



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

CONSTITUTIONAL PETITION NO. E064 OF 2025

IN THE MATTER OF ARTICLES 3(1), 10, 22(1) & 165(3) OF

THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 22 AND 23(1) OF THE

REGISTRATION OF TITLES ACT CHAPTER 281 LAWS OF

KENYA) Now repealed and transitioned as SECTIONS 24,

25, AND 26(1) OF THE LAND REGISTRATION ACT (NO. 3 OF

2012)

AND

IN THE MATTER OF THE UNLAWFUL TRESPASS ON TO AND

ILLEGAL, ULTRA VIRES AND UNCONSTITUTIONAL EVICTION

OF THE PETITIONER OVER L.R. NO. 3734/774 ALONG

MZIMA SPRINGS LANE LAVINGTON

BETWEEN

**DR RICHARD TIMOTHY AYAH
PETITIONER**

=VERSUS=

**KENYA RAILWAYS CORPORATION 1ST
RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL 2ND
RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE 3RD
RESPONDENT**

RULING

1. Before me for determination is the Notice of Motion dated 4th August 2025, brought under Articles 22 and 23 of the Constitution, Order 51 Rule 1 of the Civil Procedure Rules, and Rules 3 and 19 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2103, in which the Applicant seeks the following orders:

a) Spent.

b) Spent.

c) Spent.

d) THAT a conservatory order be and is hereby issued restraining the 1st Respondent, whether by its agents, servants and through any party whatsoever, from doing the following acts or any of them that is to say from leasing, selling, disposing of, letting, cancelling and or revoking the Petitioners' registered leasehold interest over the property known as L.R. No. 3734/774 (I.R No. 21925/1) pending the hearing and determination of this application inter partes or until further orders.

e) THAT Conservatory order be and are hereby issued directing the Board and the Managing Director/Chief Executive Officer of the 1st Respondent to within twenty four 24 hours of the issuance of this order by the Honourable court to vacate the property known as L.R. No. 3734/774 (I.R No. 21925/1) Mzima Springs Lane Lavington and remove all guards or any person whatsoever present and guarding the property for the 1st Respondent and to restore the Petitioner in possession of the said property pending the hearing and determination of the Petition.

f) THAT conservatory orders be and are hereby issued, directed at the 3rd Respondent, by himself and his agents, to remove all police officers manning or guarding the property known as L.R.

No. 3734/774 (I.R No. 21925/1), Mzima Springs Lane, Lavington, within twenty-four (24) hours of the issuance of this order by the Honourable Court, and to restore the Petitioner in possession of the said property pending the hearing and determination of the Petition.

g) THAT Conservatory orders be and are hereby issued restraining the 1st Respondent, whether by its agents, servants and through any party whatsoever from doing the following acts or any of them, that is to say from leasing, selling, disposing of, letting, cancelling, and or revoking the Petitioners' registered leasehold interest over the property known as L.R No. 3734/774(I.R No. 21925/1) pending the hearing and determination of the Petition

h) THAT the Honourable court be pleased to issue any further orders in the interest of justice.

2. The application is based on the grounds appearing on its face together with the supporting affidavit of Dr Richard Timothy Ayah, sworn on even date.

THE APPLICANT'S CASE

3. The Applicant averred that he acquired a ninety-nine-year leasehold interest in L.R. No. 3734/774 (I.R. No. 21925/1),

located at Mzima Springs Lane, Lavington (the suit property herein) on 24th March 1998.

4. He asserts that he is entitled to quiet enjoyment of the property because he has possessed it for three decades and has diligently fulfilled his obligations under the lease. He further asserts that he has a legitimate expectation that the Respondents would not interfere with his ownership and possession without due process and proper notice.
5. He averred that on 19th July, 2025, the 1st Respondent, accompanied by armed police officers, unlawfully and forcibly evicted him from the suit property without any eviction notice, thereby violating his right to property protected under Article 40(1) and (3) of the Constitution.
6. He argued that the police, as agents of the 3rd Respondent, facilitated acts of violence by enabling his unlawful eviction and securing the suit property, thereby violating his rights under Articles 40(1) and (3) of the Constitution.
7. The Applicant asserts that, despite reporting the matter to the Muthangari police and the Directorate of Criminal

Investigations (DCI), no action has been taken against the Respondents.

