



Ogiek Council of Elders, Narok Chapter (Suing on their own behalf and on behalf of the Ogiek of Maasai Mau Forest) v Attorney General & 2 others (Environment & Land Petition E005 of 2023) [2024] KEELC 1649 (KLR) (19 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1649 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND PETITION E005 OF 2023
CG MBOGO, J
MARCH 19, 2024

N THE MATTER OF: ARTICLES 2(5), 10, 19, 20, 21, 28, 35, 40, 42, 44, 47, 52, 56, 63(2), 69 AND 260 OF THE CONSTITUTION

AND

IN THE MATTER OF THE ACCESS TO INFORMATION ACT NO. 31 OF 2016

AND

IN THE MATTER THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF THE LAND ACT, 2016

BETWEEN

OGIEK COUNCIL OF ELDERS, NAROK CHAPTER PETITIONER
SUING ON THEIR OWN BEHALF AND ON BEHLAF OF THE OGIEK OF
MAASAI MAU FOREST

AND

ATTORNEY GENERAL 1ST RESPONDENT

CABINET SECRETARY MINISTRY OF ENVIRONMENT, FORESTRY &
CLIMATE CHANGE 2ND RESPONDENT

KENYA FOREST SERVICE 3RD RESPONDENT



RULING

1. Before this court is the Notice of Motion Application dated 3rd of November, 2023 expressed to be brought under Rules 23 and 24 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice Directions, 2013* seeking the following orders: -
 1. Spent
 2. Spent
 3. Spent.
 4. Pending the hearing and determination of the Petition, conservatory orders do issue, stopping the respondents, their agents, representatives, assigns and officers from conducting any evictions against the petitioner in Sasimuani area within Maasai Mau Trust Land.
 5. Costs of the application be provided for.
2. The application is premised on the grounds inter alia that the Ogiek community members reside within Sasimuani area of Maasai Mau Trust Land, that on 26th May, 2017, the African Court on Human and Peoples' Rights delivered a judgment in the *African Commission on Human & Peoples' Right in Republic of Kenya, Application No. 006 of 2012* which court found that the Mau Forest Complex is the ancestral lands of the Mau Ogiek and that the Government of Kenya forceful eviction of the Mau Ogiek from their ancestral lands violated their rights to culture, religion, property, natural resources, development and freedom from non-discrimination.
3. The application is supported by the affidavit of Wilson Memusi, sworn on even date. The applicant deposed that as part of the Ogiek Council of Elders of Narok Chapter, he confirmed that the Ogiek community members live in Sasimuani area within the Maasai Mau Trust Land where, there are about 5 clans. He deposed that as of December, 2022 the Mau Ogiek community members residing in the area were 766 adults, excluding their children who attend primary and secondary schools.
4. The petitioner/applicant further deposed that the *Constitution* of Kenya protects the rights of indigenous communities such as the Ogiek of Sasimuani within Maasai Mau Trust Land which is held in trust by the County Government of Narok.
5. The petitioner/applicant deposed that on 26th May, 2017 the African Court on Human and Peoples' Rights delivered a judgment which the petitioner/applicant was part of, and the court found that the Mau Forest is their ancestral land and that the forceful eviction of the Mau Ogiek from their ancestral land violated their right to culture, religion, property, natural resources, development and non-discrimination. He further deposed that the court affirmed its finding that the respondent state being responsible for the violations of the rights of Ogiek, bore the responsibility of rectifying the consequences of its wrongful acts. Further, that according to the court, ownership of land for indigenous people entails the right to control access to indigenous land and that there must be more than an abstract or juridical recognition of the right to property.
6. The petitioner/applicant further deposed that the African Court on Human and Peoples' Rights issued several orders to be implemented by the government including the respondents. Further, that on 30th September, 2023, he heard the President, on national television addressing the mourners attending a burial, that people will be removed from the Mau Forest. He further deposed that from the President's statement, his assumption was that the people who had encroached on the forest



