

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ELC CONSTITUTIONAL L PETITION No. E023 OF 2025**

**IN THE MATTER OF Art 1, 1(2), 2(2), 2(6), 3, 10, 10(2), 22,  
22(3), 23, 27(1), 27(2), 27(4), 28, 35(1), 43(1), 47(1),  
47(2), 174(2), 196(1) (b), 232(1)(d) OF THE  
CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ARTICLE 21.1 OF THE UNIVERSAL  
DECLARATION OF HUMAN RIGHTS (UDHR)**

**AND**

**IN THE MATTER OF ARTICLE 6.1 and 11.1 OF THE  
INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL  
AND CULTURAL RIGHTS (ICESR)**

**AND**

**IN THE MATTER OF SECTION 4 OF THE FAIR  
ADMINISTRATIVE ACTIONS ACT 2015**

**AND**

**IN THE MATTER OF SECTION 87 (1) (a) OF THE COUNTY  
GOVERNMENT ACT 2012**

**AND**

**IN THE MATTER OF THE PROPOSED CONSTRUCTION OF  
JOGOO ROAD (UHURU MODERN MARKET)**

**AND**

**IN THE MATTER OF A NOTICE TO VACATE SITE DATED  
14<sup>TH</sup> MARCH 2025**

**BETWEEN**

**JOGOO ROAD UHURU  
OPEN AIR MARKET GROUP ..... 1<sup>ST</sup>**

**PETITIONER**

**EVANS LWIKANE (CHAIR PERSON) ..... 2<sup>ND</sup>**

**PETITIONER**

**EZEKIEL KARIUKI (VICE CHAIR PERSON) ..... 3<sup>RD</sup>**

**PETITIONER**

**JOSEPH MAINA (SECRETARY) ..... 4<sup>TH</sup>**

**PETITIONER**

**JOYCE MUSIMBI (ASSISTANT SECRETARY) ... 5<sup>TH</sup>**

**PETITIONER**

**GEOFFREY KIBERENGE  
(ORGANISING SECRETARY) ..... 6<sup>TH</sup>**

**PETITIONER**

**VINCENT NJIRU (TREASURER).....7<sup>TH</sup>**

**PETITIONER**

**VERSUS**

**AG. COUNTY SECRETARY AND  
THE HEAD OF COUNTY PUBLIC SERVICE;  
ELC CONSTITUTIONAL L PETITION No. E023 OF 2025  
Ruling Page 2 of 18**

**NAIROBI CITY COUNTY ..... 1<sup>ST</sup> RESPONDENT  
COUNTY**

**CHIEF OFFICER- MARKETS & TRADE;  
NAIROBI COUNTY.....2<sup>ND</sup>**

**RESPONDENT**

**COUNTY SECRETARY;  
NAIROBI CITY COUNTY.....3<sup>RD</sup>**

**RESPONDENT**

**MINISTRY OF LANDS, PUBLIC WORKS,  
HOUSING AND URBAN DEVELOPMENT ..... 4<sup>TH</sup>**

**RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 5<sup>TH</sup>**

**RESPONDENT**

**RULING**

**1.** What is before the Court for determination is the Petitioners’  
Notice of Motion application dated 27<sup>th</sup> March 2025, where  
they seek the  
following Orders:

**a) Spent.**

**b) Spent.**

**c) That pending the hearing of the Petition inter-parties, this Honourable Court be pleased to issue a conservatory order, Prohibiting the Respondents herein, their agents, servants, assignees or anyone acting under their instructions, from implementing, and/or acting upon, the impugned “NOTICE TO VACATE SITE” dated 14<sup>th</sup> March 2025 and further be prohibited from evicting and/or displacing the traders of Jogoo Road Open Air Market, or even demolishing the structures built therein.**

**d) That cost of the Application be provided for.**

2. The application is premised on grounds on its face and supporting affidavit of EVANS LWIKANE where it is stated that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents through unorthodox means, informed the 2<sup>nd</sup> Petitioner that there was a proposal to construct Jogoo Road (Uhuru) Modern Market, which would be an upgrade from the current Jogoo Road (Uhuru) open Air Market, on the same place where the said open air market sits and that there would be enumeration on the existing Air Market to establish the number of traders

therein so as to ensure that they benefit from the proposed upgraded modern market.

3. It is claimed that the 2<sup>nd</sup> Petitioner relayed the aforementioned information to members of the 1<sup>st</sup> Petitioner who are not opposed to the project but expressed their displeasure vide a letter addressed to the 3<sup>rd</sup> Respondent in which they decried the manner in which the project was planned without public participation and considering their input on the design size of the stalls and failure to address the issue of their relocation during the period of construction of a modern market given that they rely on the market for their livelihood.

