REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC EP PET E039 OF 2024

EMMA MUTHONI NJOGU……..……...…...…1ST APPLICANT

PETER NJAU KIMEMIA…….……..……2ND APPLICANT

-VERSUS-

MARARUI FARMERS COMPANY LIMITED……..…1ST RESPONDENT

MAINA WANGUKU …...……...…..……2ND RESPONDENT

GEOFFREY MUGO ……..…….. 3RD RESPONDENT

JOHN KIAMA……...…….……4TH RESPONDENT

AND

NATIONAL LAND COMMISSION ……..……1ST INTERESTED PARTY

NEMA~~ATIONAL ENVIRONMENT MANAGEMENT AUTHORITY ……~~……..……2ND INTERESTED PARTY

RULING

1. The Applicants filed a notice of motion application dated 21st November 2024 and supported by an affidavit sworn on the same date by Emma Muthoni Njogu. They are seeking 6 orders, most of which are spent. What is remaining is the

prayer for the orders that **pending hearing and determination of this Petition**, the Court grants a temporary Conservatory Order of injunction to prevent, stop, discontinue or restrain the 1st to 4th Respondent and or anyone claiming under them from setting up excavating equipment's machines, tractors/equipment, surveying the riparian land, constructing on the riparian land, building on the riparian land reserve, clearing of a designated riparian land along Kigwa River, or doing anything else which would degrade the said land, below is my opinion.

2. The application is based on the grounds that the 1st Petitioner, an Advocate of the High Court of Kenya and proprietor of Title Nos. NAIROBI/BLOCK 139/297 and 139/296, owns land adjacent to the riparian reserve along the Kigwa River. That after purchasing the land over twenty years ago, the 1st Petitioner and the 2nd Petitioner constructed their home and undertook various conservation efforts to protect the riparian land from flooding, degradation, and illegal activities. These efforts included planting trees, fencing the area to protect it from encroachment and livestock destruction, and maintaining the free flow of stormwater and sewer systems serving the neighbourhood.
3. The Petitioners allege that on several occasions in September and October 2024, the 3rd and 4th Respondents, acting under the direction of the 1st and 2nd Respondents, unlawfully invaded, surveyed, cleared, and attempted to partition the riparian reserve while accompanied by armed goons who issued threats. The

matter was reported to Mararui Police Post under OB No. 8/12/9/2024. They contend that the –Respondents' continued attempts to seize and develop the riparian land pose a threat to the environment, the natural stormwater flow, and the sewerage infrastructure, and would likely lead to flooding, pollution, and destruction of the river's ecosystem.

4. The Petitioners argue that the Respondents' actions amount to illegal encroachment and violation of constitutional rights under Articles 42, 62, 67, 69, and 70 of the Constitution of Kenya, which guarantee the right to a clean and healthy environment and sustainable use of natural resources. They state that the riparian reserve constitutes public land essential for the protection of Kigwa River and that unless the court grants injunctive relief, the Respondents will continue their unlawful clearing, surveying, and construction activities, resulting in irreparable environmental harm and violation of both private and public environmental rights.

5. In opposition to the Applicant's motion, the 1st, 2nd, and 3rd Respondents filed replying affidavits both sworn on 20th December 2024 through their respective deponents, Zakaria Maina Wamaita and Geoffrey Mugo. Mr. Mugo, identifies himself as a resident of Marurui and the duly elected Security Chairman of the Marurui Residents' Alliance. He stated that the Association was formed to promote residents' welfare and address community needs. That due to

population growth and increased school enrolment following the County Government's free feeding programme, the Marurui residents requested for additional land to build an ECDE classrooms at Marurui Primary School and a social hall to support youth and community activities.

6. Consequent to this request, the Association in November 2023, petitioned the area MCA, Hon. Sospeter Githahu Mumbi, who, through the 1st Respondent, initiated a survey to identify land suitable for these public utility developments. The residents, including the 3rd Respondent participated in the process, which he maintained was transparent and peaceful.
7. The 3rd Respondent denied the Petitioners' allegations that "goons" were hired or that any intimidation, clearing, or construction had taken place on the riparian reserve. Mr Mugo clarified that the survey was purely to determine land availability for community use, not to alienate riparian land. He further contended that the Petitioners have no reasonable basis to oppose the exercise, as its objectives are for the common good.
8. He instead, accused the Petitioners/Applicants of fencing off and encroaching upon open land between their plots and the riparian zone, where they have planted crops, built temporary structures, and stored construction materials. He also clarified that the river in question is the Gatharaine River, not the Kigwa River, and described the Petition and motion as premature.

9. Similarly, Mr. Zakaria Maina Wamaita, Chairman of the 1st Respondent, explained that the company, incorporated in 1974, lawfully owns the Marurui land, which was subdivided and allocated to shareholders in 1989, leaving open spaces under its control. In response to the MCA's request in May 2024, the 1st Respondent agreed to engage surveyors to determine whether such open spaces could accommodate the proposed public utilities, emphasizing that the process remains ongoing.