- were the ones who would be removed. He deposed that they went to the enquire from the County Commissioner and the Regional Commissioner but they did not receive any response or action.
7. Further, that on 19th October, 2023, the 2nd respondent issued a press release stating that they were reclaiming Mau forest from encroachment and illegal eviction. That on 24th October, 2023, he saw representatives of the Kenya Wildlife Service demolishing houses on Naituyupaki area. That on 25th October, 2023, he was informed by Mr. Mutoro of Kenya Forest Service that the community should gather all the children in one area because the Kenya Forest Service would go around to evict the community members. Further, that on 26th October, 2023, he was informed that the District Officer stated that the Mau Ogiek should move out of their homes because they would be evicted.
 8. The petitioner/applicant further deposed that they began pulling down houses belonging to the residents of Sasimuani area including members of the Ogiek community. That on 2nd November, 2023, the officers from the Kenya Wildlife Service, Kenya Forest Service and the Administration Police destroyed their dwellings, and he lost all his belongings and other valuables. Further, he deposed that he has not seen any written notice and if the ongoing evictions are not halted, they stand to suffer irreparable loss and damage. Further, that there are also older members of the community who would be affected.
 9. He deposed that the reparations judgment on 23rd June, 2023, found that the Government of Kenya should implement several orders including seeking the free prior and informed consent of the community because Mau Forest Complex was their ancestral land. It was his deposition that the Government of Kenya has not implemented any of the orders issued and instead, it is threatening to continue violating the Ogiek who live in the Maasai Mau Trust land.
 10. The application was further supported by the affidavits of Stephen Ngusilo and Veronica Naipanoi Ngusilo sworn on even dates. Their supporting affidavits reiterated the averments contained in the supporting affidavit of Wilson Memusi and there would be no need of rehashing the same.
 11. The application was opposed by the 1st respondent's undated grounds of opposition filed in court on 21st November, 2023. The 1st respondent challenged the application on the following grounds: -
 1. That a relief for conservatory orders is *prima facie*, only available when a party is alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or is threatened. Besides, the petitioner must establish that they have *prima facie* with high chances of success. The mere allegation that the petitioners' fundamental rights have been contravened is not in itself sufficient to entitle the petitioner to the conservatory remedies sought.
 2. That the conservatory orders sought by the petitioner/applicant cannot issue as the application and the petition do not meet the standards as set by the Supreme Court of Kenya in [Gatirau Peter Munya versus Dickson Mwenda Kithinji & 2 Others](#) [2014] eKLR that conservatory orders, therefore, are not in like 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 applicants case for orders of stay.
 3. 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.
 4. That the [Constitution](#) of Kenya 2010 under Article 60 provides for the principles of land policy in Kenya that land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with, among other



principles, sustainable and productive management of land resources, and sound conservation and protection of ecologically sensitive areas.

5. That the Constitution under Article 69 provides that the state has an obligation to eliminate processes and activities that are likely to endanger the environment; and utilize the environment and natural resources for the benefit of the people of Kenya. Every person, organization or group of persons have a duty, which is also a duty bestowed upon the petitioner/applicant herein to cooperate with State organs and other persons and conserve the environment and ensure ecologically sustainable development and use of natural resources.
6. That the state cannot be barred from exercising a duty invested by the Constitution in the public interest in a key role like conservation of the environment. Public interest in the matter outweighs individual or group interest and cannot therefore be stopped for the selfish interest of a person or group like the applicant/petitioner herein.
7. That the petitioners are trying to re-litigate and to enforce the judgment of the African Court on Human & Peoples' rights.
8. That while the petitioners admit that the said judgment has not been implemented, it follows that having been evicted before the said judgments they have again, without any right, illegally invaded and attempted to settle in the Mau Forest Reserve.
9. That other than the false allegation that they are entitled to use the forest the petitioners have no right whatsoever to settle, reside and dwell in the Mau Forest Reserve.
10. That if the petitioners require to use the forest for their lively hood, they can only do so through supervision, regulation and license granted to them by the Kenya Forest Service under Forest Conservation and Management Act No. 34 of 2016 Act. The petitioners have not demonstrated that they have acquired such licenses.
11. That the petitioners must demonstrate real danger imminent and evident, true and actual and not fictitious, so as to deserve immediate redress by this honourable court.
12. That the petitioners have not demonstrated any prejudice or irreparable harm, damage or injury likely to be suffered if the conservatory orders sought are not granted.
13. That the petitioners have not demonstrated that if conservatory reliefs sought are not granted, the petition will be rendered nugatory.
14. That the entirety of the petitioners' claim is unmerited in that it does not disclose and demonstrate any threat or violation of the Constitution or any other laws and is premised on conjecture and misconceptions that negate the substance and object of the Act.
15. That the Mau forest having been recovered and rehabilitated see the judgment in Joseph Kimeto Ole Mapelu & 12 Others versus Cabinet Secretary, Ministry of Lands, Housing and Urban Development & 10 Others [2020] eKLR and any such other relevant cases, it will therefore, be wrong to allow the petitioners back into the forest as this will undermine the great efforts that have been undertaken to preserve and conserve the Mau forest in recent years.
16. That there is no basis granting conservatory orders and granting the same will lead to irreparable loss and damage to the Mau Forest Reserve and the environment on the other hand, the petitioners will not be prejudiced in any way as they can return to their regular private land where they settled before they invaded the forest.



