



**Gikenyi & 7 others v Gacanja & 8 others; Ethics & Anti-Corruption Commission  
& 3 others (Interested Parties); Nyakundi (Proposed Interested Party)  
(Petition E073 of 2024) [2025] KEELC 4492 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 4492 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
PETITION E073 OF 2024  
JG KEMEL, J  
MARCH 27, 2025**

**BETWEEN**

**DR MAGARE GIKENYI ..... 1<sup>ST</sup> PETITIONER  
DISHON MOGIRE KEROTI ..... 2<sup>ND</sup> PETITIONER  
PAULINE NDU'TA KINYANJUI ..... 3<sup>RD</sup> PETITIONER  
PHILIMON ABUGA NYAKUNDI ..... 4<sup>TH</sup> PETITIONER  
SHALLUM KAKA NYAKUNDI ..... 5<sup>TH</sup> PETITIONER  
AGNES WANZU WAAMBUA ..... 6<sup>TH</sup> PETITIONER  
SEMERE GOODWILL ..... 7<sup>TH</sup> PETITIONER  
MARK FORTUNE OMONDI ..... 8<sup>TH</sup> PETITIONER**

**AND**

**WILSON GACANJA ..... 1<sup>ST</sup> RESPONDENT  
ELIZABETH GISHIRI GACANJA ..... 2<sup>ND</sup> RESPONDENT  
SONETH LIMITED ..... 3<sup>RD</sup> RESPONDENT  
NATIONAL LAND COMMISSION ..... 4<sup>TH</sup> RESPONDENT  
COUNTY EXECUTIVE COMMITTEE MEMBER BUILT ENVIRONMENT &  
URBAN PLANNING NAIROBI CITY COUNTY ..... 5<sup>TH</sup> RESPONDENT  
NAIROBI CITY COUNTY ..... 6<sup>TH</sup> RESPONDENT  
CHIEF LAND REGISTRAR ..... 7<sup>TH</sup> RESPONDENT  
CHIEF LAND SURVEYOR ..... 8<sup>TH</sup> RESPONDENT**



HON ATTORNEY GENERAL ..... 9<sup>TH</sup> RESPONDENT

AND

ETHICS & ANTI-CORRUPTION COMMISSION ..... INTERESTED PARTY

LAW SOCIETY OF KENYA ..... INTERESTED PARTY

KITUO CHA SHERIA ..... INTERESTED PARTY

KATIBA INSTITUTE ..... INTERESTED PARTY

AND

BEN OMENGE AMORO NYAKUNDI ..... PROPOSED INTERESTED PARTY

*(In respect of the Petitioners' application dated 10/9/2024 and  
Proposed 5th Interested Party's application dated 6/1/2025)*

### RULING

1. This is a ruling in respect of two applications. The first application is dated 10/9/2024. It is brought by the Petitioners and it substantively seeks the following orders: -
  - a. That pending the determination of this Petition interparties, a conservatory order be issued suspending/baring the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and all parties herein and/or any other person and /or their agents, and/or purported tenants from transacting, changing use, managing, transferring, selling, leasing and/or in any way interfering or dealing with the suit property (Plot LR 2X9/3X1/2 and/or LR 2X9/11XX1 and/or LR 2X9/11XX2 and/or any other related plot numbers) hereinafter called the Suit lands).
  - b. That pending the determination of this Petition inter parties, a conservatory order be issued prohibiting the Respondents either by themselves, their agents and/or any other persons whatsoever from acting and/or giving effect to any purported change of use, any transactions and/or purported ownership of the suit property (Plot LR 2X9/3X1/2 and/or LR 2X9/11XX1 and/or LR 2X9/11XX2 and/or any other related plot numbers).
  - c. Costs be in the cause.
2. The application is premised on the grounds on the face it and further supported by the Affidavit of Dr. Magare Gikenyi, the 1<sup>st</sup> Petitioner, swearing it on his own behalf and that of and of his Co-Petitioners. The Petitioners aver that while going on with their day to day activities around Kilimani area of Nairobi, they saw a Public notice indicating a change of user in a public land purportedly now in private hands. Upon further inquiry, they discovered that the 1<sup>st</sup> to 3<sup>rd</sup> Respondents had sub-divided the said public land L.R 2X9/3X1/2 into two parcels; - LR 2X9/11XX1 and LR 2X9/11XX2 and allocated them to the 3<sup>rd</sup> Respondent despite the records from Registrar of Lands and Nairobi City County Land Rates Office showing that the land still public land.
3. The deponent avers that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are the directors of the 3<sup>rd</sup> Respondent as evidenced from the CR 12 obtained from the Registrar of Companies. The Petitioners allege that the purported allocation took place when the 1<sup>st</sup> Respondent served as a Commissioner of Lands.



