



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**CONSTITUTIONAL PETITION NO. 5 OF 2019**

**SPRINGFIELD FARMERS COOPERATIVE SOCIETY LTD..... PETITIONER**

**VERSUS**

**1. THE HONOURABLE ATTORNEY GENERAL**

**2. W.C. KIMAIYO, DEPUTY COUNTY COMMISSIONER**

**LIKUYANI SUB COUNTY.....RESPONDENTS**

**RULING**

The application is dated 17<sup>th</sup> July 2019 and is brought under Articles 1,2,19,20,21,22,23,27,40,47,73,159,258 and 259 of the Constitution of Kenya, 2010; Rules 13 and 19 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms Practice and Procedure Rules, 2013) seeking the following orders;

1. THAT the application be certified urgent and heard ex parte in the first instance.
2. THAT the petition filed herewith be set for hearing and determination on priority basis owing to the urgency.
3. THAT interim conservatory orders do issue stopping, and/or halting, any such fencing, construction and alienation being, undertaken by the respondents in regard to the Petitioner's L.R. No. Kakamega/Kongoni/327 pending the hearing and determination of this application.
4. THAT interim conservatory orders do issue stopping, and/or halting any such fencing, construction and alienation pending the hearing and determination of the petition.
5. THAT the respondents be ordered to remove the unlawfully erected fence and structures forthwith.
6. THAT the costs of this application be borne by the respondents.
7. Any other remedy that the court deems fit and just to grant.

It is based on the grounds that the petitioner is the lawful allottee of land parcel number Kakamega/Kongoni/327 having been so allocated on 4<sup>th</sup> March 1969. The respondents, and in particular, the 2<sup>nd</sup> respondent has and continues to unlawfully erect barbed fence and structures on the petitioner's aforesaid land. That the respondents' unlawful actions have and continue to deprive the petitioner the right of user, its officials cannot access the land in question. The respondents intend to demolish the petitioner's semi-permanent rental houses and the cattle dip as the 2<sup>nd</sup> respondent has unlawfully chased away the petitioner's tenants. The 2<sup>nd</sup> respondent's unlawful actions are unreasonable and arbitrarily limit the fundamental right and freedom of the petitioner and its members. The 1<sup>st</sup> respondent has failed to execute his powers under article 156(4) (6) and (7) of the Constitution despite having been served with notice. There is eminent danger and threat that the petitioner and its subjected to hardships contrary to the dictates of the Constitution of Kenya, 2010 and the process of compulsory acquisition and principles as stipulated under various laws of Kenya having not been followed by the respondents. The current operations of the 2<sup>nd</sup> respondent which is unlawful is in direct contravention of the Constitution of Kenya, 2010 and the same limits and hampers various fundamental freedoms and right of the petitioner and its members. That as it is, the respondents unlawful action is in direct contravention of Articles 2(1), (4), (5) and (6) of the Constitution of Kenya, 2010 in as far as the inconsistencies are concerned and anything done under the impugned provisions of the Constitution of Kenya, 2010. That the applicant/petitioner file the instance suit on their behalf and on behalf of its members, in the public interest and in defence of the Constitution of Kenya, 2010. That it is therefore in the interest of justice that this Honourable Court intervenes in the circumstances. That the 2<sup>nd</sup> respondent's actions are ultra vires and they go against the constitution of Kenya, 2010 and are thus sowing seeds of discord in the society. That the process of compulsory acquisition not a one off event. It is a process that commences with involving the proprietor, valuation and consideration. That in the event that no interim orders are granted

herein, there is great prejudice to be suffered. It is in the interest of justice that this Honourable Court urgently intervenes in the circumstances by upholding and giving effect to the constitutional principles and upholding the public interest which is to the effect of upholding constitutionalism and safeguarding the usage and spending of public resources and upholding the fundamental freedoms and rights of the petitioner and its members.

The respondents submitted that the suit parcel of land Kakamega/Kongoni/327 was set aside as a public utility on 6<sup>th</sup> September, 1976 and whose current registered owner is the Settlement Fund Trustee (annexed and marked as WCI 1 is a copy of the certificate of official search). That through the all leaders meetings held on 10<sup>th</sup> July, 2018 and 26<sup>th</sup> October 2018 all leaders in the sub county resolved that the Deputy County Commissioner official residence be put up on the said public utility (annexed and marked as WC 2(a) and (b) are copies of the minutes). That the Deputy Commissioner convened a meeting with the officials of the petitioner herein on 25<sup>th</sup> July, 2018 at his office where members agreed after lengthy deliberations to withdraw their objections on the one-acre piece of land being hived off from suit property, Kakamega/Kongoni/327 for the construction of the Deputy Commissioner official residence (attached and marked as WC 3 is a copy of the minutes). That further to the above, the Chairman of the Applicant's Cooperative Society attended all the meetings as captured in the minutes. That construction of the Deputy County Commissioner official residence on the suit parcel of land is not a private project by the 2<sup>nd</sup> respondent but a project undertaken and facilitated by the Likuyani NG-CDF Likuyani Constituency and such the 2<sup>nd</sup> respondent should not be sued in his own private capacity.

This court has considered the application and the submissions therein. The Supreme Court in **Gitirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Others (2014) eKLR** while discussing conservatory orders held 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 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...The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal...These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely...That it is in the public interest that the order of stay be granted. This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through the Constitution.”***

The law on the granting of conservatory orders is well settled and Odunga J in **Kevin K. Mwitwa Others v Kenya School of Law & Others (2015) eKLR** stated:

***“The first issue for determination is whether the Petitioner has established a prima facie case. 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 which discloses arguable issues and in this case arguable Constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success.”***

Therefore the first to be determined is whether the Petitioners have established a *prima facie* case. A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (2003) eKLR** as follows:

***“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”***

The Petitioners submitted that they are the lawful allottees of land parcel number Kakamega/Kongoni/327 having been so allocated on 4<sup>th</sup> March 1969. The respondents, and in particular, the 2<sup>nd</sup> respondent has and continues to unlawfully erect barbed fence and structures on the petitioner's aforesaid land. That the respondents' unlawful actions have and continue to deprive the petitioner the right of user, its officials cannot access the land in question. The respondents intend to demolish the petitioner's semi-permanent rental houses and the cattle dip as the 2<sup>nd</sup> respondent has unlawfully chased away the petitioner's tenants. The respondents submitted that the suit parcel of land Kakamega/Kongoni/327 was set aside as a public utility on 6<sup>th</sup> September, 1976 and whose current registered owner is the Settlement Fund Trustee (annexed and marked as WCI 1 is a copy of the certificate of official search). That through the all leaders meetings held on 10<sup>th</sup> July, 2018 and 26<sup>th</sup> October 2018 all leaders in the sub county resolved that the Deputy County Commissioner official residence be put up on the said public utility (annexed and marked as WC 2(a) and (b) are copies of the minutes). That the Deputy Commissioner convened a meeting with the officials of the petitioner herein on 25<sup>th</sup> July, 2018 at his office where members agreed after lengthy deliberations to withdraw their objections on the one acre piece of land being hived off from suit property, Kakamega/Kongoni/327 for the construction of the Deputy Commissioner official residence (attached and marked as WC 3 is a copy of the minutes). I find that the current ownership of the suit land appears to be in dispute. That the applicant/petitioner is not the registered owner of the suit parcel of land. I find that the petitioners have failed to establish a prima facie case and conservatory orders cannot be granted. I find this application is not merited and I dismiss it. Costs to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 18<sup>TH</sup> DECEMBER 2019.**

**N.A. MATHEKA**

**JUDGE**