

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ELC PETITION NO E004 OF 2024

OKIYA OMATAH OKOITI PETITIONER

= VERSUS =

MALABA MUNICIPALITY 1ST

RESPONDENT

CHIEF OFFICER, URBAN DEVELOPMENT

AND PHYSICAL PLANNING 2ND

RESPONDENT

THE COUNTY EXECUTIVE OF BUSIA 3RD

RESPONDENT

THE COUNTY EXECUTIVE COMMITTEE

MEMBER (CECM) FOR LANDS AND

URBAN PLANNING 4TH

RESPONDENT

= AND =

BUSIA COUNTY BUSINESS

OWNERS ASSOCIATION 1ST INTERESTED

PARTY

MALABA BUSINESS COMMUNITY

ASSOCIATION 2ND INTERESTED

PARTY

KOCHOLIA MARKET MANAGEMENT

ASSOCIATION 3RD INTERESTED

PARTY

THE BUSIA COUNTY ASSEMBLY 4TH INTERESTED

PARTY

THE COUNTY LANDS SURVEYOR, BUSIA 5TH INTERESTED

PARTY

THE LAND REGISTRAR, BUSIA 6TH INTERESTED

PARTY

THE MINISTRY OF LANDS AND

PHYSICAL PLANNING 7TH INTERESTED

PARTY

THE NATIONAL LAND COMMISSION 8TH INTERESTED

PARTY

THE HON. ATTORNEY GENERAL 9TH INTERESTED

PARTY

THE OFFICER COMMANDING STATION (OCS)

MALABA POLICE STATION 10TH INTERESTED PARTY

R U L I N G

1. What calls for my determination in this ruling is the prayer **NO 3** of the Notice of Motion by **OKIYA OMTATAH OKOITI** (the Petitioner herein and who is also the Senator Busia) dated 15th July 2024. Therein, the Petitioner seeks the following remedy:

3: That pending the inter-partes hearing and determination of the application and/or the Petition herein, this Honourable court be pleased to issue a conservatory order in the interim to restrain the respondents, whether by themselves or their servants or agents or advocates or otherwise howsoever from engaging in the purported reorganization of Malaba Town, including by demolishing all structures in customs, main stage and Kocholya areas which are ostensibly built on “road reserves and public land”.

The Motion is premised on the provisions of **Articles 20, 22, 23(3), 50(1), 159(2)(d), 162(2)(b), 165(5) and 258** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practise Procedure Rules 2013**

and all other enabling provisions of the law. It is predicated on the grounds set out therein and supported by the Petitioner's affidavit of even date.

2. In brief, it is the Petitioner's claim that contrary to the Constitution, the law and applicable international standards, the Respondents have issued eviction notices to remove small scale traders from what they call road reserves and public land in Malaba Town and Kocholya areas of Busia County yet the policy decisions and plans have not been subjected to public participation and it is a matter of public notoriety that similar exercises in Busia and Bumala towns resulted in destruction of property and livelihood of many people. The impugned actions by the Respondents are in violation of express provisions of the Constitution, the Access to Information Act, the Fair Administration Actions Act, the Physical and Land Use Planning Act, the Urban Areas and Cities Act and the County Government Act. That what the Respondents are calling "**public Participation**" is a mockery of the principle of meaningfully engaging the public. That if the reorganization of Malaba Town is necessary, the same should only be done after proper land availability and land use audits have been done. The textual authority that justifies the grant of conservatory orders and injunctions is to protect and enforce fundamental rights enshrined in the Bill of Rights. Unless the application is heard urgently and determined, the Petitioner/Applicant and the people of Kenya will suffer great loss as the Constitution and the rule of law will continue to be violated and/or threatened by the Respondents. The Petitioner has established a prima facie case with high chances of

success and granting the order sought will not prejudice the Respondents but rather will advance the cause of justice.

3. The 2nd, 3rd and 4th Respondents i.e. **CHIEF OFFICER URBAN DEVELOPMENT AND PHYSICAL PLANNING, THE COUNTY EXECUTIVE BUSIA and THE COUNTY EXECUTIVE COMMITTEE** respectively responded to the Motion vide a replying affidavit deposed by **PETER KHASAMULE ODIMA** which also encompassed the response both to the Motion and the Petition. He deposed that the allegations in the Petition and the Motion are not factual as the 1st Respondent has discussed and agreed with the traders who are lawful occupants and/or had structures that they will be considered first once the reorganization has been done and given back their structures. However, the Respondents cannot give alternative land to those who illegally occupied government without documentation. That the land on which reorganization is to be carried on is public land held in trust by the Government of Busia which has been occupied unlawfully by some people and the Respondents are cognizant of their duty to uphold the rule of law. The Notice of Motion has failed to demonstrate a prima facie case to warrant any conservatory orders.
4. The 1st Respondent i.e **THE MALABA MUNICIPALITY** adopted the replying affidavit filed on behalf of the 2nd, 3rd and 4th Respondents.
5. **PETER KHASAMULE ODIMA** swore a supplementary affidavit dated 23rd September 2025 in which he deposed, inter alia, that the re-organization of Malaba Town involved an intrinsic public participation Process and in particular, an invitation by the Municipality Board, members of the public