10. He confirmed that the 1st Respondent requested security from the Area Chief before the survey began and reiterated that neither he nor the company has any personal interest in the outcome. Mr Wamaita asserted that the survey was lawful, confined to open spaces, and not riparian zones, and accused the Petitioners of misleading the court by making baseless claims to conceal their illegal occupation of community land.

11. The 2nd Interested party also filed a replying affidavit sworn on 13th March 2025 by Ayub Macharia, its director of Environmental Enforcement. He stated that NEMA is the principal government agency mandated under the Environmental Management and Co-ordination Act (EMCA) to supervise and coordinate environmental matters, including the issuance of Environmental Impact Assessment (EIA) licenses. He states that NEMA has not received any EIA

report or application for construction on the disputed riparian land along Kigwa River.

12. That upon receiving these pleadings, NEMA conducted a site visit on 10th February 2025, where it found no evidence of construction or encroachment, only cultivation and efforts to stabilize the riverbank with Napier grass. Additionally, in line with its statutory duties, it wrote to the Water Resources Authority on 5th –March 2025 requesting them to demarcate the riparian boundaries to prevent future encroachment, reaffirming its ongoing commitment to protecting the environment.

13. In response to the 1st and 2nd Defendants' replying affidavit, the Petitioners / Applicants filed a further affidavit sworn on 2nd February 2025 by the 1st applicant. She asserted that the disputed parcel of land is riparian reserve land, not open space or land owned by the 1st Respondent. The Applicants state that the Respondents have admitted to targeting this riparian land for development of ECDE classrooms and a social hall, which is unlawful. That riparian land cannot be surveyed, allocated, or developed for any purpose public or private as it is a protected environmental and public utility zone under government and National Land Commission jurisdiction.

14. They further argue that the 1st Respondent has no statutory mandate to survey or allocate such land, and that the 4th Respondent surveyor is not a licensed

professional, as confirmed by the Land Surveyors' Board. They denied fencing or encroaching on the riparian reserve, explaining that they only planted trees and set up a green hedge to rehabilitate the area and protect it from flooding, illegal brewing, and livestock destruction.

15. The Petitioners maintain that the Respondents acted unlawfully by visiting the site with hired youths who intimidated them and by purporting to represent residents through a non-existent association. They clarify that their legitimate residents' association, Marurui Estate Residents Welfare Association (MERWA), has never authorized any such developments. They insist that the Respondents' actions threaten environmental conservation, public sanitation, and lawful sewer infrastructure, urging the Court to stop the illegal survey and grant the prayers sought in their application with costs.

Submissions:

16. The Petitioners/Applicants filed submissions dated 3rd June 2025 while the 10th July 2025. They submitted that they have produced evidence including a government survey map and photographs showing that the disputed land is a riparian reserve. They aver that the Respondents' intended survey lacks authorization from the National Land Commission hence, their application meets the prima facie threshold.

17. On the second principle, the Applicants citing the case of **Nguruman Ltd v Jan Bonde Nielsen & 2 Others [2014] eKLR** contend that if the Respondents proceed to survey, subdivide, or sell the riparian reserve, such actions would permanently alter the protected status of the land and violate environmental law, making monetary compensation inadequate. They argue that the loss of riparian land, a public environmental resource, would cause irreversible environmental degradation and adversely affect their properties and community ecosystem.

18. On the balance of convenience, the Petitioners rely on **Films Rover International Ltd v Cannon Film Sales Ltd (1986) 3 All ER 772** and **Amir Suleiman v Amboseli Resort Ltd [2004] eKLR**, where the courts held that the preferred course is one that carries the lower risk of injustice. That in this case, maintaining the status quo by restraining the Respondents from interfering with the land carries a lower risk than allowing actions that may result in unlawful subdivision or sale to third parties.

19. On the other hand, the Respondents argue that the Petitioners have not met the legal threshold for the grant of an interlocutory injunction as set out in **Giella v Cassman Brown (1973) EA 358.** They submit that no prima facie case has been established since the Petitioners have not shown any clear or legally protectable right being violated. In support they cited the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR** and **Nguruman Ltd**

v Jan Bonde Nielsen & 2 Others [2014] eKLR, the Respondents emphasize that a prima facie case must demonstrate a distinct and direct infringement of a right and an urgent need for protection.

20. They contend that the Petitioners' claim is speculative, based on misinformation, and unsupported by evidence, given that they are third-party purchasers with no proprietary rights over the open spaces, which remain under the 1st Respondent's ownership. Further, inspection by NEMA on 10th February 2025 confirmed there was no construction or encroachment on riparian land.