4. It is stated that vide a letter dated 19<sup>th</sup> March 2025, the 2<sup>nd</sup> Respondent purported to solely invite the 2<sup>nd</sup> Petitioner to an alleged engagement on the proposed construction of Jogoo Road modern market with the intention to allegedly go through the proposed design and discuss the issue of resettlement of traders but the exercise turned out to be just

him, being shown pictures of the proposed modern market

without any explanation and there was no engagement on the resettlement module. Further, that the alleged 'public engagement' was done four (4) days after the 3rd Respondent vide a letter dated 14<sup>th</sup> March 2025, issued a "Notice To Vacate Site" directed to the Petitioners' and traders of Jogoo Road Open Air Market, giving them five (5) days to vacate site, failure to which demolitions would ensue.

5. The Petitioners claim that together with traders, they protested the notice to vacate on 18<sup>th</sup> March 2025 along Jogoo Road. They contend that they are apprehensive that the Respondents will actualize the impugned Notice to vacate and commence demolitions and their rights as enshrined under Article 46(1) (c) as read with Article 43 (1) (e) of the Constitution of Kenya, will be trampled upon.

### **Responses**

6. The 1<sup>st</sup> to 3<sup>rd</sup> Respondents opposed the application by way of a replying affidavit sworn by Joshua Otieno, Principal Markets Officer with the County Government of Nairobi. He avers that the Jogoo Road Open Air Market was earmarked

for redevelopment into a modern trading market in 2016 but stalled due to unavailability of funds. He states that the County Government of Nairobi in partnership with the National Government through the State Department for Housing and Urban Development, revived the initiative in order to upgrade the market to provide a more dignified and weather-resilient space for the same traders currently operating at the site.

7. He claims that the County Government of Nairobi conducted a public participation forum on 14<sup>th</sup> April 2023, where the market representatives, traders and other stakeholders totaling 191 participants were taken through the proposed market plans, where they provided feedback on design elements. Further, they expressed support for the project and raised as well as incorporated the issue of stalls allocation and temporary relocation, which were addressed in the design.
8. He concedes that a formal notice to vacate dated 14<sup>th</sup> March 2025 was issued to enable site handover to the contractor

but contends that the five (5) days' notice was extended on the traders' request. Subsequently, a further notice dated 19<sup>th</sup> March 2025, inviting stakeholders to a public engagement on 21<sup>st</sup> March 2025 to discuss relocation plans and review the final design of the market was issued with the engagement taking place. He avers that the proposed construction works were designed to occupy only a portion of the existing market and to mitigate the impact on operations, affected traders were requested to temporarily share space with unaffected traders for the duration of the construction. Further, that a trader enumeration exercise was also initiated to ensure proper identification of affected persons and for prioritization in stall allocation upon completion.

9. He avers that the County Government of Nairobi issued a final Notice dated 16<sup>th</sup> April 2025 giving 48 hours to vacate the site adding that the shorter timeline was necessitated by repeated delays and the need to comply with contractual timelines. He contends that the traders trading options have been provided, and no permanent deprivation of livelihood

will occur. Further that issuing orders sought would halt a duly funded and time-bound public development project.

- 10.** The 4<sup>th</sup> and 5<sup>th</sup> Respondents did not file replies to the instant application, which was canvassed by way of written submissions.

### **Submissions**

- 11.** The Petitioners submit that the impugned Notice to Vacate dated the 14<sup>th</sup> March 2025 is unlawful, and it would be procedurally unfair to implement it as the Respondents failed to adhere to the constitutional imperatives of public participation, fair administrative action, and respect for socio-economic rights, thereby violating their fundamental rights and freedoms under Articles 10, 27, 28, 35, 43, 46 and 47 of the Constitution of Kenya as well as Section 87 of the County Governments Act which imposes a statutory duty on County Governments to institutionalize citizen participation.

- 12.** Further, that given that the consequences of the Respondents' decision include eviction, loss of livelihood, and

demolition of a longstanding trading site, they ought to have been consulted. They confirm that they are not opposed to development but only seek assurances that their livelihood will not be destroyed without alternative arrangements. To support their averments, they relied on the following decisions: **Mitu-Bell Welfare Society vs. Kenya Airport Authority & 2 others(2021); Law Society of Kenya v Attorney General & Another [2016] eKLR** and **Republic v National Land Commission & Another Ex parte Farmers Choice Limited [2021] eKLR.**

13. On their part, the 1<sup>st</sup> to 3<sup>rd</sup> Respondents submit that the application does not meet the principles governing conservatory relief as settled in the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR.** They point out that they have made specific commitments on stall allocation and temporary relocation and duly complied with the duty of public participation under Section 87 of the County Governments Act to the standards set in the case of **Republic v County Government of**

**Kiambu Ex parte Robert Gakuru & Another (2016) KEHC 7642 (KLR)** as public participation requires a reasonable opportunity to be informed and heard, not an expectation that every participant's preferred outcome will be adopted.