12. The petitioner/applicant herein filed a further affidavit in response to the grounds of opposition sworn on 22nd November, 2023 by Wilson Memusi. The petitioner/ applicant deposed that the nature of the petition raises arguable issues of fact and law, which show a *prima facie* case and also raises issues of public interest for conservatory orders to be granted because it deals with violation of constitutional rights as well as the protection of minority groups that need additional protection under Articles 52 and 56 of the [Constitution](#).
13. The petitioner/ applicant further deposed that the Mau forest complex, is a matter of great public interest which has also been widely dealt with herein within the jurisdiction, regionally and internationally. Further, that the 1st respondent is attempting to reopen issues already argued and settled at the African Court on Human & Peoples Rights and which are not the subject of dispute before this court. He deposed that the Kenyan government is attempting to remove the Ogiek from their ancestral lands through demolishing houses and threatened evictions, and has failed to uphold the rule of law which is central to this case.
14. The petitioner/ applicant further deposed that the respondents blatant disregard of the rule of law contrary to the [Constitution](#), have failed to recognize that the [Constitution](#) under Articles 22 and 258 grants the petitioner/applicant the power to approach the court and lodge a claim that the state has violated their rights. Further, he deposed that the respondents have not placed any evidence before the court showing that Mau Ogiek Community were not living in Sasimwani within Mau forest when these new threats to the eviction took place in October, 2023.
15. The petitioner/applicant further deposed that the African Court on Human and Peoples' Rights already held that the Mau Forest is their ancestral land which is owned and is the property of the Mau Ogiek community, and this court cannot rehear such issue. Also, that the 1st respondent is attempting to make this court make final findings at the interlocutory stage which will determine the petition. Further, that through the three affidavits in support of the application, it has been shown that there is imminent danger through evictions and destruction of property of other members of neighbouring communities and the existing threats they face, of removal from their land.
16. The petitioner/ applicant further deposed that as of 10th November, 2023, conservatory orders were issued in favour of the Mau Ogiek community against any eviction of the Mau Ogiek community members in the entire Mau Forest Complex in the ELC court sitting in Nakuru, and these orders as against the state, were to stop any evictions or attempted evictions from the entire Mau Forest Complex including Sasimwani as within Maasai Mau forest, which is also part of the case before this court. Further, that the ELC court has already issued conservatory orders in their favour pending the hearing and determination of the petition even after the merits judgment of the African Court had been issued.
17. The application was canvassed by way of written submissions. On 12th February, 2024, the petitioner/ applicant filed its written submissions dated 9th February, 2024 where it raised one issue for determination which is whether this court should issue conservatory orders stopping the respondents, their agents, representatives, assigns and officers from conducting any evictions against the petitioner in Sasimwani Area within Maasai Mau Trust land.
18. On this issue, the petitioner/applicant submitted that the respondents are attempting to use the grounds of opposition to make this court make pronouncement that will give orders in finality and that will determine the issues in dispute in the petition, and it relied on the case of [Muslim for Human Rights \(Milimani\) & 2 Others versus Attorney General & 2 Others](#) [2011] eKLR.
19. The petitioner/ applicant further submitted that they have met the requirements for this court to grant conservatory orders as provided under Article 23 (3)(c) of the [Constitution](#). While relying on the cases



