



**Mbwika v Cabinet Secretary for Lands through Deputy County
Commissioner Makueni County & 3 others (Environment and Land Petition
E009 of 2024) [2025] KEELC 7603 (KLR) (6 November 2025) (Ruling)**

Neutral citation: [2025] KEELC 7603 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND PETITION E009 OF 2024
EO OBAGA, J
NOVEMBER 6, 2025
IN THE MATTER OF ARTICLE 20(2), 22(3), 40, 47, 50, 165(3)
(B) AND (D) OF THE CONSTITUTION OF KENYA 2010.

AND

**IN THE MATTER OF SECTIONS 7, 8, 9, 10 AND 11 OF
THE FAIR ADMINISTRATIVE ACTIONS ACT 2015**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES
20(2), 47, 40 AND 50 OF THE CONSTITUTION OF KENYA 2010**

BETWEEN

JONES MUSYOKA MBWIKA PETITIONER

AND

**THE CABINET SECRETARY FOR LANDS THROUGH DEPUTY COUNTY
COMMISSIONER MAKUENI COUNTY 1ST RESPONDENT**

THE COUNTY SURVEYOR, MAKUENI COUNTY 2ND RESPONDENT

THE HON ATTORNEY GENERAL 3RD RESPONDENT

MUSAU MUSAU 4TH RESPONDENT

RULING

1. The Petitioner/Applicant filed a notice of motion dated 5th December, 2024 in which he sought the following orders:



1. Spent
 2. Spent
 3. That this honourable court be pleased to grant a conservatory order to restrain the 1st and 2nd Respondents, whether by themselves, their agents and or servants from entering the suit property purporting to implement the 1st Respondent's decision dated 2nd October, 2008 or thereabouts delivered in respect of Appeal to the Minister case No. 99/2008 over land parcel No. 334, Mangani Adjudication Section pending the hearing and determination of this petition.
 4. That in the alternative, this honourable court be pleased to grant an interim order of status quo.
 5. The costs of this application be borne by the Respondents.
2. The Petitioner who is related to the 4th Respondent contends that his father Mbwika Kithi was married to two wives. The first wife was Rael Mbutu Mbwika who is his mother and Ngumu Mbwika who is grandmother to the 4th Respondent. Mbwika Kithi purchased land at Shimba Hills, Kwale where he moved with his second wife Ngumu Mbwika in the 1970s.
 3. Mbwika Kithi and his second wife died and were buried at Shimba Hills, Kwale. In the late 1970's the 4th Respondent's mother moved back to Mangani with her children where Mbwika Kithi's first wife welcomed them. During the demarcation process, the 4th Respondent's family were given plot number 426 measuring 0.39 hectares whereas the Applicant's family were given plot 334 measuring 0.42 hectares.
 4. The 4th Respondent filed an objection which objection was dismissed. The 4th Respondent appealed to the Land Adjudication Officer who ruled in favour of the Applicant. The 4th Respondent appealed to the Minister who ruled that the land which belonged to Mbwika Kithi be subdivide equally. The decision was made on 9th July, 2008.
 5. On 2nd October, 2023 the District Surveyor, Makueni wrote a letter to both the Applicant and the 4th Respondent seeking to implement the Minister's decision. The Applicant moved to court and filed judicial review proceedings E003 of 2023 but this suit was withdrawn while it was pending judgment which had been scheduled for 11th December, 2024.
 6. It is after the withdrawal of the judicial review proceedings that the Applicant filed this petition. The Applicant contends that the 1st Respondent acted unconstitutionally and his decision was illegal and inimical to the tenets of fairness, equity and substantive justice.
 7. The Applicant argues that the Minister's decision was contrary to previous decisions from Machakos Civil Case No. 531 of 1991 which resulted to favourable rulings to him. He further argues that the Minister entertained the appeal which was filed outside the statutory period of 60 days.
 8. The Applicant further contends that the Minister's decision was concealed from 9th August, 2008 until 2nd October, 2023 when he received a letter informing him of the implementation of the Minister's decision. He further stated that no survey report was produced in evidence before the Minister made his decision.
 9. The 1st 2nd and 3rd Respondent opposed the Applicant's notice of motion through grounds of opposition dated 27th February, 2025. The Respondents contends that the Applicant's application has not met the threshold for grant conservatory orders.



10. The 4th Respondent opposed the Applicant's application based on a replying affidavit sworn on 30th December, 2024. The Respondent contends that the Applicant's application is an abuse of the process of the court. The Applicant had filed judicial review proceedings which were heard and when the same was coming for judgment on 11th December, 2024, the Applicant withdrew the same arguing that he had not sought leave to bring the same.
11. The 4th Respondent states that all procedures were followed under the [Land Adjudication Act](#) and that it is the Applicant who has failed to allow the Minister's decision to be implemented.
12. The parties were directed to file written submissions. The Applicant filed his submissions dated 25th March, 2025. The 1st, 2nd and 3rd Respondents filed their submissions dated 1st April, 2025. The 4th Respondent filed his submissions dated 8th April, 2025.
13. All the parties in this matter submitted as though they were submitting on the main petition. They did not submit on why conservatory orders should or should not issue. On the part of the Applicant, he cited the case of *Gatirau Peter Munya –vs- Dickson Mwenda Kithinji & 2 others* (2014) EKL.R where it was held 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 applicants case of 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”.
14. The Applicant submitted that he will suffer prejudice if conservatory orders were not granted.
15. The 1st, 2nd and 3rd Respondents submitted that the Applicant had not met the threshold for grant of conservatory orders. They relied on the case of *Gatirau Peter Munya (Supra)* and further relied on the case of *Kevin K. Mwititi & others –vs- Kenya School of Law & Others* where justice Odunga (as he then was) stated as follows:

“The first issue for determination is whether the Petitioner has established a prima facie case. A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the Applicant is only required to establish a prima facie case with a likelihood of success”.
16. The 4th Respondent on his part submitted as though he was submitting on the main petition. He stated that after the Applicant realized that the judicial review proceedings had been caught up by limitation, he filed this constitutional petition and that conservatory orders should not issue.
17. I have considered the material placed before me. I have gone through the history of this matter which touches on ancestral land. The Applicant is contending that if conservatory orders are not granted he will suffer prejudice. I have noted that the Minister's decision which is sought to be implemented. The Minister ruled that Mbwika Kithi's land be subdivided into two equal portions.



18. I have considered the history of Mbwika Kithi's land and how the Applicant's family came to own more than what the family of Ngumu Mbwika got. The Applicant has not demonstrated that he has a prima facie case with probability of success as to call for conservatory orders. Whereas the Applicant claims that there was no survey report filed before the Minister's decision was made, the verdict of the Minister is clear that there was a survey report filed before the Minister's decision was made, the verdict of the Minister is clear that there was a survey report to which he referred.
19. The Applicant having failed to show that he has a prima facie case with probability of success, I find that no conservatory orders should be granted. I proceed to dismiss the Applicant's application with costs to the Respondents.

It is so ordered.

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HON. E. O. OBAGA

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 6TH DAY OF NOVEMBER, 2025.

In the Presence of:

Ms. Kyalo for Petitioner

Ms. Lungu for Mr. Kuria for 1st, 2nd and 3rd Respondent.

Court assistant - Mueni

