



**Mwandori & 7 others v Weda & 7 others (Environment & Land Petition
19 of 2021) [2024] KEELC 46 (KLR) (15 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 46 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND PETITION 19 OF 2021**

**MAO ODENY, J
JANUARY 15, 2024**

BETWEEN

**KILLIAN MWAJANJI MWANDORI 1ST PETITIONER
FARES KAZUNGU MWAFUNGO 2ND PETITIONER
KAINGU JAPHET KUFUJA 3RD PETITIONER
WILSON KAI DECHE 4TH PETITIONER
NYEVU MAZIHA MUKONGU 5TH PETITIONER
RAJAB NYALE MWANYAE 6TH PETITIONER
JUMA MWASEMU MWANYAE 7TH PETITIONER
ALFEIT MUMBO ABIO GUNDA 8TH PETITIONER**

AND

**ALI NDOROR WEDA 1ST RESPONDENT
HENRY MWANGOME TSUMA 2ND RESPONDENT**

AND

EVANS MPATE MBARU PETITIONER

AND

**EMMANUEL NDORO DIDA 1ST RESPONDENT
FARAJ MWANGOME 2ND RESPONDENT
KILIFI COUNTY LAND ADJUDICIAION OFFICER 3RD RESPONDENT
COUNTY GOVERNMENT OF KILIFI 4TH RESPONDENT
NATIONAL LAND COMMISSION 5TH RESPONDENT**



RULING

1. This ruling is in respect of a Notice of Motion dated August 23, 2021 by the petitioners' seeking the following orders;
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of this motion or until further orders of the court, a conservatory order be issued restraining the 1st to 5th respondents from sitting in Mtwapa- Kidutani Settlement Committee and specifically restrain the 1st to 5th respondents from identifying or selecting beneficiaries, sitting or hearing disputes relating to settlement of persons on Land Reference Number G.L 15A, the suit property herein.
 - d. That pending the hearing and determination of petition or until further orders of the court, a conservatory order be issued staying the appointments of the 1st to 5th respondents as members of the Mtwapa- Kidutani Settlement Committee.
 - e. That pending the hearing and determination of petition or until further orders of the court, a conservatory order be issued restraining the 1st to 5th respondent from sitting in the Mtwapa- Kidutani Settlement Committee and specifically restrain the 1st to 5th respondents from identifying or selecting beneficiaries, sitting or hearing disputes relating to settlement of persons on Land Reference Number G.L 15A, the suit property herein.
 - f. That any other or further interim relief or reliefs as deemed just and expedient by the court under the circumstances.
 - g. That costs of the application be provided for.
2. The application is based on the grounds set out on the face of the application, the supporting affidavit of Killian Mwajanji Mwandori the 1st petitioner who deponed that in the year 1988, the suit property was surveyed, and a head count of the occupants conducted establishing 174 families including the Petitioners.
3. The applicant further deponed that the families including the petitioners were allotted plots, which they have been in occupation of until when the 1st to 5th respondents with the assistance of government officers hatched a plan to dispossess and deprive the petitioners of their land. He stated that they reported the invasions to the 7th respondent on May 2, 2014 and no action was taken.
4. The applicant deponed that the inaction by the 7th respondent led to the institution of Kilifi PMCC No. E52 of 2020 and Kilifi PMCC No. E16 of 2020 where the court on diverse dates issued injunctive orders against the 1st to 5th respondents restraining them from accessing, trespassing into or in any manner whatsoever hindering the Petitioners' peaceful use and occupation of the suit property.
5. The petitioner stated that despite the 1st to 5th respondents having pending issues relating to the suit parcel of land, they have been appointed to oversee allocation, which violates Article 73 of [*the constitution*](#) and it is in public interest that conservatory orders issue.
6. The 2nd respondent Henry Mwangome Tsuma filed a Replying Affidavit on his behalf and of the 2nd, 3rd and 4th respondents whereby he deponed that there has always been a mix up on the question of



the suit property and clarified that G.L 15A is a piece of Government land measuring approximately 100 acres which was surveyed under the new Kidutani Settlement Scheme pending allocation to the beneficiaries.

