



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MAKUENI**

**ELC. PETITION NO.5 OF 2017**

**IN THE MATTER OF: ARTICLE 2(2) 10, 19, 20, 21, 22, 23, 23, 27, 29, 39, 40, 47, 64, 67, 165(3)**

**(B), 176, 179, 183, 186, AND THE FOURTH SCHEDULE OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF: IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 28, 39, 40 AND 47 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 64, 67,**

**183 AND 186 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF SECTION 5 AND 6**

**OF THE NATIONAL LAND COMMISSION ACT, 2012**

**AND IN THE MATTER OF ALLEGED CONTRAVENTION OF PART VIII AND**

**SECTIONS 134 AND 135 OF THE LAND ACT 2012**

**AND**

**IN THE MATTER OF REGISTRATION OF TITLES ACT, CHAPTER 281**

**OF THE LAWS OF KENYA (REPEALED)**

**BETWEEN**

**UATHIMO FARM LIMITED.....1<sup>ST</sup>PETITIONER**

**PETER KIILU.....2<sup>ND</sup>PETITIONER**

**AND**

**THE HONOURABLE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION.....2<sup>ND</sup> RESPONDENT**

**HON. GOVERNOR PROF. KIVUTHA KIBWANA.....3<sup>RD</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF MAKUENI.....4<sup>TH</sup> RESPONDENT**

GEORGE ONYANGO

THE OCS, EMALI POLICE STATION.....5<sup>TH</sup> RESPONDENT

NICK MUTHOKA.....6<sup>TH</sup> RESPONDENT

ALOIS MUIA.....7<sup>TH</sup> RESPONDENT

MULANDI MBALU,

NDETI LAVU,

DAVID KIOKO,

STEPHEN MUTUKU

(All sued as the named leaders and/or officials of

Mukambita ranching Cooperative Society/Invaders).....8<sup>TH</sup> RESPONDENT

### RULING

1. What is before this court for ruling is the Petitioners' Notice of Motion application dated 24<sup>th</sup> October, 2017 and filed in court on even date for orders:-

1. Spent

2. Spent

3. Spent

4. Spent

5. **THAT pending hearing and determination of the Petition herein, the Respondents either by each one of them or jointly or by persons claiming through them be strictly enjoined by way of a conservatory order and restrained whether by themselves or by their servants, agents or otherwise howsoever from alienating, occupying, sub-dividing, distributing or in any manner acting or claiming any interest or entering into any apart or portion of the property known as land parcel LR No.9731/2 whether by themselves, by agent(s), servant(s) or by any other description.**

6. **THAT pending hearing and determination of the Petition herein, the Respondents either by each one of them or jointly or by persons claiming through them be strictly enjoined by way of a conservatory order and restrained whether by themselves or by their servants, agents or otherwise howsoever from trespassing, or in any way whatsoever interfering with the Petitioner's quiet possession and enjoyment over all and any of the portion of property known as land parcel LR No.9731/2 whether by themselves, by agent(s), servant(s) or by any other description.**

7. **THAT the costs of and occasioned by this application be provided for.**

The application is supported by the supporting and supplementary affidavits of Serah Nzembi Nzyoka, the co-administrator of the estate of Ruth Kalekye Mutua and a co-Guardian Ad litem of Mr. James Kasyula Mutua, the directors of the 1<sup>st</sup> Petitioner sworn on the 24<sup>th</sup> October, 2017 and 23<sup>rd</sup> April, 2018 respectively.

2. The application is opposed by the 8<sup>th</sup> Respondent vide the replying affidavit of Ndeti Lavu who is one of its members. The 1<sup>st</sup> and the 5<sup>th</sup> Respondents have opposed the application vide the replying affidavit of George Konyango, the OCS Emali sworn at Nairobi on the 12<sup>th</sup> January, 2018. The two Respondents further filed grounds of opposition dated 17<sup>th</sup> November, 2017 where they raise the following:-

1. **THAT the Petitioners have not demonstrated how the articles of the Constitution relied on in the Petition have been infringed by the 1<sup>st</sup> and 5<sup>th</sup> Respondents.**

2. **THAT the Petition is frivolous, vexatious and misconceived as against the 1<sup>st</sup> and 5<sup>th</sup> Respondents.**

3. **THAT the Petition is an abuse of Court process.**

The 2<sup>nd</sup> Respondent has also opposed the application vide the replying affidavit of Silas Mburugu, its Principal Land Administration Officer, sworn at Nairobi on 12<sup>th</sup> March. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents have opposed the application vide the replying affidavit of Alex N. Nthiwa, the

Chief Officer, Department of Lands, Physical Planning and Urban Development, Government of Makeni, sworn at Nairobi on 19<sup>th</sup> March, 2018.