- of *Gatirau Peter Munya versus Dickson Mwenda Kitbinji* [2014] eKLR, *Centre for Rights Education & Awareness (CREAW) versus Attorney General* [2011] eKLR and *Law Society of Kenya versus Office of the Attorney General & Another; Judicial Service Commission (Interested Party)* [2020] eKLR, the petitioner/ applicant submitted that they have an arguable case with a likelihood of success and in the absence of conservatory orders, they will likely suffer prejudice and that grant of the orders will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
20. On the 16th February, 2024 the 1st respondent filed its written submissions dated 15th February, 2024. While relying on the case of *Wilson Kaberia Nkunja versus The Magistrates and Judges Vetting Board & Others* [2016] eKLR, *Board of Management of Uburu Secondary School versus City County Director of Education & 2 Others* [2015] eKLR, *Mrao Limited versus First American Bank of Kenya Limited & 2 Others* [2003] eKLR and *Dry Associates Limited versus Capital Markets Authority; Interested Party Crown Berger (K) Limited* [2012] eKLR the 1st Respondent submitted that the application is based on the roadside declaration that was made by the President that encroachers of Mau Forest Complex will be removed as there is no official communication to that effect.
 21. The 1st respondent further submitted that it is only the National Land Commission that has the constitutional mandate to manage, alienate and allocate public land and as such, the application has fallen short of the test required for the grant of conservatory orders.
 22. The 1st respondent submitted that the affidavits do not refer to presence of imminent danger and the attached photographs do not comply with the mandatory requirements of the *Evidence Act*. Reliance was placed on the case of *Martin Nyaga Wambora versus Speaker of the County of Assembly of Embu & 3 Others* [2014] eKLR.
 23. The 1st respondent further submitted that in line with Article 69 of the *Constitution*, sustainable realization of natural resources which is the principal object of environmental law and the encroachment of Mau Forest goes against the principal of sustainability as well as the principle of intergenerational equity and therefore, the government has a responsibility to protect and preserve the interest of the public now and for posterity.
 24. I have considered the application, replies thereof and the written submissions filed by the petitioner and the 1st respondent. In my view, the issue for determination is whether the petitioner/ applicant is entitled to the orders sought.
 25. The Supreme Court in Civil Application No 5 of 2014 *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others* (2014) eKLR, the court discussed, at paragraph 86, the nature of conservatory orders 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 a case; or “high probability of success” in the applicant’s case for orders of stay.”
 26. In *Katiba Institute vs Judicial Service Commission & 2 others; Kenya Magistrates and Judges Association & 2 others (Interested Parties)* (Constitutional Petition E128 of 2022) [2022] KEHC 438 (KLR)



(Constitutional and Human Rights) (3 June 2022) (Ruling), Mrima, J in granting conservatory orders observed as follows: -

“The nature of conservatory orders was further discussed in *Judicial Service Commission v Speaker of the National Assembly & another* [2013] eKLR where the court had the following to say: -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.

84. Conservatory orders are, therefore, aimed at preserving the substratum of the matter pending the determination of the main issues in dispute.

85. Given the interlocutory 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.”

27. While I place reliance on the above cited authorities and looking at the nature of the application before me, I find the instant application to be one for such consideration.

28. However, the petitioner/applicant in their further affidavit, have acknowledged that indeed the ELC court sitting in Nakuru, granted conservatory orders on 18th December, 2020 which in their view, included Sasimuani Area within the Mau Forest Complex.

29. As observed hereinabove the petitioner/applicant in their further affidavit admitted that they obtained orders in Petition E001 of 2023 before the ELC Court in Nakuru which covers the Mau Forest Complex including Sasimuani Area. I have perused the annexed attached to the further affidavit. The said orders refer to the Mau Forest Complex wherein they obtained interim conservatory orders pending hearing of the application. Further, the orders indicate that the application was pending hearing on 28th November, 2023.

30. The petitioner/applicant has not disclosed what transpired of the application before the ELC court sitting in Nakuru. The petitioner/ applicant is in my view engaged in forum shopping.

31. To avoid embarrassing this court, I am not inclined to grant the orders at this stage for the reason that the petitioner is trying to seek orders from courts of concurrent jurisdiction which is not permissible in law.

32. The Notice of Motion Application dated 3rd November, 2023 is hereby dismissed. Costs in the cause.

It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 19TH DAY OF MARCH, 2024.

HON. MBOGO C. G.

JUDGE

In the presence of: -

Mr. Meyoki Pere – C. A

