



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC PETITION NO. E001 OF 2023

BETWEEN

**NAMUNYAK SELF HELP GROUP & 89
OTHERS.....PETITIONERS**

VERSUS

**MUKWANO DISTRIBUTORS LIMITED.....1ST
RESPONDENT**

**FELLOW LIMITED.....2ND
RESPONDENT**

**MULTILINGUAL LIMITED.....3RD
RESPONDENT**

**NUMERICAL MACHINING COMPLEX LIMITED.....4TH
RESPONDENT**

AND

THE ATTORNEY GENERAL.....1ST

INTERESTED PARTY

THE CHIEF LAND REGISTRAR.....2ND

INTERESTED PARTY

KENYA REVENUE AUTHORITY.....3RD

INTERESTED PARTY

KENYA MEAT COMMISSION.....4TH

INTERESTED PARTY

DIRECTOR GENERAL KENYA

REVENUE AUTHORITY.....5TH

INTERESTED PARTY

RULING

1. This is a ruling that aims to determine two notices of motion, one filed by the petitioners dated 17/01/2023 and the other by the 1st and 2nd respondents dated 29/03/2023.
2. The petitioners' motion is filed within the provisions of **Articles 2, 3, 10, 19, 21, 22, 28, 29, 33, 40, 43, 47, 53 and 56** of the **Constitution of Kenya 2010**, as well as **Rules 3, 4, 13, 19 and 23** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and**

Procedure Rules, 2013, and all other enabling provisions of law. In this motion, they seek the following reliefs: -

a. Spent.

b. Spent.

c. Spent.

d. That a conservatory order does issue restraining the respondents, their agents, servants, officials, directors, assigns, or any other person acting under or at their behest from interfering, entering, encroaching, alienating, building, trespassing, evicting the petitioners, or in any other manner transacting on or dealing with the parcel of land known as Number LR No. 26700/3 comprised in Grant I.R No. 119942 pending hearing and determination of the petition.

e. Spent.

f. That a conservatory order does issue restraining the respondents, their agents, servants, officials, directors, assigns, or any other persons acting under or at their behest from interfering with, demolishing, entering, alienating, or otherwise dealing with churches, mosques, places of worship, schools, and business premises erected on the parcel of

land known as Number LR No. 26700/3, comprised in Grant I.R. No. 119942, pending hearing and determination of the petition.

g. That pending the hearing and determination of the petition, the court be pleased to conduct a site visit.

h. Spent.

i. That the court do summon the interested parties to appear, testify and produce documents regarding allegations raised herein.

j. That such further or other relief and orders be granted as the court deems just and expedient.

k. That the costs of the application be provided for.

3. The motion is supported by the grounds outlined in the body thereof and Meshack Ojowi Adongo's affidavit, sworn on the same date. In a nutshell, the petitioners state that they have resided on **LR No. 26700/3, comprised in Grant I.R. No. 119942 ("suit property")**, for over 40 years, and their intended forcible eviction from the suit property will violate their fundamental rights to life, human dignity, security of the person, freedom of movement and residence, socio-economic rights, right to property, equality, worship, children, adequate housing, and fair administrative action as guaranteed by the **Constitution** and **Article 11** of the **International**

Covenants on Economic, Social and Cultural Rights, Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights.

4. According to them, no reasons have been provided as to why they should be evicted from the suit property, and worse, no notice has been served to them, or has any alternative accommodation been offered. They argued that the suit property did not belong to the respondents; even if it did, the petitioners could claim entitlement through adverse possession. They maintained that our legislation provides clear guidelines regulating forced evictions. They stated that the petitioners comprise 300 families, and an eviction would leave them destitute. The respondents or interested parties did not oppose this motion.
5. Reverting to the 2nd motion, the 1st and 2nd respondents moved the court under the provisions of **Sections 6 and 7** of the **Civil Procedure Act** and **Order 51** of the **Civil Procedure Rules**, where they sought the following prayers: -
 - a. That the petitioners' notice of motion and petition dated 17/01/2023 be dismissed.***
 - b. That the petitioners bear the costs of the motion.***
6. The motion is premised on the grounds set out in the body thereof and Christopher Ngolo's affidavit, sworn on the same