3. The brief summary of the relevant facts are as stated by the Petitioners namely that the 1<sup>st</sup> Petitioner is the registered owner of all that land parcel of land known as I.R.15765/8 (Land Reference 9731/2) – (hereinafter referred to as suit property measuring approximately 1091 hectares (less a road reserve of 15 hectares). The land is situated in Emali area. The 1<sup>st</sup> Petitioner purchased the land from Agricultural Development Co-operation in 1982. That in the year 2006, the Government of Kenya through the Land Adjudication and Settlement Trust (SFT) engaged with the 1<sup>st</sup> Petitioner with a view to purchasing the said land parcel number LR 9731/2 for purposes of settling members of the 8<sup>th</sup> Respondent. However negotiations broke down. That the Government did appoint a Task Force to inter alia, establish the status of the suit property together with the neighbouring LR.9730/2 and 9731/1 and to establish whether the said parcels were available for purchase. The 1<sup>st</sup> Respondent was not invited to make representations in regard to its interest of suit property. The Task Force recommended that the government should compulsorily acquire the subject parcels of land for purposes of settling members of the 8<sup>th</sup> Respondent. However, 1<sup>st</sup> Respondent vide a letter dated 14<sup>th</sup> August, 2007 advised the Permanent Secretary, Ministry of Lands that it wasn't within the law to compulsorily acquire private land to settle squatters. That in April, 2008 the 1<sup>st</sup> Petitioner applied for and was granted approvals for subdivision of the suit property into 202 sub plots. The 1<sup>st</sup> Petitioner also applied for a change of user to include residential, commercial, education and agricultural purposes. That on 03<sup>rd</sup> February, 2017 the 4<sup>th</sup> Respondent issued a public notice indicating that it had requested the National Government to acquire the suit property for purposes of settling the 8<sup>th</sup> Respondent members and cautioned that it was “now unsafe for any third party to purchase land in any of the subject parcels.” The 1<sup>st</sup> Petitioner contends that on 17<sup>th</sup> October, 2018, the 6<sup>th</sup> and 7<sup>th</sup> Respondents acting together with named officials of the 8<sup>th</sup> Respondents led a group of invaders to the suit property. The invasion intensified on 21<sup>st</sup> October, 2018 when a group of over 400 people forcibly entered into the suit property and caused massive destruction including demolishing the 1<sup>st</sup> Petitioner's colonial farm house, destroying thousands of orange trees and threatening to harm beneficial owners. However according to the 8<sup>th</sup> Respondent, it has been in actual possession and use of the suit property since pre-colonial times. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents too contend that the dispute over the suit property is historical, long standing and emotive.

4. Directions were given that the application be disposed off by way of written submissions. I have read the submissions that were filed by the Petitioners, the 1<sup>st</sup> and 5<sup>th</sup> Respondents as well as those filed by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents. I am in agreement with the Counsel for the Petitioners that the submissions by the 1<sup>st</sup> and 5<sup>th</sup> Respondents have gone off on tangent in so far as the definition of what constitutes a prima facie case in the application before me. Prima facie defined in the case of **Ramanlal Trambaklal Bhatt vs. R [1957] EA 332** at pages 334 and 335 does not apply herein as this is not a criminal trial. As such, I will disregard the submissions by the 1<sup>st</sup> and 5<sup>th</sup> Respondents.

5. From the submissions filed by the Petitioners and the Respondents herein and more particularly the 3<sup>rd</sup> and 4<sup>th</sup> Respondents, I do agree with the Petitioners' Counsel that the only issue for determination is whether the Petitioners have made out a case for the grant of conservatory orders pending the hearing and determination of the petition. The 6<sup>th</sup> to 8<sup>th</sup> Respondents never filed their submissions.