**14.** The submit that they have undertaken proportionate administrative measures that address the claimed prejudice. They rely on the case of **National Treasury & Others v Okoiti & 52 Others [2024] KESC 47** to urge the Court to weigh public interest and submit that interim reliefs must not paralyze governance. They point out that the modern market redevelopment is a duly funded public project serving hundreds of traders and further delays will impact the well-being of a large number of traders and cause enormous economic loss to the public.

**15.** They also submit that there have been no demolitions to date and that the Petitioners are not deserving of the orders sought as their leaders have contributed to the circumstances complained of since they have politicized the

enumeration exercise and discouraged cooperation thereby frustrating the process.

### **Analysis and Determination**

**16.** Upon consideration of the instant Notice of Motion application including the respective affidavits and rivalling submissions, the only issue for determination is whether the Petitioners have met the threshold for grant of a conservatory order.

**17.** The Petitioners seek conservatory orders prohibiting the Respondents from implementing a Notice to Vacate issued on 14<sup>th</sup> March 2025. They contend that the notice gave them only five (5) days', to vacate the open air market without any relocation plan, and that it is unlawful and procedurally defective because the project pursuant to which it issued, is contemplated to be undertaken with due public participation. They also contend that it poses a grave and unlawful threat to their right to livelihood. The 1<sup>st</sup> to 3<sup>rd</sup> Respondents insist that they conducted public participation and annexed a report to that effect. They contend that they have duly

conducted public engagements on the project to constitutional standards.

- 18.** The principles for grant of conservatory were stated by the Supreme Court in **Gatarau Peter Munya v Dickson Mwenda Kithinji & 2 others (2014) eKLR** 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. 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 courses.”* Emphasis

Mine

**19. In Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR the court stated that:**

*“In an application for a conservatory order, the court is not invited to make any definite or conclusive findings of fact or law on the dispute before it because that duty falls within the jurisdiction of the court which will ultimately hear the substantive dispute. The jurisdiction of the court at this point is limited to examining and evaluating the materials placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of a conservatory order. The court is also required to evaluate the materials and determine whether, if the conservatory order is not granted, the applicant will suffer prejudice. Thirdly, it is to be borne in mind that conservatory orders in public law litigation are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the court in the public interest.”*

20. In this instance I note the fulcrum of the Petition herein revolves around an open air market where the Petitioners insist they were not granted ample notice to move nor did they participate properly in the project design. The 1<sup>st</sup> to 3<sup>rd</sup> Respondents explain that the Jogoo Road Open Air Market was earmarked for redevelopment into a modern trading market in 2016 but stalled due to unavailability of funds. Further, that the County Government of Nairobi in partnership with the National Government revived the initiative in order to upgrade the market to provide a more dignified and weather-resilient space for the same traders currently operating at the site. They insist that during the public participation forum on 14<sup>th</sup> April, 2023, a total of 191 participants who included market representatives, traders and other stakeholders attended the forum. Further, that they were taken through the proposed market plans where they provided feedback on design elements and expressed their support for the project. They argue that the Petitioners' concerns which revolved around the issue of stalls allocation and temporary relocation was addressed in

the design. They insist that the proposed construction works were designed to occupy only a portion of the existing market and to mitigate the impact on operations, affected traders were requested to temporarily share space with unaffected traders for the duration of the construction. Further, that a trader enumeration exercise was also initiated to ensure proper identification of affected persons and for prioritization in stall allocation upon completion.

21. Based on the facts as presented while relying on the principles set in the case of **Gatarau Peter Munya v Dickson Mwenda Kithinji & 2 others (2014) eKLR** and applying them to the circumstances at hand, I find that the development of the Jogoo Road Open Air market is in public interest and is a priority. I opine that since the 1<sup>st</sup> to 3<sup>rd</sup> Respondents have explained measures they have put in place while undertaking the project, noting that there were representatives of the Petitioners who were involved in the public participation exercise and gave input to the project design, I hence find that the interim reliefs sought will

paralyze the implementation of the project noting that the modern market redevelopment is a duly funded public project serving hundreds of traders and further delays will impact the well-being of a large number of traders and cause enormous economic loss to the public. It is not in dispute that the project is in an open air market and the 1<sup>st</sup> to 3<sup>rd</sup> Respondents have confirmed there are no demolitions. Further, the Petitioners have also confirmed they are not opposed to the project. In the circumstances, I find that the Petitioners have not established a prima facie case to warrant the grant of conservatory orders as sought.

22. In the foregoing, I find the instant Notice of Motion application unmerited and will disallow it but make no order as to costs.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup>  
DAY OF DECEMBER, 2025**

**CHRISTINE OCHIENG**  
**JUDGE**

**In the presence of:**

Mwangi Ndegwa for Petitioners

Ms Wanjala for 1<sup>st</sup> – 3<sup>rd</sup> Respondents

Court assistant: Joan

ORIGINAL