8. In conclusion, the Applicant urged the court to allow the application as prayed.

THE 1ST RESPONDENT'S CASE

9. The 1st Respondent filed a replying affidavit sworn by Stanley Gitari on 17th September 2025 in opposition to the application.
10. The deponent asserts that the 1st Respondent is the registered owner of the suit property. He further asserts that the suit property was leased to the Petitioner without the 1st Respondent's board's consent or the Ministry of Lands' approval, contrary to Section 14(4) of the Kenya Railways Act. He relied on clause 3b of the lease agreement dated 24th March 1998 to assert that leasing the property for 99 years was intended to circumvent the provisions of Sections 13 and 14 of the Kenya Railways Corporation Act.
11. He emphasised that the suit property is public land owned by the 1st Respondent and that it can be disposed of only in accordance with the procedures set out in Sections 13 and 14 of the Kenya Railways Corporation Act.

12. The deponent cited **Dina Management Limited v County Government of Mombasa & 5** others to support the assertion that Article 40 of the Constitution limits the right to property acquired unlawfully. He further stated that the 1st Respondent intends to annul the sale or lease of the suit property because those transactions were conducted without proper procedure. He also confirmed that the 1st Respondent regained possession of the suit property on 19th July 2025.

THE RESPONSE

13. In a further affidavit dated 25th September 2025, the Petitioner reiterated the contents of his Petition and supporting affidavit.
14. He stated that the validity of a title document is the court's preserve, not the 1st Respondent's. He maintained that the root of his title has not been challenged in any court on the grounds of fraud, misrepresentation, or corrupt acquisition.
15. He further stated that the 1st Respondent has never challenged the validity of the lease during the three decades of his possession of the suit property. He explained that the 1st Respondent has not produced any evidence showing that

the lease granted in his favour was executed without the approval of the 1st Respondent's board or the authorization of the Ministry of Lands.

16. He stated that he holds a lease in the suit property, which is not subject to the provisions of Section 14(4) of the Kenya Railways Corporation Act because the 1st Respondent never transferred or conveyed the suit property to him. He argued that if the lease was entered into without proper procedures, the appropriate remedy for the 1st Respondent would be to invalidate the lease through lawful means, rather than by trespassing and evicting him from the suit property. Furthermore, he maintained that, having not violated the provisions of clause 3(b) of the Lease, the 1st Respondent lacked the right to enter and seize control of the suit property.
17. He maintained that only a court has the authority to determine the legality of the lease agreement between him and the 1st Respondent, and therefore the 1st Respondent's actions are unlawful.
18. He maintained that the essence of the Supreme Court's decision in **Dina Management Limited v County**

Government of Mombasa & 5 others (2023) eKLR is that the limitation under Article 40(6) of the Constitution applies only after it is established that the property was unlawfully acquired.

19. He explained that the 1st Respondent had begun wasting the suit property by carrying out illegal demolitions and damaging his movable assets within the suit property, thereby necessitating preservation of the subject matter of this suit
20. The application was canvassed by way of written submissions.

THE PETITIONER/APPLICANT'S SUBMISSIONS

21. The Petitioner filed his submissions dated 21st August 2025.
22. On behalf of the Petitioner, Counsel outlined the following issues for the court's determination:
- a) The basis, threshold, and grounds for granting Conservatory Orders; and*
 - b) Whether the Applicant has demonstrated the threshold for the grant of conservatory orders.*

23. Regarding the first issue, Counsel submitted on conservatory orders as restated in the case of **Centre for Rights Education and Awareness(CREAW) & another v Speaker**

of the National Assembly & 2 others (2017) eKLR and further reiterated in the case of **Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre for Intellectual Property & Information Technology (Proposed Amicus Curiae) Petition Nos. 56,58 & 59 of 2019(2019) eKLR.** where it was held that a party seeking a conservatory order must establish a prima facie case with a likelihood of success and that it will suffer prejudice if the order is not granted.

24. Counsel relied on the contents of the supporting affidavit to assert that the Petitioner had established a prima facie case.
25. Counsel submitted that the Applicant is the registered holder of the lease for the suit property and that his rights under Article 40, read together with Article 260, as defined by Sections 5, 24, 25, and 26 of the Land Registration Act, would be prejudiced unless an order is granted, as the subject matter would be rendered nugatory.

