



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELCL PET NO. E009 OF 2025

**KATHEKA KAI FARMERS
COOPERATIVE SOCIETY
LIMITED.....PETITIONER**

-VERSUS-

**PIUS MATINGI- WATER ENGINEER
MACHAKOS COUNTY.....1ST
RESPONDENT**

**ALFONSE KIIO.....2ND
RESPONDENT**

**CHARLES NZINGA.....3RD
RESPONDENT**

**PAUL MUINDI.....4TH
RESPONDENT**

**MARTIN WAMBUA.....5TH
RESPONDENT**

**JUSTINA LAZARUS.....6TH
RESPONDENT**

ONESMUS MUYA KUYU- CEC WATER

MACHAKOS COUNTY.....7TH

RESPONDENT

COUNTY GOVERNMENT OF MACHAKOS.....8TH

RESPONDENT

RULING

1. This is a ruling concerning the notice of motion dated 8 October 2025, filed by the petitioner, and presented under **Article 165 (1)** of the **Constitution of Kenya** and **Rules 13, 19, and 23** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**. It prays for the following orders:

a. Spent.

b. Spent.

c. THAT this honourable court be pleased to issue conservatory orders herein restraining the respondents, their employees, servants, or agents of the 8th respondent, or any person acting on its behalf, from taking over the operations or in any way interfering with the petitioner's use, occupation, or management of Kwa Kaggia Borehole situated on Land Title No. IR 17433/10, owned and operated by the

petitioner herein, pending the determination of the petition filed herewith.

d. THAT the costs of the suit be provided for.

2. The motion is supported by the grounds outlined in the body thereof and Amos James Kimuli's supporting affidavit, sworn on the instant dated. In a nutshell, the petitioner alleges ownership of land **Title No. IR 17433/10 ("suit land")**, where a borehole referred to as Kwa Kaggia is located, and claims that the respondents have unlawfully attempted to take control of its operations, leading to a three-day closure and denying water access to approximately 10,000 community members. Despite police involvement and a demand letter, the respondents have persisted, including damaging a water tank. To support its case, several annexures were availed, including a title document for land parcel no. **LR. No.10257 (IR 17433)**.
3. The respondent, through the very lengthy replying affidavit of Benedict Ngumbau, the Chief Officer of the 8th respondent and sworn on 12 November 2025, concisely informs this court that the borehole was initially repaired and managed by the national government. The management was later transferred to the 8th respondent following complaints about its exclusive use for construction sites and limited community access. The

handover process was gradual and conducted through meetings, contrary to claims of forceful takeover.

4. He further states that the 8th respondent requires water service providers to be properly licensed; however, the petitioner allegedly lacks the necessary licences, rendering its operations illegal. The only authorised provider is MAWASCO, which is affiliated with the 8th respondent. He argues that the borehole is now a public utility and highlights legal and procedural flaws in the petitioner's case, including misrepresentation of facts and failure to supply a list of the cooperative society members it represents.
5. In a quick rejoinder, Amos James Kimuli, deposed a supplementary affidavit on 23 January 2026, and briefly argues that there is no evidence supporting the 8th respondent's claim that the borehole was legally transferred from the petitioner to the government. He maintains that although the public has been allowed to benefit from the borehole, ownership was never relinquished, and no proper legal process or compensation for compulsory acquisition has taken place. The land on which the borehole sits remains the petitioner's property, with no resolution ever passed to transfer ownership. He contends that the 8th respondent has no right to manage or control the borehole without the petitioner's explicit agreement. Furthermore, he asserts that the specific land

parcel in question is part of a larger privately-owned area and cannot be dealt with in isolation.

6. Accordingly, following the court's directions, the law firms of **Ms. Nzaku & Nzaku Advocates** for the petitioner filed written submissions dated 23 January 2026, and the **Ms. Office of the County Attorney for Machakos County**, representing the respondents, filed written submissions dated 12 January 2025. Thus, having carefully considered the motion, its grounds, affidavits, submissions, the legal framework, and prevailing jurisprudence, including those relied upon by counsel, the key issue for determination is **whether the petitioner has met the legal requirements to justify the grant of conservatory orders**. We will now proceed to analyse and determine this issue.
7. With regard to the provisions of the law conferring authority upon this court to entertain a constitutional petition, **Article 23** of the **Constitution** grants this court jurisdiction to hear and determine applications seeking redress for any denial, violation, infringement, or threat to a right or fundamental freedom enshrined in the Bill of Rights, including the authority to issue conservatory orders.
8. Nevertheless, the exercise of such jurisdiction is confined to specific rights or fundamental rights, particularly those

pertaining to land and a clean, healthy environment, as delineated in various **Articles** such as **40, 42, 69, and 70** of the **Constitution. Refer to Section 13(3) of the Environment and Land Court Act (“ELC Act”)**. Therefore, the petition dated 8 October 2025 is properly before this court.

9. As for the prevailing jurisprudence, it is now established that in the exercise of judicial discretion when entertaining applications for conservatory orders, an applicant must demonstrate that it has a *prima facie* case with a reasonable prospect of success, demonstrate that the petition has a public interest connotation, show the merit of the case and that, in the absence of such an order, there exists a tangible risk of prejudice resulting from the violation or threatened violation of the **Constitution**. These principles are non-exhaustive. In reiterating the guiding principles, the Supreme Court of Kenya in **Munya v Kithinji & 2 others [2014] KESC 30 (KLR)**, a decision that the petitioner has relied upon, stated: -

“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.”

10. Furthermore, the decision in **Board of Management of Uhuru Secondary School v. City County Director of Education & 2 others [2015] KEHC 2174 (KLR)**, which is also cited by the petitioner, examined multiple judicial rulings pertaining to conservatory orders and succinctly summarised the principles as follows:

- i. The applicant should present a prima facie case showing a likelihood of success.***
- ii. Demonstrate that without the conservatory orders, there is a likelihood of suffering prejudice.***
- iii. Show evident likelihood of success.***
- iv. Satisfy the court that if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.***
- v. Show a public interest connotation in the matter.***

11. In the matter presently before the court, the petitioner contends that its right to property and to a clean and healthy environment have been violated by the respondents' actions concerning the petitioner's suit land. It suffices that the core issue in dispute between the parties pertains to the alleged ownership of the suit land, and the substantive reliefs sought

in the petition relate to this very land. Notwithstanding the court's observations in its orders of 13 October 2025 that a copy of the title document pertaining to the suit land has not been presented to it, no such document has been furnished to date by either of the parties.

12. Consequently, in the circumstances where the existence of the suit land has not been established, its registration status remains unknown, and the various interests therein are not evidenced by way of title, this court finds that the petitioner has failed to establish a *prima facie* case with a likelihood of success. Having failed to meet this threshold, the court finds the motion not merited.

13. In the end, and for the foregoing reasons and finding, the notice of motion dated 8 October 2025 is dismissed with costs being in the cause. A mention date shall be scheduled for the purposes of pre-trial directions.

It is so ordered.

Delivered and Dated at Machakos this 28th day of April, 2026.

**HON. A. Y. KOROSS
JUDGE
28.04.2026**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Ms. Kanja Court Assistant

Miss Ndunda for respondent.

Mr. Muriithi for petitioner.

ORIGINAL