



Ngugi & another v Twalib & 4 others; National Environment Management Authority & another (Interested Parties) (Environment & Land Petition 1 of 2023) [2023] KEELC 15709 (KLR) (22 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15709 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 1 OF 2023
NA MATHEKA, J
FEBRUARY 22, 2023**

BETWEEN

PETER WANGO NGUGI 1ST PETITIONER

PAUL MIGHULO MSABAA 2ND PETITIONER

AND

HON. BADI TWALIB 1ST RESPONDENT

BAKARI MWAKIFUNDI 2ND RESPONDENT

HAMADI BAKARI 3RD RESPONDENT

COUNTY GOVERNMENT OF MOMBASA 4TH RESPONDENT

**THE CHIEF OFFICER LAND PLANNING AND HOUSING MOMBASA
COUNTY 5TH RESPONDENT**

AND

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY . INTERESTED
PARTY**

NATIONAL LAND COMMISSION INTERESTED PARTY

RULING

1. The application is dated January 4, 2023 and is brought under Section 1A, 1B and 3A of the [Civil Procedure Act](#), Order 1 Rule 10 (2) & (14) of the [Civil Procedure Rules](#) seeking the following orders;

1. That this application be certified as urgent and service thereof be dispensed with.



2. That this court be pleased to grant conservatory orders restraining the 1st & 2nd and 3rd Respondents by themselves, their agents, servants, employees and/or any other person acting on their instructions from continuing with construction on the parcel of land located at Kwa Mwanzia in Jomvu Sub - County within Mombasa County pending the hearing and determination of this petition.
3. That the cost of this application be provided for.
2. It is based on the following grounds that a complaint was lodged in the Applicants' offices about grabbing of a public land in Mikindani. That despite the Applicant writing a letter to the office of the Governor over the said issue they have never received any response. That the Applicant decided to investigate further and involve and/or engage the members of the public living in Mikindani on the aforesaid allegation of land grabbing and the Applicant established as follows; That the suit property is located in Kwa Mwanzia area. That the aforesaid public land in Kwa Mwanzia area was earmarked and has always been used as a public parking and children's playground. That the 1st Respondent was given an allocation letter by the County Government for the modernization of the chief's office located in Kwa Shee area within Mikindani. That the Allocation letter for the public land in Kwa Shee area and the intended construction was subject to public participation which was not done. That the 1st, 2nd & 3rd Respondents have started construction and are going on with it on a land totally different from the land on the allocation letter. That the same is going on without there being a public participation as provided in the allocation letter and it is constitutionally required. That the Applicants' application is for the interest of Mikindani residents as per the signatures collected and attached and for the general public. That the Applicants application is also to see that things are done procedurally according to the law and the Constitution of Kenya.

3. The application is supported by the annexed affidavit of Shipeta Mathias Hezron.

This court has considered the application, supporting affidavit and annexures therein. In respect of the instant application, I find that the sole issue for my determination is whether the Applicant has met the threshold for grant of conservatory orders. This threshold was established by the Supreme Court in the case of Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others (2014) eKLR 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 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."

4. The starting point is to determine whether the Applicant has established a *prima facie case* with a likelihood of success. In the case of Centre for Rights Education and Awareness (CREAW) & 7 Others vs Attorney General (2011) eKLR it was held that:

" It is important to point out that the arguments that were advanced by counsel and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the petitioner's application and not the petition. I will not therefore delve into



a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only requires to demonstrate that he has a *prima facie case* with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”

5. When a court is called upon to determine whether a *prima facie case* has been established, it should not delve into a detailed analysis of the facts and law but should focus on determining whether the Applicant has put forward a case that is arguable and not frivolous. The Petitioners stated that the suit property is located in Kwa Mwanzia area. That the aforesaid public land in Kwa Mwanzia area was earmarked and has always been used as a public parking and children's playground. That the 1st Respondent was given an allocation letter by the County Government for the modernization of the chief's office located in Kwa Shee area within Mikindani. That the Allocation letter for the public land in Kwa Shee area and the intended construction was subject to public participation which was not done. That the 1st, 2nd & 3rd Respondents have started construction and are going on with it on a land totally different from the land on the allocation letter. this application was not opposed. I find that the Petitioners have established a *prima facie case* in this matter I find the application is merited and I grant prayer number 2 of the application. Cost to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 22TH DAY OF FEBRUARY 2023.

N.A. MATHEKA

JUDGE

