

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VOI

CONSTITUTIONAL PETITION NO. E007 OF 2025

**IN THE MATTER OF: ENFORCEMENT AND PROTECTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS
PURSUANT TO ARTICLE 23 OF THE
CONSTITUTION**

AND

**IN THE MATTER OF: PROTECTION OF THE RIGHT TO OWN
PROPERTY PURSUANT TO ARTICLE 40 OF
THE CONSTITUTION**

AND

**IN THE MATTER OF: APPLICATION BY SQUATTERS FOR
PROTECTION OF THEIR RIGHTS OVER
PLOT NUMBERS TAVETA/TAVETA SCHEME
PHASE 1/001-2339 SCHEME NUMBER 889,
AND PLOT NUMBERS TAVETA/TAVETA
SCHEME PHASE 2/001-3205 SCHEME
NUMBER 890**

AND

**IN THE MATTER OF: EQUALITY AND FREEDOM FROM
DISCRIMINATION CONTRARY TO ARTICLE
27 OF THE CONSTITUTION**

AND

**IN THE MATTER OF: COMPULSORY ACQUISITION OF LAND
TO SETTLE THE LANDLESS OR TO
FACILITATE ACCES TO ADEQUATE
HOUSING AND SANITATION UNDER
ARTICLES 40 AND 47 AND CARE FOR THE
OLDER PERSONS UNDER ARTICLE 57 OF
THE CONSTITUTION**

AND

**IN THE MATTER OF: POLITICAL PARTIES MANIFESTO AND
THE LEADERSHIP AND INTEGRITY,
CHAPTER 6 OF THE CONSTITUTION OF
KENYA**

AND

**IN THE MATTER OF: APPLICATION BY PETER NZIOKA
MUSEMBI AND 9 OTHERS ON BEHALF OF**

**MEMBERS OF TAVETA SUB-COUNTY,
TAITA TAVETA COUNTY**

BETWEEN

- 1. PETER NZIOKA MUSEMBI**
- 2. DUNCAN KIOKO MUTISYA**
- 3. DAVID KIOLI NGALA**
- 4. STEVEN NYAKI STONEY**
- 5. RIRIMBO HASSAN IKHOMI**
- 6. JOSEPH TUMAINI MSHAMBA**
- 7. DAVID KYALO MALII**
- 8. LEONARD NDAMBUKI**
- 9. BENEDICT MWANIA MUSYOKI**

10. FESTUS

MUTINDA

JOHN.....PETITIONERS

-VERSUS-

- 1. THE HONOURABLE ATTORNEY GENERAL**
- 2. THE NATIONAL LAND COMMISSION**
- 3. NATIONAL POLICE SERVICE**
- 4. THE COUNTY COMMANDER, TAITA TAVETA COUNTY**
- 5. THE OFFICER COMMANDING STATION, TAVETA**

6. DEPUTY COUNTY COMMISSIONER, TAVETA SUB-COUNTY

7. COUNTY GOVERNMENT OF TAITA-TAVETA

8. KENYA KWANZA COALITION

9. SPEAKER, NATIONAL ASSEMBLY

10. SPEAKER, THE SENATE

11. THE MEMBER OF PARLIAMENT TAVETA CONSTITUTENCY

12. THE SENATOR, TAITA TAVETA COUNTY

13. JOSIAH MALOMBE sued as the Representative of

TAITA FARMERS ASSOCIATION.....

.....RESPONDENTS

RULING

1. This ruling is in respect to the Petitioner's application dated 22nd November 2025 seeking the following reliefs:-

(i) Spent.

(ii) Spent.

(iii) That pending the hearing of the proposed appeal to the Court of Appeal,

(a) This Honourable Court be pleased to issue conservatory orders in the form of orders of

injunction restraining the 1st, 3rd, 4th, 5th, 6th and 13th Respondents and/or any other person acting under him from evicting the petitioners and/or demolishing the Petitioners structures currently standing on Plot Numbers Taveta/Taveta Scheme Phase 1/001-2339 Scheme Number 889 and Plot Numbers Taveta/Taveta Scheme Phase 2/001-3205 Scheme Number 890.

(b) This Honourable Court be pleased to issue conservatory orders in the form of orders of prohibition restraining the 1st, 3rd, 4th, 5th and 6th Respondents from arresting and arraigning the Petitioners in court on charges related to the occupation/detainer by the Petitioners on Plot Numbers Taveta/Taveta Scheme Phase 1/001-2339 Scheme Number 889, Plot Numbers Taveta/Taveta Scheme Phase 2/001-3205 Scheme Number 890 and or in any other manner whatsoever disturbing the current status quo.

(iv) Costs of the application be provided for.

