REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. PETITION NO. 1A OF 2019

TANA & ATHI RIVERS DEVELOPMENT AUTHORITY.....PETITIONER

VERSUS

GREEN PLANET FORESTRY KENYA LIMITED.....1ST RESPONDENT

BETTER GLOBE FORESTRY LIMITED.....2ND RESPONDENT

RULING

1. By a notice of motion dated 4th March 2019 brought under **Sections 1A, 1B & 3A of the Civil Procedure Act (Cap. 21), Rules 4, 23 & 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and all other enabling provisions of the law,** the Petitioner sought a conservatory order restraining the Respondents, their agents, employees and servants from trespassing, taking possession, building upon, cutting trees, cultivating, drawing water or in any manner whatsoever from interfering with the Petitioner's property known as *I.R. No. 6420 L.R. No. 12621* (hereafter *the suit property*) pending the hearing and determination of the petition.

2. The said application was based upon the grounds set out on the face of the motion. It was contended that the Petitioner was the registered proprietor of the suit property measuring 13241.3 ha which borders the Kiambere Dam. It was further contended that the Respondents had unlawfully taken possession of the suit property, cultivated thereon, erected structures thereon, cut down trees thereon and drawn large volumes of water from the Kiambere dam to the detriment of the Petitioner. It was the Petitioner's case that the Respondents had ignored notices to vacate the suit property hence the filing of the petition.

3. The said application was supported by the affidavit of Stephen Riumuku Gathaiga sworn on 10th January 2019 in support of the petition. It was contended that the suit property was located in an ecologically sensitive area and that the Respondents' unlawful actions were bound to degrade the suit property and to adversely affect thousands of residents within the region and downstream users of water from Tana River and Kiambere dam. It was the Petitioner's case that the Respondents had violated its constitutional rights under **Articles 10, 40, 42, 43 and 60 of the Constitution of Kenya** which called for a conservative order pending the hearing and determination of the petition.

4. The 2nd Respondent filed a replying affidavit sworn by its managing director, Jean Paul Deprins, on 8th April 2019. The 1st Respondent denied all the material allegations of impropriety levelled against it. It also denied violating any of the constitutional rights set out by the petitioner in its petition and application for conservatory order. It was further stated that the 1st Respondent had changed its name to Better Globe Forestry Limited.

5. The 2nd Respondent contended that it entered the suit property with the Petitioner's full knowledge, authority and consent pursuant to a memorandum of understanding (hereafter MOU) dated 2nd May 2004. The Petitioner's ownership of the suit property was not disputed. It was contended that it was the Petitioner who initially approached the Respondents for the purpose of undertaking some forestry activities on part of the suit property.

6. The 2nd Respondent further contended that all concerned parties to the MOU were aware that the Respondent was going to plant trees on part of the suit property and that trees would take many years to mature for harvesting. It was further contended that a lease agreement could not be executed between the parties at the material time because the Petitioner did not have title documents for the suit property. The 2nd Respondent stated it planted some trees on a pilot basis on the assurance and permission of the Petitioner.

7. The 2nd Respondent denied degrading the suit property in any manner. It stated that, on the contrary, it had improved and rehabilitated badly eroded and wasted land by undertaking afforestation. It was contended that the 2nd Respondent had invested Kshs. 238 million in planting trees, soil maintenance, and control of soil erosion. Photographs depicting parts of the suit property before and after re-afforestation

were annexed to the replying affidavit.

8. The 2nd Respondent admitted having received a notice to vacate and stated that upon receipt it stopped planting any additional trees but it continued tending and maintaining the trees it had planted earlier on. The 2nd Respondent blamed the Petitioner for failing to facilitate the execution of a formal lease as earlier contemplated by the parties. It was the 2nd Respondent's case that it would not be possible to relocate the trees which have 7 more years to mature and that the only option available was to await their maturity before vacating as demanded by the Petitioner.

9. When the said application was listed for hearing on 15th May 2019 the advocates for the parties agreed to canvass it through written submissions. Consequently, the Petitioner was granted 30 days to file written submissions whereas the Respondents were similarly granted 30 days to file theirs. The record shows that the Petitioner filed its submissions on 15th July 2019 whereas the Respondents filed theirs on 15th August 2019.

