



Kubasali & another (Suing as in the Interest of the Parties) v National Land Commission & 2 others; Mogaka & 2 others (Interested Parties) (Environment and Land Petition E004 of 2025) [2025] KEELC 5824 (KLR) (30 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5824 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND PETITION E004 OF 2025
CK NZILI, J
JULY 30, 2025
IN THE MATTER OF ARTICLES 1, 2(4), 10(1) (B),(C),
10(2)(A),(B),(C), 22(2)(C), 35(1), 35(3), 47(1),(2), 60(1)
(C), (D); 73(1) AND 232(1)(A),(C),(D),(E) AND (F) OF THE
CONSTITUION

BETWEEN

BERNARD SIMIYU KUBASALI 1ST PETITIONER
ANDREW KHISA WANJALA 2ND PETITIONER
SUING AS IN THE INTEREST OF THE PARTIES

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT
THE LAND REGISTRAR, TRANS NZOIA COUNTY 2ND RESPONDENT
THE ATTORNEY GENERAL 3RD RESPONDENT

AND

BEN NICODEMUS OMARIBA MOGAKA INTERESTED PARTY
G.H.TANNA & SONS INTERESTED PARTY
ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY



RULING

1. Before the court is an application dated 28/3/2025, premised on Rule 23 of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013](#); Article 165(3) (b) and (d)(ii) of the [Constitution](#), Order 40 Rule 1, 2 and 4 of the Civil Procedure Rules; Section 3A of the [Civil Procedure Act](#); Sections 13(7) and 21 of the [Environment and Land Court Act](#).
2. The applicants seek:
 - a. ...spent
 - b. That pending the inter partes hearing of this application, there be issued a conservatory order restraining the 2nd interested party. Its agents, servants and or any other person who may claim interest or acting through the 2nd interested party from charging, selling, leasing, trespassing on to or developing on the land known as Kitale Municipality Block4/364, (hereinafter the suit parcel), situate in Kitale Town, measuring 0.1932 Ha and or whichever other way interfering with the public use of the suit parcel and her interest therein.
 - c. That pending the hearing of the substantive petition, directions be taken on the following issue;
 - i. Whether the petition raises a matter of substantial public interest insofar as allocation or reallocation of public land by the Settlement Fund Trustees under the [Constitution](#).
 - ii. If (i) above is in the affirmative, whether the petition herein should be heard by a special composition of the bench of the court to provide guidelines in such allocation or reallocation, to give effect to give effect to the relevant provisions of the [Constitution](#), including Articles 40,47 and 60(1)(a),(b),(c) and (d).
 - iii. The 3rd interested party does find out and file a report in this court, whether or not the 1st and 2nd respondents did collude to fraudulently allocate the suit parcel to the 1st interested party.
 - d. That at the inter partes hearing thereof, orders granted in prayer (b) above do operate until the substantive petition is heard and determined.
 - e. Costs
3. The application is supported by grounds on its face and an affidavit sworn on the same date by Benard Simiyu. It is averred that the suit parcel of land belongs to the public but has been grabbed by the 2nd interested party, a private developer. The applicants aver that the 1st and 2nd respondents, in collusion with the 1st interested party, allocated the suit parcel of land to the 1st interested party, in blatant violation of salient provisions of the [Constitution](#) and the law.
4. The applicants aver that the 2nd interested party now claims to hold a title to lease the suit parcel of land and was likely to invade the same, alter its status, hence defeating the purpose of substantive proceedings herein. The applicants aver that through the petition, they have established a prima facie case with high probability of success, substantial loss may result if the status quo is not preserved, and that the balance of convenience favours the grant of the orders sought and it is in the interest of justice that the subject matter is preserved.