date. In summary, it is averred that this court lacks the necessary jurisdiction to hear, make orders in respect of, and determine the petitioners' motion, as the petition is *res judicata* due to a similar matter previously dealt with in **Mukwano Distributors Limited v Sanoye (Environment & Land Case 91 of 2016) [2022] KEELC 13683 (KLR) (19 October 2022) (Judgment) ("former suit")**. It is further maintained that the two matters are directly and substantially in issue between the parties, were/are handled by this same court, and bear profoundly identical grounds. It is further stated that the petitioners, who were defendants in the former suit, have now masqueraded as a self-help group; the subject matter remains the same, and the current suit is *sub judice* since there is an appeal against the decision in the former suit, namely **Sanoye v Mukwano Distributors Limited [2023] KECA 144 (KLR)**.

7. On service, the petitioners promptly opposed this motion by filing grounds of opposition dated 12/02/2024 and a replying affidavit sworn by Meshack Ojowi Adongo on the instant date. The grounds of opposition state *inter alia* that the petition is not *res judicata*, the petition raises serious constitutional issues, the motion is incompetent, bad in law, misconceived and without merit.
8. Turning to the replying affidavit, of significance is that it is maintained that the petitioners were not parties in the former

suit. Furthermore, it is argued that the subject matters in these two suits are different, since the land parcel no. in the former suit is **LR No. 26700/3, comprised in Grant I.R. No. 119946 (“suit property in the former suit”)**, while the subject matter here is the suit property. It is also averred that the issues in the two suits are different.

9. Accordingly, and following the court’s directions, the law firms of **Ms Yano & Co. Advocates** for the petitioners and **Ms Okwach & Co. Advocates**, representing the 1st and 2nd respondents, filed their respective submissions, all dated 26/05/2025. The court expresses its gratitude for these valuable submissions. Thus, having carefully considered the motion, its grounds, affidavits, submissions, the legal framework, and prevailing jurisprudence, including those relied upon by counsel, the substantive issues for determination are: (a) **whether the suit is *res judicata* and *sub judice***; and (b) **whether the petitioners have satisfied the legal requirements to justify the grant of conservatory orders.**

10. Nevertheless, before the court proceeds further, it is necessary to mention that it is apparent from the petitioners’ submissions that they have abandoned some of the reliefs sought, such as site visits and directions on the testimonies of the interested parties. Therefore, this court will not dwell on them; furthermore, this court considers these reliefs as

premature, as the court has not issued directions on the hearing of the petition. We will now turn our focus to the issues for determination, which shall be handled sequentially.

a) Whether the suit is *res judicata*

11. Regarding the legal framework of *res judicata* doctrine, it is found in our **Section 7** of the **Civil Procedure Act**, in the following terms: -

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

12. In illuminating this doctrine, the learned authors of **Mulla, Code of Civil Procedure, 18th Ed. 2012, page 293**, explained the purpose of the doctrine and its exceptions in the following words:

“The principle of finality or *res judicata* is a matter of public policy and is one of the pillars on

which a judicial system is founded. Once a judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision.”

13. In discussing this principle in the decision **Kenya Commercial Bank Limited & another v Muiri Coffee Estate Limited & 3 others [2016] KESC 6 (KLR)**, which has been relied upon by the 1st and 2nd respondent’s counsel, the Supreme Court of Kenya clarified as follows:

“52. Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights.”

This decision extends further in **paragraph 54** by stating: -

“54.The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.”

14. This court also associates itself with the decision by the apex court in **John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR)**, which confirmed the following guiding principles: -

“We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated:

a)There is a former judgment or order which was final;

**b)The Judgment or order was on merit;
c)The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
d)There must be between the first and the second action identical parties, subject matter and cause of action.”**

15. In the present case, the parties have taken opposing positions, and the 1st and 2nd respondents have submitted various documents to this court to support their arguments. However, notably, for reasons best known to them, they did not provide a copy of their plaint in the former suit. Nevertheless, the judgment and defence in the former suit are considered sufficient to determine whether the current petition is *res judicata*.