10. The court has considered the Petitioner's said application for a conservatory order, the 2nd Respondent's replying affidavit in opposition thereto as well as the respective written submissions of the parties. The main question for determination is whether the Petitioner has made out a case for the grant of a conservatory order.

11. The test to be applied in granting or declining an application for a conservatory order was set out in the case of **Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 Others [2014]eKLR.** The nature of a conservatory order was described 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 the 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 …"**

12. The court has considered the entire material on record in this matter. In the first instance, the petition and application painted the Respondents as some ruthless tyrants who had, with impunity, invaded the suit property without regard to the Petitioner's property rights. The impression created by the Petitioner was that of some malicious Respondents who were viciously degrading and wasting the suit property to the detriment of the residents in Kiambere dam region. It was as if the Respondents were out to grab the Petitioner's land without due process.

13. The 2nd Respondent's replying affidavit in response to the petition and application, however, appears to have balanced out the serious allegations the Petitioner had levelled against them. It has emerged that the Respondents are law abiding entities which have had a long standing relationship with the Petitioner. That relationship was based or partly based upon the MOU dated 2nd May 2004. It would further appear that the Petitioner did not have title documents at the material time to facilitate the registration of a formal lease but it, nevertheless, permitted the Respondents to take possession of part of the suit property for the purpose of cultivating and planting trees.

14. It would further appear from the material on record that by the time the Petitioner acquired the title document in 2012, the management of the corporation had changed and the new team was no longer keen on having the Respondents on the suit property. The Respondents were consequently asked to vacate the suit property around the year 2013 but could not vacate since their trees were yet to mature. The Petitioner then decided to file the instant petition and application for a conservatory order.

15. It is clear from the material on record that the Respondents have been in occupation of the part of the suit property for over 14 years now. They entered the suit property with the permission of the Petitioner. They planted the trees and undertook other forestry activities with the knowledge of the Petitioner. It is common ground that trees may take several years to mature. It is not clear why the Petitioner is suddenly in a hurry to recover the portion of the suit property on which the Respondents have planted some trees which are yet to mature. The Petitioner appears to have a large tract of land most of which is degraded and without forest cover. The court is not satisfied that there is any compelling reason to justify a conservatory order pending the hearing and determination of the petition whereas the Respondents have been in possession for over 14 years. There is no evidence on record to demonstrate that the Respondents are degrading or wasting the portion of the suit property they are working upon. The material on record indicates that the 1st Respondent is engaged in afforestation and improvement of the land as opposed to its degradation.

16. The court is further of the opinion that the doctrine of estoppel may apply against the Petitioner in so far as it seeks to evict the Respondents from the suit property before maturity of the trees which it allowed them to cultivate. In the case of **Century Automobiles Ltd V Hutchings Biemer Ltd [1965] EA 304** and **Nurdin Bandali V Lombank Tanganyika Ltd [1963] E.A. 304,** it was held that the equitable doctrine of estoppel applied in East Africa. In the latter case it was held, *inter alia*, that:

> **"The precise limits of an equitable estoppel are, however, by no means clear. It is clear, however, that before it can arise one party must have made to another a clear and unequivocal representation, which may relate to the enforcement of legal rights, with the intention that it should be acted upon and the other party, in the belief of the truth of the representation, acted upon it."**

17. The court shall say no more on the merits of the application. There is a risk of making comments, remarks or observations which may prejudice the fair hearing of the main petition. Suffice to state, however, that the court is far from satisfied that the Petitioner has met the threshold for the granting of a conservatory order in a petition alleging violation of its constitutional rights.

18. The upshot of the foregoing is that the court finds no merit in the notice of motion dated 4th March 2019. Accordingly, the same is hereby dismissed. Costs of the application shall be costs in the petition.

19. It is so ordered.

RULING DATED, SIGNED and **DELIVERED** in open court at **EMBU** this **3RD DAY** of **OCTOBER 2019.**

In the presence of Ms. Ikenye holding brief for Mr. Otenyo for the Respondents and in the absence of the Petitioner.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

03.10.19