4. The Petitioners further argue that the Register at the Ministry of Lands does not show the existence of parcel of land known as L.R 2X9/11XX2 or how the 3<sup>rd</sup> Respondent acquired the land from the National Land Commission. That there are no approvals whatsoever to that effect. That the record shows that there are overdue rates owed to the Nairobi City County and aver that the purported subdivision together with the resultant titles are null and void. They accuse the 4<sup>th</sup> to 9<sup>th</sup> Respondents of failing in their duty to protect public land. hat this is a matter of Public interest hence the application should be allowed as prayed.

#### **The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' Replying Affidavit.**

5. In opposing the motion, the 1<sup>st</sup> to 3<sup>rd</sup> Respondents filed a Replying Affidavit sworn by Wilson Gacanja on 1/10/24. He stated that he together with the 2<sup>nd</sup> Respondent are the directors of the 3<sup>rd</sup> Respondent. The deponent avers that the Petition offends the doctrine of exhaustion and ought to be dismissed at the first instance. He maintained that they are the registered proprietors of the suit properties; LR No. 11XX1 and LR No. 11XX2 which are a sub-division of LR No. 2X9/ 3X1/2. They annexed a Search for the suit properties which confirms the 3<sup>rd</sup> Respondent's ownership.
6. He further states that the 3<sup>rd</sup> Respondent like any other person applied for allotment and the land having been available the same was allocated to it. He admits that his position as the Commissioner of Lands then did not bar him from being allocated land like other Kenyans. He added that in any event, he was not a Director of the 3<sup>rd</sup> Respondent at the allotment of the suit land. That no grounds of any impropriety on his/their part in the allotment of the suit property has been proven and the allegations remain unsubstantiated. He asserts that the 3<sup>rd</sup> Respondent was lawfully allocated the suit property and has been enjoying quiet possession for 33 years without any interruption while duly paying rates as they fall due.
7. He deposes that the Petitioners' allegation that the suit property is public land remains untenable in the absence of any evidence. That there have been numerous unsuccessful attempts to tamper with the 3<sup>rd</sup> Respondent's title and in 2024, the Ministry of Lands discovered that the Deed File for the said suit property was missing. Upon authentication of the 3<sup>rd</sup> Respondent's title, the Ministry reconstructed the Deed File having been no objection raised by the Petitioners or any other quota.
8. The deponent argues that the Petitioners have not demonstrated that they have a prima facie case to warrant the issuance of conservatory orders. That should the court issue the orders sought, the subject property is likely to be wasted. Further, that the suit property is already leased out to a third party for 20 years, which Lessee is yet to be joined in the proceedings herein. They therefore urge the court to dismiss the application with costs.

#### **The 4<sup>th</sup> Respondent's Replying Affidavit**

9. In opposing the application, Brian Ikol, the 4<sup>th</sup> Respondent's Director Legal Affairs swore a replying affidavit on 20/1/2024 that; the Petitioners have not adduced any evidence proving that they approached the Commission with a complaint regarding the suit land and the commission refused to exercise its constitutional mandate; since the records regarding the suit land are kept by the Ministry of Lands, the Attorney-General is better placed to adduce them for the Court to determine if there was irregular allocation of public land especially because the allocation was made by individuals who were employees of the Ministry at that time. He nevertheless prays that the application and the Petition be dismissed with costs.