6. The Counsel for the Petitioners began by pointing out the Article 23(3) (b) and (c) of the Constitution provides that in any proceedings brought under Article 22, a court may grant appropriate relief, including an injunction and conservatory order. The Counsel added that Rule 23(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2010 (“The Mutunga Rules”) empower a judge before whom a petition alleging contravention of fundamental rights and freedoms is presented to hear and determine an application for conservatory or interim orders. The Counsel cited the case of **Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR** where Odunga, J elucidated the nature of such conservatory order as follows:-

*“Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as 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.”*

In addition, the Counsel cited the case of **Gitirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others [2014] eKLR** where the Supreme Court adopted a similar position and went further to set the threshold for the grant of conservatory orders in the following terms.

*“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 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 the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”*

7. The Counsel was of the view that it follows from the aforementioned decisions that conservatory orders as sought herein will not only bind the parties but is a remedy in rem. The Counsel further submitted that it is on this basis that the court is called upon to bear in mind that the public interest while granting conservatory orders. In this regard, the Counsel referred the court to the case of **Multiple Hauliers East Africa Ltd vs. Attorney General & 10 others [2013] eKLR** where the High Court was called upon to consider that the action by the Respondent was in line with public interest. The Counsel pointed out that the High Court nevertheless held that,

*“.....(the public interest will be better served if the state and organs of the state and public authorities scrupulously act in accordance with the dictates of the constitution.”*

The Counsel added that in the case of **Sound Equipment Ltd vs. Registrar of Titles & Another [2011] eKLR**, the court was emphatic about strict compliance with the due process in the following terms.

*“The 1<sup>st</sup> Respondent had no legal mandate to arbitrarily revoke the Petitioner’s title without any notice and most importantly, without following the due process of law. Due process must be adhered to by all, the State and its citizens including public officers. The first Respondent’s actions amount to unlawful acquisition of a person’s property, without due process and is an act impunity which must be frowned upon by the law.”*

8. The Counsel went on to submit that the 1<sup>st</sup> Petitioner’s title to the suit property is absolute and as held in the cases that he cited, cannot be impeached without following the due process of the law. The Counsel added that the Petitioner’s right to own the suit property is undoubtedly protected under Article 40 of the Constitution. With regard to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents’ allegation that their intervention by publishing the impugned notice cautioning third parties against transacting with 1<sup>st</sup> Petitioner over its property and moving the 2<sup>nd</sup> Respondent to compulsorily acquire (sic) the suit for purposes of settling members of the 8<sup>th</sup> Respondent, the Petitioner’s Counsel submitted that it is important to point out that Article 40(3) of the Constitution limits the deprivation of a person of property of any description, or of any interest in, or right over, property unless the deprivation is, inter alia, for a public purpose and is carried out in accordance with the Constitution and applicable Act of Parliament.

9. It was further submitted that Part VIII of the Land Act, 2012 sets out an elaborate process of compulsory acquisition. The Counsel cited the case of **Virenda Ramji Gudka & 3 others vs. Attorney General [2014] eKLR** where the court held that;

*“Rights of compulsory acquisition are contained by specific provisions of the law being Article 40 of the Constitution and Section 107 and 133 of the Land Act, No.6 of 2013 which replaced the provisions previously contained in the Land Acquisition Act .....these provisions have to be complied with for the rights of acquisition to crystallize.*

10. The Counsel was of the view that in this case, it cannot be gainsaid that such a process has not only been complied with but as the 2<sup>nd</sup> Respondent has confirmed at paragraph 15 of Mr. Mburugu’s affidavit, the route of compulsory acquisition can only be pursued if the suit land were required for public use and not for purpose of settling members of the 8<sup>th</sup> Respondent.

11. The Counsel went on to submit that as indicated in paragraphs 47 and 49 of the Petition, Section 134 of the Land Act sets out an even more elaborate procedure for establishing a settlement scheme.

12. The Counsel further submitted that the Respondents have failed to demonstrate that even a single step has been taken to comply with the foregoing provisions. That as confirmed by the 2<sup>nd</sup> Respondent, the suit property remains private land and the public interest will be best served if this court were to uphold the sanctity of the 1<sup>st</sup> Petitioner’s title. The Counsel termed the 6<sup>th</sup>, 7<sup>th</sup> as well as members of the 8<sup>th</sup> Respondents trespassers of the 1<sup>st</sup> Petitioner’s property who should be directed to give way pending the determination of the dispute and it is no answer that they depend on their alleged acts of trespass for food. The Counsel added that a wrong doer cannot divest another party its right to property just because he is poor and pointed out that is one of the grounds for limitation of rights as set out under Article 24 of the Constitution.

