the petitioners have developed may be simply a matter of apprehension rather than reality. The 1st respondent may have been genuinely acting in good faith to safeguard the security installations on the premises. Nonetheless, the 1st respondent's conduct, having been undertaken unilaterally without resort to court in the midst of this litigation, is not to be taken as being sanctioned by this court; in fact, this court considers reprehensible all such conduct as may make any of the parties be apprehensive that one party is flexing his perceived might such as to intimidate them. The 1st respondent should take note that when the actor is a State institution, it is very easy for ordinary litigants, perceiving themselves to be weak, to consider any such action taken unilaterally, however bona fide, adversely. The safest way of ensuring every person has confidence in the legal process is if all parties refrained from dealing with the subject matter in such a manner or resorted to court so as not to occasion anyone any such apprehension.

61. Be that as it may, and however objectionable to them the 1st respondent's action may seem, the reasoning of this court as above remains - that despite the presentation of a prima facie case for nullification of the gazettement, no benefit would be derived by the petitioners perchance the prayer for conservatory orders is granted - and that reasoning is sufficient to dispose of that prayer in the negative.

62. The outcome of the foregoing is that the application dated 21/5/2025 is partially merited and for clarity the following prayers are therefore granted:

    a. The petitioners are hereby granted leave to amend their petition within 21 days of this order and such amendment shall take into consideration the contents of this ruling and it shall exclude the prayer (f) in the draft amended petition attached to the application dated 21/5/2025;

b. Such amended petition shall be filed together with a supplementary affidavit in support thereof;

c. The costs of the application shall abide the outcome of the petition.

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 30TH DAY OF OCTOBER, 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.