### **The 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Respondents' Replying Affidavit**

10. The 7<sup>th</sup> to 9<sup>th</sup> Respondents filed a Replying Affidavit dated 17/2/2025 deponed by Edga E. Oduol. He states that according to the Deed File and the records held at the Nairobi Central Registry, the land parcel LR 2X9/11XX2 was first registered by way of Grant IR 52178 on 1/9/1989 measuring 0.4032 Hectares on Survey Plan No. 153982. That the grant was for a term of 99 years at an annual rent of Kshs. 56, 000/= . The land is registered in the name of Soneth Limited. That in April 2024, the Deed File was reconstructed vide the Deed of Indemnity dated 15/4/2024 after the initial one was discovered missing. That on 17/5/2024, a short-term lease of 20 years 2 months starting from 1/5/2024 at an annual rent of Kshs. 1,000,000/= was registered in favour of Dar-Ul Maqaam and Real Estate Limited. That based on the above records, the said parcel of land is not public land. With regards to Grant IR 52179, LR 2X9/11XX1, the deponent avers that the record from the Deed File shows that it was first registered on 1/6/1990, measuring 0.4032 Hactares on Survey Plan 153981. That the term of the Grant is 99 years with effect from 1/9/1989 at an annual rent of Kshs. 96,000/= and registered in the name of Soneth Limited. He argues that the Petitioners do not have any proprietary rights over the suit land or any of the sub plots thereof. Therefore, the orders sought cannot be granted. That the Petitioners have not met the conditions for grant of conservatory orders.

### **The Proposed 5<sup>th</sup> Interested Party's Application.**

11. The Proposed 5<sup>th</sup> Interested Party's application dated 6/1/2025 is expressed to be brought under the provisions of Article 40 of the Constitution and Section 3 and 3A of the Civil Procedure Act. The Applicant substantively prays for Orders that;
- a. Ben Omenge Amoro Nyakundi, the Applicant be joined as an Interested Party in this Petition and be allowed to file pleadings and affidavits on his position in this matter.
  - b. The costs of this Application be awarded to the Applicant.
12. The application is premised on the grounds on the face of it and the Proposed Interested Party's Supporting Affidavit deponed on even date. The Applicant avers that he is the registered owner of Nairobi/ Block 27/3X5 previously under LR No. 2X9/3X1/2. He annexes a Certificate of Lease and a copy of a search dated 17/5/2023. He asserts that the 7<sup>th</sup> Respondent is well aware of his proprietorship having previously invited him and the 3<sup>rd</sup> respondent to its offices for the resolution of the question on the ownership dispute.
13. He contends that any purported sub-division of the suit property as alleged by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents is null and void. He alleges that he lodged an objection to the reconstruction of the registers through a letter dated 5/7/2024. He also objected to the conversion of the purported subdivisions through the objection dated 4/8/2024. He states that he has only learnt of the existence of this suit whose subject matter is his property. That should it proceed in his absence, he stands to suffer irreparable damage thus infringing on his right to property and the right to a fair hearing. He maintains that he is a necessary party in the instant proceedings.

### **The Petitioners' Replying Affidavit**

14. The Petitioners filed a Replying Affidavit dated 16/1/2025 sworn by Dr. Magare Gikenyi J. Benjamin in response to the Proposed Interested Party's application. The Petitioners are not opposed to the joinder of the Proposed Interested Party as a party in the suit.



### **The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Replying Affidavit.**

15. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents opposed the application vide the Replying Affidavit of Wilson Gacanja, the 1<sup>st</sup> Respondent herein, sworn on 10/2/2025. The deponent reiterates his assertions in the Replying Affidavit of 1/10/2024 on how the 3<sup>rd</sup> Respondent acquired the suit property and the subdivision of the Original land that created the two parcels LR No. 2X9/11XX1 and LR No. 2X9/11XX2. He further details how the Deed Files were reconstructed after they went missing at the Ministry and the fact that the Proposed Interested Party never objected to the reconstruction thereof. He asserts that the 3<sup>rd</sup> Respondent's titles over the suit properties having been authenticated through the subdivision and survey process cannot be questioned.
16. That based on the foregoing, he contends that the Proposed Interested Party has no proprietary rights over the suit properties and his joinder is aimed at convoluting the matter and delay the administration of justice for the 3<sup>rd</sup> Respondent. He prays that the application be disallowed with costs.
17. The 4<sup>th</sup> Respondent and the 1<sup>st</sup> Interested Party do not oppose the application. The rest of the Respondents and the Interested parties did not file any responses.