THE 1ST RESPONDENT'S SUBMISSIONS

26. The 1st Respondent filed its submissions dated 23rd October 2025. On behalf of the 1st Respondent, Counsel submitted that the issue for determination is whether a conservatory order should issue.
27. It was submitted that conservatory orders are issued to preserve the status quo. In the matter at hand, Counsel submitted that the conservatory orders sought by the Petitioner cannot be issued because the 1st Respondent is the registered owner of the suit property and is currently in possession. It was further submitted that the dispute concerns the validity of the lease.
28. It was submitted that the Petitioner has not demonstrated that he would suffer prejudice if the orders sought are not granted. To support this point, reliance was placed on the case of **Centre for Rights Education 7 Awareness (CREAW) & another v Speaker of the National Assembly & 2 others (2017) KEHC 9419 (KLR)**
29. Counsel further submitted that the conservatory order sought would delay the determination of the dispute because the Applicant did not seek to certify the petition as urgent.

30. It was argued that granting the conservatory order would effectively determine the main Petition. Counsel further argued that the Petitioner has not demonstrated that it would compensate the 1st Respondent if the conservatory orders are granted and the 1st Respondent ultimately succeeds in the Petition.

ANALYSIS AND DETERMINATION

31. Having considered the application, the respective affidavits, and the rival submissions, the following issues fall for determination:

a) Whether the Applicant has met the threshold for the grant of a conservatory order.

b) Whether the Applicant can be reinstated to the suit property.

32. Regarding the first issue, Article 23(3) of the Constitution empowers a court to grant appropriate relief in any proceedings brought under Article 22 where there has been a violation or a threat of violation of a fundamental right or freedom. The relief may include a conservatory order.

33. The law on the issuance of conservatory orders is well settled.

In Judicial Service Commission v Speaker of the National Assembly & Another (2013) eKLR, conservatory

orders were defined as follows:

“Conservatory orders, in my view, are not ordinary civil remedies but are remedies provided for under the Constitution, the supreme law of the land. They are not remedies between one individual against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”

34. In **Gitirau Peter Munya vs. Dickson Mwenda Kithinji & 2**

Others (2014) eKLR, the Supreme Court outlined the principles governing the grant of interim conservatory orders 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 causes.”

35. In **Wilson Kberia Nkunja v The Magistrates and Judges Vetting Board and Others, Nairobi High Court Constitutional Petition No. 154 of 2016**, the court

summarized the principles for granting conservatory orders as follows:

An applicant must demonstrate that he has 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.

- a. ***Whether a conservatory order is not granted, the petition alleging violation of or threat of violation of rights will be rendered nugatory.***
- b. ***The public interest must be considered before the grant of a conservatory order.***

36. The first issue to be determined is whether the Petitioner has established a prima facie case warranting the grant of conservatory orders. It has been held in various decisions that a prima facie case is not one that must succeed at the hearing of the main case, but rather one that discloses arguable issues in a case alleging a violation of rights.

37. A prima facie case was defined in the case of **Kevin K Mwiti & Others vs Kenya School of Law & Others (2015) eKLR**, in which the court stated:

“.....A prima facie case, it has been held, is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, the Petitioner has to show that he or she has a case that discloses arguable constitutional issues.”

38. It is not in dispute that the lease of the suit property is registered in the Petitioner’s name. Under Article 40 of the Constitution, every person has the right to acquire and own property of any description, subject only to lawful limitations.

39. In **Henry Muthee Kathurima v. Commissioner of Lands & another[2015]eKLR** the Court of Appeal held that a registered proprietor is entitled to legal protection unless the title is lawfully challenged and nullified.

40. The Petitioner produced a lease dated 24th March 1998 between him and the 1st Respondent, which shows that it is for a term of 99 years from the 1st day of February 1998 at a

yearly rent of Kshs. 16,000/= payable in advance on the 1st day of January every year. The Petitioner claims that he was unlawfully evicted from the suit property without proper notice or due process.

41. The 1st Respondent asserts that the lease was obtained unlawfully and intends to file a cross-petition on that basis.

42. Section 26(1) of the Land Registration Act provides that a certificate of title or lease constitutes prima facie evidence of ownership and shall not be subject to challenge except on the grounds of fraud or misrepresentation to which the proprietor is proved to be a party, or where the title has been acquired illegally, unprocedurally, or through a corrupt scheme.