5. In the affidavits sworn by Bernard Simiyu and Andrew Khisa on 28/3/2025, they depose that the suit parcel of land measuring approximately 0.1932 Ha was designated as Kamukunji Park before the 1st and 2nd respondents allegedly converted it into private land and allotted it to M/s Mariba Enterprises Limited in 1994. Attached are copies of the allotment letter, payment receipt, and a lease title as annexures marked BK-1A and 1B, and BK-2.
6. Further, the applicants depose that the issuance of the title to the 1st interested party amounted to an abuse of office since the respondent acted in breach of his trust as a public officer, without any survey plans or RIM from the director of surveys showing the boundaries of the suit parcel of land. Additionally, the applicants aver that the reallocation was not subjected to any public participation and therefore the court should defend the rule of law, democracy, and the *Constitution*.
7. The applicants aver that despite their correspondence to the 2nd respondent requesting that they rectify the position, they have not received any response. The letters are attached as annexure marked BSK-3A and 3B. The applicants depose that the members of the public stand to suffer irreparable loss and in the interest of justice that the court gives effect to the constitutional rights, values, and principles raised.
8. The 2nd interested party opposed the application through a replying affidavit sworn by Paresh Gordhandas Tanna on 14/5/2025. He avers that he is one of the directors of the 2nd interested party and attached his authority as annexure marked PGT-1.
9. The 2nd interested party denies violation of the applicant's rights and avers that it is the registered owner of the suit parcel, according to the copies of the official search, certificate of lease and green card attached and marked as annexures PGT-2(a),(b) and (c). The 2nd interested party avers that it is a bona fide purchaser for value from the original allottee of the suit parcel, Ben Nicodemous Omariba Mogaka, the 1st interested party in 1999, now deceased. The sale agreement and newspaper obituary are annexed as PGT-3(a) and (b).
10. Further, the 2nd interested party avers that it obtained consent to transfer from the relevant authority and attached the application for consent and consent to transfer as PGT 4(a) and (b). Again, the 2nd interested party avers that the applicants have not demonstrated how the title to the suit parcel of land was acquired through fraud, misrepresentation, illegally, unprocedurally, or through a corrupt scheme. The 2nd interested party avers that it has been in occupation and possession of the suit parcel of land since 1999 and hence denies that it is designated as Kamukunji Park.
11. The 2nd interested party terms both the petition and application as fishing expeditions, given that there have been several cases in court claiming the non-existence of the suit parcel, such as *Kitale ELC No. 64 of 2011*, where the 2nd interested party was found to have lawfully purchased the suit parcel as private land. The 2nd interested party avers that the said judgment has never been set aside other than an application by Muliro Kamukunji Community Based Organization, which had sought to be enjoined as an interested party, but their application was dismissed. Copies of the judgment, decree, and the ruling are attached as PGT-5 (a) and (b) and 7.
12. The 2nd interested party avers that there is a pending appeal on the said ruling at the Eldoret Court of Appeal, Civil Appeal No.E042 of 2022, marked as annexure PTG-8. It is also deposed that there is a pending suit, which is partly heard, *Kitale CMC Land Case No.75 of 2018*, where the plaintiffs are claiming that the suit parcel does not exist. A copy of the amended plaint is attached as annexure marked as PGT-9.



13. The 2nd interested party avers that following a meeting with the commissioner of land officials, the suit parcel was agreed to be in existence, a PDP KTL10/94/49, and the RIM was submitted to the director of survey in January 1996. The minutes are attached as PGT 6.
14. Further, the 2nd interested party alleges that the court is not properly seized with jurisdiction to determine the petition in view of other ongoing cases on the suit parcel of land. The 2nd interested party terms the petition time-barred, as it has been filed inordinately and unreasonably late after 31 years, with the delay not explained, and as brought in bad faith. The 2nd interested party avers that after Kitale ELC PET No.4 of 2019 was dismissed, where the 3rd respondent had filed grounds of opposition annexed as PGT- 10 and 11, this court is functus officio and thus parties should be bound by their pleadings.
15. The 2nd interested party filed written submissions dated 26/6/2025. It submits that the applicants have not demonstrated what prejudice they stand to suffer if the orders sought are not granted. That the court, in considering the issuance of conservatory orders, must ensure the decision aligns with fundamental values and principles in the *Constitution*. Further, the 2nd interested party submits that the court is functus officio and the orders sought violate Article 259(8) of the *Constitution*.
16. The issues calling for my determination are: whether the court should issue conservatory orders and whether the petition raises substantial or novel issues calling for the invocation of Article 165(4) of the *Constitution*.
17. The parameters to consider on whether or not to grant conservatory orders were discussed in *Gatirua Peter Munya v Dickson Mwenda Kitbinji & Others* [2014] eKLR. The court observed that conservatory orders bear a public law connotation, for they facilitate ordered functioning within public agencies as well as uphold the adjudicatory authority of the court in the public interest.
18. The court held that conservatory orders, unlike interlocutory injunctions, like private-party issues, are aimed at preserving the substratum of the pending matter, pending the determination of the main issues in dispute. The court held that caution must be exercised when dealing with any request for such orders, lest the court deal with the main issue in the petition, whose reserve is the main hearing.
19. The principles to consider were summarized in *Wilson Kaberia Nkunja v Judges Vetting Board & Others* [2016] eKLR, that an applicant must:
 - (a) Demonstrate a prima facie case with a likelihood of success and that, unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the *Constitution*.
 - (b) Whether, if a conservatory order is not granted, the petitioner's allegation of violation of or threat of violation of a right will be rendered nugatory.
 - (c) The public interest must be considered before a grant of a conservatory order.
20. On the first issue, an applicant has to meet the threshold in *Mrao v First American Bank of Kenya Limited & 2 Others* [2003] eKLR. He has to show the likelihood of success of his prima facie case, which, if there is no conservatory order, he will suffer prejudice as held in *Mirugi Kariuki v Attorney General & Others* [1992] EA 156. The arguability of a case is not enough. There must be evidence of the likelihood of success at the main hearing.
21. In Board of *Management of Uhuru Secondary School v City Council Director of Education & Others* [2015] eKLR, the court held that it had to consider whether the grant or denial of the conservatory order would enhance the constitutional values and objection of a specific right or freedom in the Bill