### **Directions.**

18. On 3/2/2025, the Court directed that the two applications be disposed of by way of written submissions. I have read and considered the written submissions on record

### **Analysis and Determination.**

19. The Court has read and considered the two Applications, the Affidavits and the annexures thereto as well as the rival submissions, I am of the view that the issues for determination are as follows;
  - a. Whether the Petitioners have made out a case for the grant of conservatory orders pending the hearing and determination of this Petition.
  - b. Whether the Proposed Interested Party should be joined as Interested Party in the proceedings herein.
  - c. Which Orders should the Court issue?

#### **a. Have the Petitioners made out a case for the grant of conservatory orders pending the hearing and determination of this Petition?**

20. *The Constitution* of Kenya in Article 23 provides the guiding framework for making findings on the granting of conservatory orders. In determining whether the Petitioners are entitled to a conservatory order I am guided by the locus classicus case of Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & 2 others [2014] e K.L.R, which case was cited by all parties in their submissions, where the Supreme Court of Kenya held: -

“(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 supplicant’s case for orders of stay. 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.”

21. In yet another case, the Court in the case of Law Society of Kenya –vs- Office of the Attorney General & Another; Judicial Service Commission (Interested Party) (2020) eKLR, J elaborated the principles to be fulfilled before granting conservatory orders as follows;
  - a. First, an Applicant must demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice.
  - b. The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
  - c. Thirdly, the court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.
  - d. The final principle for consideration is whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.
22. Firstly, the Petitioners are supposed to prove that they have a prima facie case with the likelihood of success. See case of Mrao –vs- First American Bank (2003) KLR 125 where for the description of a prima facie case.
23. The Petitioners are challenging the root of the titles held by the 3<sup>rd</sup> Respondent. Quite clearly it is not possible to make a final determination at this interlocutory stage on the validity or otherwise of the 3<sup>rd</sup> Respondent’s titles. More so, since a third party is equally claiming ownership of the suit properties.
24. Rule 23 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, (otherwise referred to “The Mutunga Rules”) grants this Court powers to hear and determine an application for Conservatory orders or interim orders. This is intended to preserve and/or secure the subject matter during the pendency of the Petition. Rule 23 of “the Mutunga Rules” provide: -

“Despite any provision to the contrary, a Judge before whom a petition under Rule 4 is presented shall hear and determine an application for conservatory order or interim order”
25. The Petitioners herein have adduced a Public Notice dated 6/6/2024 notifying the public of the proposed Change of User of the suit property. That the indications are that the owner intends to change its use from residential to commercial subject to approval by the 6<sup>th</sup> Respondent. It is also evident that the 3<sup>rd</sup> Respondent has leased out the subject property to a third party, whom once the approval is granted by the 6<sup>th</sup> Respondent, is likely to commence activities appropriate to the new user thereon.
26. Considering that the Petition seeks to challenge the validity of the 3<sup>rd</sup> Respondent’s title, the Petitioners will be called upon to prove their claims during the hearing. At this stage this court is not required to go into a mini hearing and all it has to satisfy itself is that there is a right that is threatened and or likely to be threatened which need the protection of this court. It is therefore my finding that the Petitioners have demonstrated an arguable prima facie case with a likelihood of success and shown that in the absence of the Conservatory orders they are likely to suffer prejudice as the third party could commence construction if the conservatory orders are not granted hereof.



27. The Petitioners have further met the second principles that granting of the Conservatory orders would enhance the Constitutional values and objectives of a specific right or freedom, in the Bill of Rights. Thirdly the Petitioners intend to protect the larger public interest, therefore in the event that the court finds that the suit property is indeed public land, the character of the subject property would have not have changed. In the event that the Court finds that the subject land is indeed private land, the 3<sup>rd</sup> Respondent shall be at liberty to deal with its property as it so wishes. In any case, the 1<sup>st</sup> – 3<sup>rd</sup> Respondents admit at Paragraph 42 of their Replying Affidavit dated 1/10/2024 that the suit property being a parcel of land which is fixed and which is not subject to any significant activity, shall not be wasted during the pendency of this suit.
28. In the final analysis, I am satisfied that a case has been made out for the grant of the conservatory orders sought by the Petitioners. The Petitioners’ application is therefore merited.