7. He also deponed that the parcel of land does not form part of Nyika Reserve which is yet to be surveyed, adjudicated and regularized to the local community. It was the 2nd Respondent's case that the other parcel of land is Private property which is not utilized by the owners but occupied by squatters.
8. The 2nd Respondent further deponed that that the property in dispute includes Nyika Reserve and private property and the name Mtwapa/Kidutani G.L 15A was created to mislead the court that the entire suit property in question covers only G.L 15A and is within Mtwapa/Kidutani which is not true. Further that there was a dispute in Nyika Reserve which was resolved by the Land Disputes Tribunal thus the petitioners have no claim in the suit land.

Petitioner/Applicants' submissions

9. Counsel submitted that the petitioners have met the threshold for grant of conservatory orders as set out in the cases of *Wilson Kaberia Nkunja v Magistrates and Judges Vetting Board & another* [2016] eKLR, *Board of Management of Uburu Secondary School v City County Director of Education & 2 others* [2015] eKLR and urged the court to grant the orders as prayed.

1st 2nd 3rd and 4th respondents' submissions

10. Counsel submitted that the respondents were legally appointed as members of the Committee and that the 1st petitioner does not have authority to plead on behalf of the other petitioners as required by law.
11. Counsel further submitted that the application is res judicata as per Section 7 of the *Civil Procedure Act* and relied on the cases of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR and *Pangaea Holdings LLC & another v Hacienda Development Ltd & 2 others* [2020] eKLR and urged the court to strike out the application with costs.

Analysis And Determination

12. The issue for determination is whether the Applicants have established a case for the grant of conservatory orders.
13. The principles to be considered in an application for conservatory orders were summarized in the case of *Okiya Omtatah Okoiti v Judicial Service Commission; Philomena Mbete Mwilu & another (Interested Parties)* [2021] eKLR where the court in reference to various decisions of the superior Courts stated as follows;

“In Civil Application No. 5 of 2014 *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* (2014) eKLR, the Supreme Court discussed, at paragraph 86, the nature of conservatory orders as follows: -

- (86) 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 a case; or “high probability of success” in the Applicant's case for orders of stay.”



14. In the case of *Wilson Kaberia Nkunja v Magistrates and Judges Vetting Board & another* [2016] eKLR(supra) the court held that:
- A. “ an applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*”
 - B. Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
 - C. The public interest must be considered before grant of conservatory order
15. The Applicant must establish a prima facie case with a likelihood of success and that is the conservatory order is not granted there will be real danger of violation or threatened violation of *the Constitution*.
16. The court should also ascertain whether the grant of a conservatory order will not delay the determination of the dispute as was held in the case of *Kenya Tea Development Agency Holdings Limited & 55 others v Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries & Co-operatives & 2 others; Kenya Small Tea Holders Growers Association (Kestega (Interested Parties))* [2021] eKLR.
17. Similarly in the case of *Judicial Service Commission v Speaker of the National Assembly & Another* [2013] eKLR the Court held that:
- “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.
- Given the nature of conservatory orders, it is argued, that there is need for a Court to exercise caution when dealing with any request for such prayers. I agree with that proposition for the reason that matters which are the preserve of the main Petition ought not to be dealt with finality at the interlocutory stage.”
18. The petitioners have explained the circumstances under which the respondents were appointed to the Land Committee, which is to deal with identification of the beneficiaries. They fear that there might be interference with the allocation as the respondents are also interested in the suit land. When there is real or perceived unfairness in the administration of public duty, it would be in the interest of justice that a neutral arbiter is appointed to carry out the said duty.
19. In the case of *David Ndiu & others v Attorney General & others* [2021] eKLR, the court in granting conservatory orders held that;
- “... Such orders are granted to preserve the substratum of the Petition and therefore, where it is contended that there is a threat of violation of *the Constitution*, any stage in the chain of a constitutional process under challenge may properly be the subject of a conservatory order as long as that action is consequential to the process under challenge...”
20. In this case, if the appointment of the 1st to 5th respondents is upheld, the allocation exercise shall be carried out to the detriment of the petitioners. The respondents are also a party to the dispute, which is still pending hearing and determination.



21. The upshot is that the application for conservatory orders is allowed as prayed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF JANUARY 2024.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