- of Rights. An arguable suit is one that is not frivolous. In *Centre for Rights Education and Awareness (CREAW) & Others v Attorney General* [2011] eKLR, the court held that at this stage, a party seeking a conservatory order must demonstrate a prima facie case.
22. Further, in *Law Society of Kenya v Officer of the Attorney General & another; Judicial Service Commission (Interested Party)* [2020] eKLR, the court held that at this stage, it examines the merits of the petition and finds out if the petitioner has established a prima facie case to warrant interim orders of protection of and in order to secure the substratum of the suit and not to render the petition nugatory, hence remaining mere academic exercise.
 23. As to public interest, the court in *Centre for Rights Education & Awareness (CREAW) & another v Speaker of the National Assembly & 2 others* [2017] eKLR, the court held that a conservatory order could not normally issue when there is a real impending danger to violation of the *Constitution* or fundamental rights and freedoms, with a consequence that a petitioner or the public at large would suffer prejudice, unless the court intervenes and grants the conservatory orders.
 24. In *Martin Nyaga Wambora v Speaker of the County Assembly of Embu & Others* [2014] eKLR, the court held that a party must show real danger that is imminent, evident, true, actual and not fiction, hence requiring immediate remedial attention or redress by the court.
 25. Public interest is defined in Stroud's Judicial Dictionary Vol. 4, as "a matter of public or general interest, does not mean that which is interesting as granting curiosity or love of information or amusement of class or community, has a pecuniary interest or some interest by which the legal rights or liabilities are affected. Public interest as held in *Said Chitebwe v Edward Muriu Kuria & Others* [2011] eKLR, must be considered. In applying the doctrine of public interest, the court held that where public interest and individual liberty are in play, the maxim of Jeremy Bentham of utilitarianism would apply. See the *Aura v Attorney General & 6 others* [2024] KEHC 7031 (KLR).
 26. Applying the case law to the instant application, the 2nd interested party submits that the annexures attached by the petitioners do not show that the suit land is public land, the prejudice to be suffered is not demonstrated, a prima facie case is not established and the issue of ownership of the suit parcel of land was determined in an earlier suit namely, *Kitale CM ELC No. 75 of 2018/*, ELC No. 64 of 2011 and Eldoret Court Appeal No. E043 of 2022.//
 27. The court has looked at the annexures in the 2nd interested parties' replying affidavit, sworn on 14/5/2025, to both the notice of motion herein and the main petition. There is no rival affidavit challenging the authenticity of the said annexures.
 28. In the premises, I find that the application has failed to meet the threshold for issuance of conservatory orders. The notice of motion dated 28/3/2025 falls for dismissal. It is hereby dismissed with no orders as to costs. The petition to be heard on a priority basis.
 29. Orders accordingly.

RULING DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 30TH DAY OF JULY 2025.

In the presence of:

Court Assistant - Dennis

Kisaka for petitioners present

1st respondent absent



Baithalu for 3rd interested party present

Attorney General for 2nd and 3rd respondents absent

1st and 2nd interested parties absent

HON. C.K. NZILI

JUDGE, ELC KITALE.