13. On the other hand, the Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents submitted that in order for the Petitioner to avail themselves the discretionary power of the court to grant conservatory order, they must demonstrate;

**i) A prima facie case, which is a standard higher than arguable case. They have to demonstrate the probability of success at full hearing.**

**ii) They must also demonstrate the irretrievability of irreparability of the loss of conservatory orders are not issued. They must show that the entire suit will be rendered nugatory.**

14. The Counsel submitted that contrary to the Petitioner’s allegation that the dispute herein arose in October, 2017 when members of the 8<sup>th</sup> Respondent “invaded” the disputed land (as is disposed in paragraph 28 of the supporting affidavit), the Petitioner’s own documents attached to the supporting affidavit show that the dispute has been ongoing for a long time. The Counsel further submitted that there is evidence that the alleged invaders have been on the land for a long time. That some of them have constructed thereon while others have grown crops from time to time. The Counsel pointed out that it is therefore evident that the Petitioner’s application under certificate of urgency is founded on falsehood. The Counsel was of the view that it can be surmised that as long as those occupying the land do not further subdivide for sale or permanently construct on the occupied parcels, there is no likelihood of irreparable loss to the Petitioner. The Counsel added that the loss likely to be suffered by the Petitioner, if any, is loss of user of the land which is measurable in monetary terms by way of an award of damages.

15. It was also the Counsel’s submissions that the Petitioner has not satisfied the principles governing grant of conservatory order. The Counsel cited the case of **Muslim for Human Rights (Muhuri & 4 Others vs. Inspector general of Police and 2 others Mombasa petition number 62 of 2014** as cited in the case of **Bella Vista Restaurant Mombasa Ltd vs. Kenya Revenue Authority [2016] eKLR** where the Court held as follows:-

*“The emerging principles for the grant of injunction or conservatory orders under the constitutional litigation, as I understand them are firstly, that the applicant must demonstrate an arguable case sometimes called prima facie arguable case – the reference to arguable case distinguishing it from the prima facie test of the Giella v. Casman Brown (1973) EA 385 traditionally applied in regular civil cases; secondly, that the applicant must show that the petition would be rendered nugatory or that the damage that would be suffered in the absence of the conservatory order would be irreversible; and, thirdly, that in constitutional cases, the public interest in the matter would be considered and generally upheld.”*

16. The Counsel further cited the case of **City Riders Sacco & 11 others vs. County Government of Nairobi & 3 others [2016] eKLR**

Mumbi, J had this to say:-

*“The Supreme Court enunciated a third critical principle to be taken into consideration when a ..... seeks to determine whether or not to grant conservatory orders in a constitution petition before it.”*

Mumbi J, cited the case of **Gatirau Peter Munya vs. Dickson Mwenda Githinji & 2 others SCK Petition No.2 of 2013** where the Supreme Court (Ojwang and Wanjala JJSC) stated thus;

*“Conservatory orders’ bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the court, in the 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 supplicant’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”*

*Thus, where a conservancy order is sought against a public agency like a legislative assembly that is mandated to carry out certain functions in the normal course of its business, it is only to be granted with due caution. The interruption of the lawful functions of the legislative body should take into account the need to allow for their ordered functioning in the public interest.”*

17. The Counsel further submitted that the proportionality of the competing interests involved does not favour issuance of eviction orders at an interlocutory stage in these proceedings. The Counsel cited the case of **Lucy Wangui Gachera vs. Minundi Okemba Lore [2015] eKLR** where the Court of Appeal held that an order of eviction has to be specific in order for the Respondent to be made aware of the orders sought against him. The Counsel added that the court addressed itself to the mischief of camouflaging an eviction order as a prohibitory injunction in the following terms:-

*“The application that the Respondent presented before the High Court was, on the face of it, an application for a prohibitory injunction “restraining” the appellant from doing something, engaging in certain conduct or taking certain action. But rather mischievously, the same application sought to restrain the appellant from occupying, living, continuing to live, or staying on the suit property. It is not disputed that by the time the application for injunction was made, the appellant was in possession of the suit property and had been in possession and occupation of the same for more than 10 years. To seek to stop her from occupying, living, continuing to live or to stay on the suit premises required nothing short of clear and specific prayer for a mandatory injunction. In view of the drastic nature of the remedy that the Respondent was seeking at an interlocutory stage, the appellant was entitled to be notified in the clearest of terms that what was being sought in the application was her eviction, even before the suit was heard, from the property she was claiming to be matrimonial property. Instead, the application was made to appear as though all that it sought was to prohibit the appellant from wasting, damaging, alienating or wrongfully selling the suit property.”*