**b. Whether the Proposed Interested Party should be joined as Interested Party in the proceedings herein**

29. First and foremost, who is an Interested Party? Order 1 Rule 10(2) of the Civil Procedure Rules states as follows: -

“The court may at any stage of the proceedings, either upon, or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon or settle all questions involved in the suit, be added.”

30. Black’s Law Dictionary defines an Interested Party as;

“a party who has a recognizable stake (and therefore standing) in the matter.”

31. Further, The Supreme Court of Kenya in *Communications Commission of Kenya and 4 Others –vs- Royal Media Services Limited & 7* [2014] eKLR held as follows:

“An interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. Similarly, in the case of *Meme v. Republic*, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

- i. Joinder of a person because his presence will result in the complete settlement of all the question involved in the proceedings;
- ii. Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- iii. Joinder to prevent a likely course of proliferated litigation.

We ask ourselves the following questions: a) what is the intended party’s state and relevance in the proceedings and b) will the intended interested party suffer any prejudice if denied joinder.?”



32. Subsequently, having defined who an Interested Party is, it is important to then determine whether the Applicant has satisfied the criteria to warrant the joinder of the proposed Interested Parties in the proceedings.
33. The law on joinder of interested parties to suits has been settled by the Supreme Court of Kenya in the case of Francis K. Muruatetu and Another vs. Republic & 5 Others (2016) eKLR, the court set out identifiable key elements for consideration in an application for joinder as an Interested Party. The elements are as follows: -
- “a. The Personal interest or stake that the party has in the matter must be set out in the application. The Interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
  - b. The prejudice to be suffered by the intended Interested Party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
  - c. Lastly, a party must, in its application, set out the case and/or submission it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the court.”
34. In the instant suit, the Proposed 5<sup>th</sup> Interested Party seeks to be joined in this proceeding on the basis that he is the registered proprietor of the suit properties and hold a valid title thereto. He avers that he is the registered owner of Nairobi/ Block 27/3X5 previously under old LR No. 2X9/3X1/2. He annexes a Certificate of Lease and a copy of a search dated 17/5/2023. In view of his alleged registration status over the subject property, he will definitely be affected by any decisions made by this Court with respect to the suit properties. He is a necessary party to this suit. It is therefore in the interest of justice that he be accorded a chance to be heard.

**d. Which orders should the court grant?**

35. In view of the foregoing and in determining the applications dated 10/9/2024 and 6/1/2025, the Court issues conservatory orders in the following terms: -
- a. Status quo orders be and are hereby issued to preserve the suit property pending the hearing and determination of the petition.
  - b. For avoidance of doubt the respondents, agents, assigns, employees or any per persons acting under them shall not in any way change user, transfer, sell, lease and/or in any way interfere with the suit property (Plot LR 2X9/3X1/2 and/or LR 2X9/11XX1 and/or LR 2X9/11XX2 and/or any other related plot numbers) pending the hearing and determination of the Petition herein.
  - c. The parties currently in possession and occupation of the suit properties shall continue to so occupy pending the hearing and determination of the Petition herein.
  - d. The Proposed Interested Party be and is hereby enjoined as the 5<sup>th</sup> Interested party
  - e. Costs of the applications shall be in the cause.
36. It is so ordered



**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 27<sup>TH</sup> DAY OF MARCH 2025 VIA MICROSOFT TEAMS.**

**J. G. KEMEI**

**JUDGE**

In the presence of;

Dr Magare present in person and on behalf of the 2<sup>nd</sup> -8<sup>th</sup> Petitioners

Mr Eredi for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Ms Njenga HB for Mr Bashir for the 3<sup>rd</sup> Respondent

NA for the 4<sup>th</sup> Respondent

Mr Nderitu HB for Mr Awele for the 5<sup>th</sup> and 6<sup>th</sup> Respondent

N/A for the 7<sup>th</sup> -9<sup>th</sup> Respondents

Ms Wambugu for 1<sup>st</sup> IP

N/A for the 2<sup>nd</sup> -4<sup>th</sup> IPs

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Ms Tazita for the Proposed IP

CA- Ms Yvette Njoroge