2. The application was supported by the affidavit sworn by David Kioli Ngala on 22nd November 2025.
3. It was deponed that on 5th November 2025 this court struck out the Petition and the Petitioners being aggrieved lodged a Notice of Appeal to the Court of Appeal.
4. The Petitioners now seek conservatory orders or orders for maintenance of the status quo pending the hearing and determination of the appeal.
5. It was further deposed that the Petitioners have occupied the suit property for a minimum of 15 years while some staying there for around 50 years and if the orders sought are not granted there is an imminent threat of execution.
6. The application was opposed by the 13th Respondents vide Notice of Preliminary Objection dated 26th January 2026 and the Replying Affidavit sworn by Josiah Malombe on 26th January 2026.
7. The Preliminary Objection was premised on the grounds that by dint of the ruling dated 5th November 2025, this Court lacks jurisdiction to hear and determine the notice of application,

the Court of Appeal in **Mombasa Civil Application No. E058 of 2023 Simon Mwongi & 5 Others =Versus= The Hon. A. G & 7 Others** is now seized with the matter and the Court is functus officio and ousts its jurisdiction and in toto the Petitioner's application is frivolous, vexatious and an abuse of the court process.

8. In respect to the Replying Affidavit, it was deposed that the Court lacks jurisdiction and it should down its tools, no prima facie case has been established to warrant the grant of the reliefs sought. The Court of Appeal is a Supreme Court and any decision made by this Court would amount to usurping the appellate jurisdiction and this court would be confining itself jurisdiction which it doesn't have.

9. The application was canvassed by way of written submissions pursuant to the directions issued by this court. The Petitioners filed written submissions dated 11th February 2026 while the 13th Respondent filed written submissions dated 18th February 2026.

10. The Petitioners submitted that the 13th Respondent's Preliminary Objection relies on a separate appeal being

Mombasa Court of Appeal Civil Application No. E058 of 2023 that does not directly overlap with this application.

11. Counsel for the Petitioners submitted on the following issues:- jurisdiction, functus officio, abuse of court process, meritoriousness of the application and whether the threshold has been met.
12. It was argued that the present application is brought under Order 42 Rule 6 of the Civil Procedure Rules, 2010 which vests jurisdiction in the court appealed from to grant stay or conservatory orders.
13. It was further submitted that the power to grant conservatory orders pending appeal survives the striking out of the main petition as it does not bar post-judgment applications for stay. Reliance was made to the case of **Kakiya =Versus= Mutente & Another (2025) KEELC 2982 (KLR).**
14. On whether this court is functus in view of Mombasa court of Appeal Civil Application No. E058 of 2023, it was submitted that the said position is misplaced for the reasons that E058 of 2023 appeals the judgment in ELC Petition No. 6

of 2019 while this motion seeks to stay a separate ruling that struck out the Petition filed herein.

15. On whether the motion amounts to an abuse of the court process, it was submitted that the motion was necessitated by ongoing eviction and arrest threats, post the striking out of the Petition, the same is meritorious in seeking orders Order 42 Rule 6 of the Civil Procedure Rules, 2010 and Articles 22, 23 and 165(3)(b) of the Constitution of Kenya 2010 and Rules 21, 23 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The application was filed expeditiously and reliance was made to the case of **Gatirau Peter Munya =Versus= Dickson Mwenda Kithinji & 2 Others (2014) eKLR.**

16. It was further submitted that the application satisfies the test set out in **Gatirau Peter Munya case.** There is an arguable appeal, substantial loss will occur if the orders will not be granted as the Petitioners are facing eminent eviction, the appeal will be rendered nugatory if the orders sought will

not be granted and the balance of convenience tilts in favour of the Petitioners.

17. The court was urged to grant the orders sought and dismiss the Preliminary Objection with costs.

18. The 13th Respondent submitted that the court does not have jurisdiction to re-open the original petition as it would be sitting on its appeal. Reliance was placed on the case of **Kitelo & 2 Others =Versus TUM & 4 Others (ELC Case E002 of 2025) (2025) KEELC 4994 (KLR) (2 JULY 2025)** where it was held that once the lower court proceedings are struck out, the court cannot revive it nor entertain any post striking out applications to remove it since the suit ceases to exist.

19. Citing the case of **Judith Wanjiru Njenga =Versus= Andmasto Holdings Limited & 6 Others Application No. E020 of 2024** together with the case of **Thuita Mwangi =Versus= Kenya Airways Ltd (2003) KECA 201 (KLR)**, it was argued that interlocutory applications have no basis in the absence of an appeal accompanied by a Memorandum of Appeal.

20. It was further submitted that after the ruling of the court delivered on 5th November, 2025, this Court became functus and hence cannot issue any orders more so where the Court of Appeal is seized with the same matter.