18. Arising from the above, the Counsel urged the court to find that the Petitioners by camouflaging their conservatory order as they have done in the application before court, disentitles them to the exercise of this court’s discretion in their favour. The Counsel added that in **Lucy Wangui Gachera’s case** (supra), the Court of Appeal found that a mandatory injunction at an interlocutory stage will be granted where special circumstances exists to justify the issue of such an order.

19. The Counsel was of the view that the Petitioners have not demonstrated the existence of any special circumstances to justify the issue of mandatory injunction at this stage and urged the court to dismiss the application as it lacks merit.

20. In their supplementary submissions, the Petitioners through their Counsel submitted that unlike the Respondent in **Lucy Wangui Gachera vs. Munundi Okemba Lore [2015] eKLR** who claimed ownership of the suit property as her matrimonial home and was in occupation thereof at the time the orders were being sought, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents admit both in their replying affidavit and submissions that they are not claiming ownership. The Counsel added that the conservatory orders being sought are intended to protect the subject matter in dispute, being the Petitioners right not to be deprived of its property without due compliance with the due process. The Counsel added that the 3<sup>rd</sup> to 4<sup>th</sup> Respondents have failed to make attempt at justifying the legal basis for their exercise of political and constitutional mandate.

21. My take on the competing arguments by the parties herein is that it is not in dispute that the 1<sup>st</sup> Petitioner is the registered owner of all that parcel of land known as I.R.15765/8 (Land Reference No.9731/2) measuring 1091 hectares. It’s title to the said suit property is absolute and can only be impeached by following the due process of the law. Ndeti Lavu who is a member of the 8<sup>th</sup> Respondent has deposed in his replying affidavit that the 8<sup>th</sup> Respondent was formed in 1976 with a view to purchase the suit premises from Agricultural Development Corporation (ADC). That the negotiations between the 8<sup>th</sup> Respondent and the ADC broke down whereupon they learnt that the suit property had been bought by the Petitioners herein. Whereas Ndeti Lavu claims that the 8<sup>th</sup> Respondent took possession of the suit property with the support of the government, his assertions are in my view tenuous. He is approbating and reprobating at the same time. It is also to be noted that whereas the 3<sup>rd</sup> and the 4<sup>th</sup> Respondent have submitted that some members of the 8<sup>th</sup> Respondent have built on the suit property, the affidavit of Ndeti Lavu shows that the only activity that has been going on the said property is cultivation of crops. I would agree with the Petitioner’s Counsel that the assertion by the 6<sup>th</sup>, 7<sup>th</sup> as well as members of the 8<sup>th</sup> Respondent that they should be allowed to continue using the suit property on account of being poor cannot be used to divest another party of its right to property. The Petitioners herein have shown that the actions of the members of the 8<sup>th</sup> Respondent have caused destruction to their property and also threaten the over 200 beneficial owners of the parcels that 1<sup>st</sup> Petitioner intends to sell land to and has entered into land sale agreement with. Owing to the fact that the suit property is private property, public interest would be better served by upholding the sanctity of the 1<sup>st</sup> Petitioner’s title.

22. The upshot of the foregoing is that I am satisfied that the Petitioners’ application have met threshold for the grant of conservatory orders. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents have not demonstrated the legal basis upon which their involvement through political and constitution

mandate falls within.

23. In the circumstances, I hereby proceed to grant prayers 5, 6 and 7 of the application.

**Signed, dated and delivered at Makueni this 13<sup>th</sup> day of June, 2019.**

**MBOGO C. G.,**

**JUDGE.**

**In the presence of:-**

Mr. Kwaka holding brief for Mr. Ouma for the Petitioner present

No appearance for the 1<sup>st</sup>& 5<sup>th</sup> Respondents

No appearance for the 2<sup>nd</sup> Respondent

No appearance for the 3<sup>rd</sup> & 4<sup>th</sup> Respondents

No appearance for the 6<sup>th</sup> to 8<sup>th</sup> Respondents

Ms. C. Nzioka – Court Assistant

**MBOGO C. G. (JUDGE),**

**13/06/2019.**