16. Therefore, having considered this former decision in relation to the current one, the court's jurisdiction in the former suit, which resolved the case on the merits with finality, is unquestionably established. The court must now assess other criteria, including: (a) whether the parties involved in both suits are the same, (b) whether the issues in dispute are identical in both cases, and (c) whether the parties are litigating under the same title or claim.

17. As regards test (a), this court has had an opportunity to scrutinise the former suit against the current petition and concludes that the only common factor between the two cases is that the 1st respondent is the plaintiff in the former suit. Although the 1st and 2nd respondents contend that the petitioners were parties in the former suit, that is far from the truth, as the judgment and defence in the former suit reveal that the 1st respondent only sued one **Seuri Legusi Sanoye**, who is not a party to this petition. In consequence, this court agrees with the petitioners that the parties are not the same.

18. As concerns test (b), this court finds no difficulty in establishing that the subject or issue in the former suit and this petition are different. This is because, although the LR Nos. of the properties in question are both **LR No. 26700/3**, they possess different grant numbers, with the former suit bearing **I.R. No. 119946** and the current petition bearing **I.R. No. 119942**. Therefore, this court concludes that the subject matters in dispute are different.

19. Turning to test (c), in the instant suit, the petitioners claim the respondents have threatened to infringe upon their constitutional rights to human dignity, security of the person, freedom of movement and residence, and property, among many other alleged violations. Meanwhile, in the former suit, the 1st respondent sought declaratory orders and eviction against Seuri Legusi Sanoye, his agents, servants, and/or

representatives, over a property that is not the subject of the current petition. Ultimately, although the facts of the two cases appear to be strikingly similar, this court finds that the petition herein is not *res judicata*. It is worth mentioning that, if at all, the physical location of the two parcels of land is the same, some explanations have to be tendered as to why the 1st respondent is holding two separate sets of certificates of title over the same parcel of land (if at all).

b) Whether the suit is *sub judice*

20. Respecting this issue, the relevant legal framework is found in our **Section 6** of the **Civil Procedure Act**, which states: -

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.Explanation.— The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.”

21. Applying the principles established by law, while considering the court's conclusion and findings on the issue of *res judicata*, this court finds that although the facts appear somewhat similar in both cases, and there is an appeal against the decision of this court in the former suit, this court finds that this petition is not *sub judice* because the parties involved in each suit are not the same, the issues in dispute are not identical, and the parties are litigating under different titles or claims.

c) Whether the petitioners have satisfied the legal requirements to justify the grant of conservatory orders.

22. Concerning the provisions of the law that grant this court power to entertain a constitutional petition, **Article 23** of the **Constitution** confers upon this court jurisdiction to hear and decide applications for redress of any denial, violation, or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights, including jurisdiction to issue conservatory orders.

23. However, the exercise of such jurisdiction is limited to specific rights or fundamental rights, particularly those related to land and a clean, healthy environment, as outlined in several **Articles** such as **40, 42, 69, and 70** of the **Constitution. See Section 13(3) of the Environment and**

Land Court Act (“ELC Act”). In this case, the petitioners have submitted a mixed petition, as some of the **Articles** they allege have been violated fall within the jurisdiction of the High Court, but be that as it may, it emerges that the predominant issue is their right to property as protected under **Article 40** of the **Constitution**.