21. The Court was urged to dismiss the application with costs.

22. Having considered the application, rival affidavits together with the Preliminary Objection, the main issue running throughout the said application and submissions of the parties is whether this court can grant any conservatory orders in form of injunction of prohibition pending appeal upon striking out of a petition or suit. If this issue is addressed in the affirmative then the petitioners will be entitled to the reliefs sought in their application dated 22nd November 2025.

23. In the instant application, it is the Petitioner's case that the application seeks conservatory orders pending appeal having brought the same under Order 42 Rule 6 of the Civil Procedure Rules, 2010, Articles 22, 23 and 165(3)(b) of the Constitution and Rules 21, 23 and 24 of the Mutunga Rules. It was also their case that the Petitioners are long term occupants of portions of the suit property (Taveta/Taveta

Scheme Phase 1/001-2339 Scheme 889 and Phase 2/001-3205 Scheme 890 which occupation exceeds 15 years for most of them and over a half a century for others.

24. While the Petitioners have sought to rely inter alia on Article 23(3) of the Constitution and Rules 21, 23 and 24 of the Mutunga Rules, it is noteworthy that as was clarified by the Supreme Court in the **Peter Munya case (2014) Supra**, conservatory orders are meant to preserve the subject matter of a dispute pending determination. They are ancillary reliefs anchored upon a subsisting cause and where there is no pending petition before the court there is nothing to preserve and once the petition is struck out this court became functus officio and to grant such orders would amount to re-opening the same matter.

25. The Petition herein was by a ruling delivered on 5th November 2025 struck out and it is well settled that an Order striking out a Petition is a negative order to the effect that it does not commend any positive act as it merely terminates the proceedings. By striking out the Petition, this Court conclusively determined the matter before it. There is no

pending cause to preserve. To grant conservatory orders at this stage would amount to indirectly reinstating a Petition already struck out.

26. It therefore follows that this court having struck out the Petition, it lacks jurisdiction to entertain an application whose effect would be to preserve a cause no longer before it. The order striking out the Petition is a **negative order** incapable of being stayed within the meaning discussed in **Western College of Arts and Applied Sciences v Oranga & Others [1976] KECA 15 (KLR)**

27. The Supreme Court further applied the same position in the case of **Josephine Wairimu Kinyanjui & 4 Others =Versus= Mary Kalinga & 6 Others (Supreme Court Petition E014 of 2014)**, where the Court of Appeal had struck out an appeal for lack of jurisdiction, then the Applicant moved to the Supreme Court seeking conservatory orders, it was held that since the Court of Appeal had struck out the matter, there was no positive order capable of execution to warrant a stay or conservatory order. The Supreme Court

noted that extending the life of such a Petition which was premised on a lack of jurisdiction would not serve the interest of justice. This Court is duly bound.

28. This Court is fortified in its view by recent decisions of the Environment and Land Court in Constitutional petitions which have addressed circumstances where a petition was struck out and parties sought to pursue or sustain interim relief. In **Dofu & 3 Others v Ngome & 7 Others, Constitutional Petition E021 of 2024 [2025] KEELC 3896 (KLR) (Ruling delivered 15 May 2025)**, the Court struck out the Petition for want of competence. Upon doing so, the Court observed that having determined that it lacked jurisdiction, it had effectively “downed its judicial tools” and that to proceed to consider the pending application for conservatory orders would be an academic exercise. The Court declined to entertain the application for interim relief, holding in effect that once the Petition had been struck out, there was no subsisting cause capable of supporting conservatory orders.

29. Similarly, in **Karage & another v Cabinet Secretary of Interior & Co-ordination of National Government & 6**

others; Eastend Development Properties Limited (Interested Party), Environment & Land Petition E047 of 2022 [2023] KEELC 17035 (KLR) (Ruling delivered 18 April 2023), the Court struck out the Petition on the ground that it was sub judice. The Petitioners had sought conservatory orders among other interlocutory reliefs. Upon striking out the Petition, the Court declined to entertain the interim application, the logical consequence being that once the Petition ceased to exist as a live proceeding, the foundation upon which conservatory orders could stand equally collapsed.

30. It therefore follows that Conservatory orders are ancillary reliefs and must be anchored upon a subsisting constitutional cause and that once a Petition is struck out, there is no pending matter before the Court capable of preservation, and any application for conservatory relief becomes academic.

31. Consequently, the Notice of Motion dated 22nd November 2025 is hereby dismissed. Each party to bear own costs.

**Dated, Signed and Delivered Virtually at Voi this 5th
day of March 2026.**

**E. K. WABWOTO
JUDGE**

In the presence of: -

Mr. Munyithia for the Petitioners.

Mr. Motuka for the 13th Respondents.

Mr. Kiilu for the 2nd Respondent.

N/A for the other parties.

Court Assistant: Mary Ngoira.