43. The 1st Respondent's allegations remain unproven at the interlocutory stage. Whether the lease was entered into contrary to Section 14(4) of the Railway Act is a substantive question of law and fact that can be conclusively determined only after hearing the Petition and the intended cross-petition.

44. The court is not required to make any conclusive determination regarding the validity of the lease or the legality of the eviction, as doing so would amount to

determining the Petition at the interlocutory stage. At this stage, the court is required to determine whether the Petitioner has established a prima facie case with a likelihood of success.

45. Based on the foregoing, I find that the Applicant has demonstrated an arguable interest in the suit property and that his eviction raises serious constitutional questions regarding due process and property protection. This court is persuaded that, in the absence of preservation orders, the 1st Respondent may transfer or otherwise dispose of the suit property. Accordingly, I find that the Applicant has established a prima facie case.

46. The Applicant seeks reinstatement to the premises within 24 hours of the order's issuance. The law is clear that conservatory orders are preservative, not restorative. They are designed to maintain the status quo and prevent further prejudice, not to undo what has already occurred.

47. In **Martin Nyaga Wambora v Speaker of the Senate & 6 others (2014) eKLR**, the court held that:

“Conservatory orders are not meant to remedy a wrong that has already been committed. They are meant to prevent threatened or continuing violations.”

48. Similarly, in **Muslims for Human Rights (MUHURI) & Another v Attorney General & 2 others (2015) eKLR**, the court held that:

“The purpose of conservatory orders is to preserve the subject matter of litigation and to ensure that the Petition is not rendered nugatory. They are not meant to reverse completed acts.”

49. In the matter at hand, the status quo is that the Applicant is out of possession of the suit property.

50. It is not in dispute that the 1st Respondent is in possession of the suit property. Conservatory orders are not intended to resolve contested facts or to determine rights conclusively before hearing the evidence. Reinstatement to the suit property is a final remedy that would issue after a full hearing.

Granting it at this stage would amount to determining the contested issues without the benefit of evidence.

51. In an application for a conservatory order, the court must warn itself against making any definitive findings of fact or law. This principle was articulated in **Kenya Association of Manufacturers & 2 Others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 Others (2017) eKLR**, where the court stated as follows:

“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.

52. Before granting conservatory orders, the court must evaluate the pleadings and determine whether denying the orders would prejudice the Applicants. In **Centre for Rights Education & Awareness (CREAW) & Another vs. Speaker of the National Assembly & 2 Others (2017) eKLR**, the court held that;

“A party who moves the court seeking conservatory orders must show to the satisfaction of the court that his or her rights are under threat of violation, are being violated, or will be violated, and that such violations, or threatened violation, is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent the violation of rights and fundamental freedoms and preserve the subject matter pending the hearing and determination of a pending cause or petition.”

53. The Petitioner claims he was evicted from the suit property without prior notice or a formal order. Based on his pleadings and annexures, it is clear that he holds a valid lease for the property.
54. Having evaluated the material before me, I find that the Applicant will suffer prejudice if the conservatory orders are not granted because the lease has not expired. Without an order restraining the 1st Respondent from transferring or

dealing with the property, a third-party interest could arise, undermining the Applicant's right to property and rendering the petition nugatory.

55. Regarding whether the public interest will be served or prejudiced by a decision to exercise discretion in granting or denying a conservatory order, I find that it will be better served by preserving the suit property pending the hearing and determination of the Petition.

56. The upshot of the foregoing is that the application dated 4th August 2025 partially succeeds in the following terms:

a) A Conservatory order be and is hereby issued restraining the 1st Respondent, whether by its agents, servants and through any party whatsoever from doing the following acts or any of them that is to say from leasing, selling, disposing of, letting, cancelling and or revoking the Petitioner's leasehold interest over the property known as L.R. No, 3774/774 (I.R No. 21925/1) pending the hearing and determination of the Petition.

***b) Costs to abide with the outcome of the
Petition.***

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT
TEAMS THIS 19TH DAY OF JANUARY, 2026.**

.....
**T. MURIGI
JUDGE**

IN THE PRESENCE OF:

Mukuha for the Petitioner/Applicant

Ms Nyaberi for the 1st Respondent

Ahmed - Court Assistant