24. As was stated in the case of **Centre For Rights Education and Awareness (CREAW) & 7 others v Attorney General [2011] KEHC 4297 (KLR)**, this court’s mandate at this stage is limited to probing and appraising the facts and evidence before it and determining whether the petitioners have met the legal threshold to warrant a grant of a conservatory order and in consequence, this court adopts the position taken by this decision when it stated:

***“At this 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.*”**

25. This court agrees with the petitioners’ that the principles for granting conservatory orders are well established, and that the decision of the **Board of Management of Uhuru Secondary**

School v City County Director of Education & 2 others [2015] KEHC 2174 (KLR) succinctly summarises these principles as follows: the applicant must demonstrate a *prima facie* arguable case with a likelihood of success, and show that without the conservatory orders, they are likely to suffer prejudice; consider whether granting or denying the conservatory relief will promote the constitutional values and objectives of the specific rights or freedoms in the Bill of Rights; assess whether, if an interim conservatory order is not granted, the petition or its foundational matter will become futile; and recognise that the court must also consider conservatory orders in the context of public interest. Unfortunately, the 1st and 2nd respondents did not argue this issue as they merely stated that the petitioners' motion should be dismissed.

26. The petitioners have submitted to this court a bundle of photographs purportedly showing their occupancy of the suit property. They have also provided a copy of the certificate of title for the suit property, which indicates that it was registered on 4/8/2009 in the name of the 4th respondent, before being transferred to the 3rd respondent on 20/08/2010. The 3rd respondent then transferred it on the same date to the 2nd respondent, who ultimately allegedly transferred it to the 1st respondent on 30/04/2015.

27. They have also provided a copy of the decisions from the defunct Athi River Land Dispute Tribunal dated 3/12/2008 and 15/12/2008, which allegedly awarded the suit property to them. Additionally, and importantly, there is an alleged letter to Meshack Ojowi Adongo from the Ministry of Lands and Settlement dated 30/07/2020 that purportedly questions the certificate of title of the suit property registered in the name of the 1st respondent.

28. This letter states that it is unfamiliar with the certificate of title, questions the deed plan as it lacks certification, and claims that the signatures are forged. It also states that there are no documents confirming the registration of the suit property to the 1st respondent. This letter concludes that the certificate of title is fake. The respondents did not rebut the petitioners' averments, and in the circumstances and on considering these facts, the court finds that the petitioners have established a *prima facie* case.

29. As to whether a grant or denial of conservatory relief will enhance the constitutional values and objectives of the specific right or freedom in the Bill of Rights, this court finds in the affirmative and also finds that denying conservatory orders would be based on the material before this court, stifle the petitioners' fundamental rights. Moreover, suppose the petitioners are evicted from the suit property as they allege, then in that case, the petition will be rendered nugatory, and

they will suffer irreparable harm as has been defined in the case of **Martin Nyaga Wambora v Speaker of The County of Assembly of Embu & 3 Others [2014] eKLR.**

30. Ultimately, this court finds that the petitioners are entitled to protection from the court and that their notice of motion dated 17/01/2023 is justified. Costs shall be in the cause. Consequently, for the reasons and findings above, this court grants the following final orders: -

a) That the notice of motion dated 29/03/2023 is hereby dismissed.

b) That a conservatory order does issue restraining the respondents, their agents, servants, officials, directors, assigns, or any other person acting under or at their behest from interfering, entering, encroaching, alienating, building, trespassing, evicting the petitioners, or in any other manner transacting on or dealing with the parcel of land known as Number LR No. 26700/3 comprised in Grant I.R No. 119942 pending hearing and determination of the petition.

c) That a conservatory order does issue restraining the respondents, their agents, servants, officials, directors, assigns, or any other persons acting under or at their behest from interfering with, demolishing, entering, alienating, or otherwise

dealing with churches, mosques, places of worship, schools, and business premises erected on the parcel of land known as Number LR No. 26700/3, comprised in Grant I.R. No. 119942, pending hearing and determination of the petition.

d) That a mention date shall be given for directions on the hearing of the petition.

e) Costs shall be in the cause.

It is so ordered.

Delivered and Dated at Machakos this 2nd day of December, 2025.

HON. A. Y. KOROSS

JUDGE

02.12.2025

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Ms. Kanja Court Assistant.

Miss. Mutunga holding brief for Mr. Musyimi for Appellant.

Mr. Odongo holding brief for Mr. Makau for Respondent.

ORIGINAL