and all affected persons who attended the exercise on 18th June 2024 and signed the list of participants. Annexed to the supplementary affidavit is a list of some 28 names which, unfortunately, are not very legible and is therefore not of much probative value to this court. Hopefully a more legible list have been filed by the time this Petition comes up for hearing.

6. The court directed that the Motion be canvassed by way of written submissions. Those submissions were subsequently filed by the Petitioner who is acting in person, by **MR WEKESA** instructed by the firm of **AMANI WEKESA & ASSOCIATES ADVOCATES** for the 1st Respondent and by **MR OWUOR** instructed by the firm of **OMBOKO & OWUOR ADVOCATES LLP** for the 2nd, 3rd and 4th Respondents. And although leave was granted to file supplementary affidavit, I did not see any by the Petitioner. The Interested Parties did not participate in the Motion.
7. I have considered the Motion, the rival affidavits and the submissions by counsel.
8. What the Petitioner seeks at this stage is the grant of a conservatory order restraining the respondents, whether by themselves, their advocates agents or otherwise howsoever from engaging in the purported reorganization of Malaba Town including by demolishing the structures in customs, main stage and Kocholya areas which are ostensibly built on **“road reserves and public land”**.
9. A conservatory relief, as was held in the case of **DOCK WORKERS UNION & OKIYA OMTATAH OKOIT -V- PORTSIDE FREIGHT TERMINALS LTED & 10 OTHERS**

SUPREME COURT PETITION (APPLICATION) NO E010 of 2024 [2024 KESC 35 KLR] at paragraph 11 (v) and (vi):

“Is a Constitutional relief specifically provided for under 23 of the Constitution, grantable as matter of judicial discretion. Conservatory orders have a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies as it is meant to secure the enforcement of the provisions of the Constitution and to also uphold the adjudicatory authority of the Court so that the authority conferred on the courts is not exercised in vain hence the need to keep the subject matter in dispute in situ.”

See also the case of **GAITARAU PETER MUNYA -V- DICKSON MWENDA & 2 OTHERS 2014 eKLR** cited by counsel for the 1st Respondent where the same court set out the applicable principles in granting conservatory orders pending appeal were set out as:

- 1) The appeal is arguable and not frivolous.
- 2) Unless the orders sought are granted the appeal were it to eventually succeed would be rendered nugatory.
- 3) That it is in public interest that the conservatory orders be granted.

In the same case, the court said the following at paragraph 86:

“Conservatory orders bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the

courts, in public interest. Conservatory orders, therefore, are not like interlocutory injunctions linked to such private-party issues as ‘the prospects of irreparable harm’, occurring during the pendency of a case or ‘high probability of success’ in the supplicant’s case for orders of stay. Conservatory orders, consequently should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributable to the relevant causes.” Emphasis mine.

Guided by the above binding precedents, I have no doubt that the Petitioner has made out a case for the grant of conservatory orders restraining the Respondents whether by themselves, their agents, servants or any other persons or body acting through them from engaging in the purported re-organisation of Malaba Town including the demolition of any structures in customs, main stage and Kocholya areas which are ostensibly built on road reserves and public land pending the hearing and final determination of this Petition. Violation of constitutional provisions have been cited and, in my view, established on a prima facie basis. This court is also alive to the public interest and the fact that whereas to grant the conservatory order sought will enhance the constitutional values enshrined in the Constitution and other laws cited herein, to deny the order sought may render the Petition and its substratum nugatory.

10. I am, accordingly, persuaded that the orders sought in paragraph 3 of the Notice of Motion dated 15th July 2024 are well merited. I allow it and issue the following disposal orders:

- 1) Pending the hearing and determination of this Petition, the Respondents whether by themselves, their servants, agents, advocates or any other persons are hereby restrained by a conservatory order from engaging in the purported re-organisation of Malaba Town including by demolishing all structures in customs, Main Stage and Kocholya areas ostensibly built on “road reserves and public land.”**
- 2) Costs shall be in the cause.**

**BOAZ N. OLAO
JUDGE**

24TH NOVEMBER 2025

**Ruling dated, signed and delivered on this 24th day of
November 2025 by way of electronic mail.**

**BOAZ N. OLAO
JUDGE**

24TH NOVEMBER 2025