21. On the issue of irreparable harm, the Respondents rely on **Nguruman Ltd *(supra),*** arguing that the Petitioners have not demonstrated any actual or imminent injury that cannot be compensated by damages. No evidence has been adduced of excavation, construction, or environmental degradation, and NEMA's findings negate any such allegations.

22. The Respondents further accuse the Petitioners of illegal encroachment by fencing off and cultivating part of the open space, undermining their claim to be protecting the environment. They argue that it is illogical for the Petitioners to allege irreparable environmental harm while simultaneously exploiting the same land. The 1st Respondent, notes that he has involved NEMA and local authorities in a survey process to identify land for community projects and has expressly stated that no development will occur on riparian land.

23. Regarding the balance of convenience, the Respondents contend that it tilts in their favour and in the public interest. In support, they cite the case of **Amir Suleiman v Amboseli Resort Ltd [2004] Eklr** and **Bryan Chebii Kipkoech v Barnabas Tuitoek Bargoria & Another [2019] Eklr**, emphasizing that courts should adopt the course with the lower risk of injustice.

24. They argue that halting the survey intended to establish community utilities would unjustifiably hinder public development on the basis of unproven claims. That since no construction or environmental harm has occurred, denying the injunction poses minimal risk, whereas granting it would frustrate lawful public initiatives.

Analysis and Determination:

25. The issue for determination here is the question whether the Applicant has laid a basis for the grant of temporary conservatory orders seeking to restrain the Respondents and or anyone claiming under them from setting up excavating equipment's machines, surveying, clearing or constructing the land adjacent to their parcels on the grounds that the same is riparian land.

26. The guiding principles upon which this Court can grant conservatory orders are well settled within the framework of Article 23 of the Constitution where the Courts are called upon to uphold and enforce the Bill of Rights.

27. The matter being at an interlocutory stage, the court cannot make a definite finding on facts or the law but instead is required to evaluate the material placed before it and decide whether the Applicant has made a prima facie case with likelihood of success and further whether declining to grant the orders will prejudice the Applicant.

28. In the case of **Centre for Rights of Education and Awareness (CREAW) & 7 others vs. Attorney General Nairobi High Court Petition NO. 16 of 2011, (2011) eKLR**, Justice Musinga, as he then was, discussed issue of conservatory orders as follows: -

> ***"It is important to point out that the arguments that were advanced by counsel and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the Petitioner's application and not the Petition. I will not therefore delve into a detailed analysis of facts and law. At this state, a party seeking a conservatory order only requires demonstrating 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." (Emphasis added)***

29. On the face of the pleadings filed for and against the application, there is no dispute that the Applicants occupy the parcels of land which are adjacent to the

riparian land. They annexed copies of their title deeds to show support that they are rightfully on the adjoining land.

30. The Respondents have argued that the disputed land is part of the land that was owned by the 1st Respondent, a land buying company that owned the Marurui land. In his replying affidavit Mr.Zakaria stated that this land was subdivided and allocated to shareholders in 1989, leaving open spaces under its control.

31. They conatend that it is these open spaces, after involving the area MCA, who, through the 1st Respondent, initiated a survey to identify land suitable for public utility developments due to the expanding population. However, the 1st Respondent, did not annex any ownership documents to affirmcorroborate this fact. Hence, the question of whether the disputed land is riparian or private land remains one for determination.

32. The Applicants have articulated that they face the risk of irrepairable damage if the land in contention is cleared or constructed on. Because of the competing claim here, in considering whether or not to grant conservatory order, it is my view that the principle of proportionality plays a not remote role.

33. As was stated by **Ojwang, AJ** (as he then was) in **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589** the Court, in responding to prayers should always opt for the lower rather than the higher risk of injustice. The learned Judge expressed himself as follows:

"…Although the court is unable at this stage to say that the applicant has a prima facie case with a probability of success, the Court is quite convinced that it will cause the applicant irreparable harm if his prayers for injunctive relief are not granted. In these circumstances, the balance of convenience lies in favour of the applicant rather than the respondent. There would be a much larger risk of injustice if the court found in favour of the defendant, than if it determined this application in favour of the applicant".

34. The Respondents speaks of looking for land to be put to use for the benefit of the community but they did not annex any application made to the 1st Interested Party for allocation of land for such purpose. If the land is not public/riparian as alleged by the 3rd Respondent, why did the area MCA write to the 1st Respondent requesting for land.

35. These gaps demonstrate that the Applicant has raised a prima facie case and since the care of the impugned land has been in their control, the balance of convenience tilts in preserving that status quo. The Respondents not having denied visiting the area whether to survey and or whatever activity, it is imperative that the orders prayed for be granted to avoid interference with the land before the suit is heard and determined.

36. Consequently, I hold and find that the Applicants have met the threshold to grant conservatory orders against the Respondents pending determination of the Petition and the same is hereby granted. Costs of the application ordered in the cause.

Dated, Signed and Delivered at Nairobi, the 6th day of November, 2025.

A. OMOLLO

JUDGE