



**North Coast Development Company Limited v County Government of Mombasa & 2 others
(Constitutional Petition 54 of 2021) [2023] KEELC 16498 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16498 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CONSTITUTIONAL PETITION 54 OF 2021**

LL NAIKUNI, J

MARCH 16, 2023

**IN THE MATTER OF: THE JURISDICTION OF THE SUPERIOR
COURT UNDER ARTICLE 23(1), ARTICLE 162(1), (2)(B), ARTICLE
165 (2)(D)(II) OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS AND BREACH OF ARTICLES 40,47,239(3)
(A),244 AND 245(2) (B) OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF: SECTION 8 OF THE NATIONAL POLICE SERVICE ACT

BETWEEN

NORTH COAST DEVELOPMENT COMPANY LIMITED PETITIONER

AND

THE COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT

**THE INSPECTOR GENERAL OF THE NATIONAL POLICE
SERVICE 2ND RESPONDENT**

THE ATTORNEY GENERAL 3RD RESPONDENT

RULING

I. Introduction

1. The Petitioner herein, North Coast Development Company Limited, moved this Honorable Court through filing the Notice of Motion application dated December 8, 2021 for its determination. The application was brought pursuant to the provision of Article 23 of the [Constitution of Kenya, 2010](#)



and Rules 3, 13, 19, 23(1) and (2) and 24 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules, 2013 (Also known as “The Mutunga Rules”).

II. The Petitioner/Applicant’s Case

2. The Petitioner/Applicant in this application sought the following orders:-
 - i. Spent
 - ii. Pending the hearing and determination of this application inter - partes. there be and is hereby issued a Conservatory Order to prohibit and restrain the Respondents jointly and severally, their agents, assigns. employees, officers and/or any person acting on behalf, authority. instructions and/or directives of the Respondents from trespassing on, stepping onto, visiting, vandalizing, demolishing, and generally interfering with the Petitioner’s ownership, rights, use and occupation of the property known as Mombasa/Block XLVI/138.
 - iii. Pending the hearing and determination of this Petition, there be and is hereby issued a conservatory order to prohibit and restrain the Respondents jointly and severally, their agents, assigns, employees, officers and/or any person acting on behalf, authority, instructions and/ or directives of the Respondents from trespassing on, stepping onto, visiting, vandalizing, demolishing, and generally interfering with the Petitioner’s ownership, rights, use and occupation of the property known as Mombasa/Block XLVI/138.
 - iv. Costs of this application be provided for.
3. The Application was based on the grounds that:
 - a. The Petitioner was the registered owner of the property known as Mombasa/Block XLVI/138 (hereinafter “the suit property”) situate in Mombasa County in an area commonly known as Mudhubaha.
 - b. On September 8, 2021, the 1st Respondent’s officers led by the County Executive Committee Member for Transport, Infrastructure & Public Works, Taufiq Balala visited the suit property and addressed a group of youth thereon and promised to construct a public road cutting across the suit property to the beach.
 - c. Thereafter, the 1st Respondent through its officers, employees, agents and county askaris accompanied and aided by police officers have interfered with the Petitioner’s ownership, occupation, use and rights over the suit property and have made it impossible for the Petitioner to own, occupy. use, develop and enjoy the suit property by doing the following actions:
 - i. On September 22, 2021 the 1st Respondent’s officers and employees accompanied by about 100 county askaris and police officers visited the suit property with a huge bulldozer and demolished part of the suit property including the perimeter wall and staircase.
 - ii. On September 15, 2021, the 1st Respondent served upon the Petitioner through the Petitioner’s sister business known as Fayaz Bakers a “Notice to Remove Abandoned Containers Structures and vehicle on the Road/Public Pavement” dated September 14, 2021. The said Notice alleged that the Petitioner had abandoned containers, structures and vehicles at Mudhubaha Street/Road contrary to the County Government By-Laws 1968 and ordered the Petitioner to remove the same within 7 days. The 1st Respondent did not specify the nature and the exact item which had allegedly been abandoned and where exactly it was abandoned.



- iii. On September 22, 2021, the 1st Respondent through its authorized employees and officers accompanied by about 100 county askaris and police officers visited the suit property and forcefully removed therefrom and carted away the Petitioner's Container Number MSKU 9887463 45G1 together with the contents of the said containers. The Petitioner had stationed and kept on the said container on suit property and was using it for storage purposes.
- iv. On various dates thereafter the 1st Respondent through its employees, officers and county askaris have frequently and on many occasions visited the suit property accompanied by police officers and caused commotion and disruption thereon and made it impossible for the Petitioner to quietly and peacefully occupy and use the suit property.
- d. The different acts of illegalities committed by the 1st Respondent through its employees and officers had been reported to the police but the police headed by the 2nd Respondent have deliberately refused, declined and neglected to take any action.
- e. Further and in addition to the 1st Respondent's illegal activities, there have been other illegalities committed by different persons on the suit property including trespass which had been reported to the police but the police headed by the 2nd Respondent have adamantly refused and declined to take any action.
- f. It was manifestly clear that the 2nd Respondent was either working jointly with the 1st Respondent to frustrate the Petitioner and/or was deliberately aiding the 1st Respondent and other persons in the ill - intended quest to illegally take over the suit property from the Petitioner and/or make it impossible for the Petitioner to own, occupy, use and develop the suit property in a manner that is in breach the Petitioner's constitutional rights.
- g. The 1st Respondent had alleged that the Petitioner's property has encroached on the 60 meter portion from the High Water Mark and had impeded easement rights of the members of the public contrary to the [Survey Act](#) and the Regulations thereunder, which was not true.
- h. The Petitioner's property did not encroach on the 60 meters High Water Mark.
- i. The allegation by the 1st Respondent that the Petitioner's property had encroached on the High Water Mark is not true and has been made maliciously to justify the 1st Respondent's illegal activities on the suit property because:
 - i. The frontage of the suit property abutting the Indian Ocean was infamous for criminal activities and had become a den of thieves, robbers and drug dealers. To stem the crime, the Petitioner proposed to develop the said frontage of the suit property by constructing a religious mosque, a restaurant and a recreational facility which proposal was duly approved by the 1st Respondent.
 - ii. The Petitioner embarked on the construction of the said facilities in the year 2017 with the full approval and consent of the 1st Respondent but in October 2017 the 1st Respondent abruptly stopped the development on the basis that the same was on public land.
 - iii. Thereafter, there had been many attempts to resolve the dispute whereby the officers of the Petitioner and the 1st Respondent had held several meetings.



- iv. The 1st Respondent's allegation that the Petitioner had extended its property to include the 60-meter-High Water Mark was discriminatory because there were several developments along the Indian Ocean in the same area/locality and even beyond which extend up to the Ocean because they front the creek and not the beach. It was therefore very malicious and discriminatory for the 1st Respondent to single out the Petitioner's property.
- j. The Respondents' actions as described herein and were in breach of the [Constitution](#) and the law and were in breach and violation of the Petitioner's constitutional rights as pleaded in the Petition filed herewith
- k. Under Article 40 of the [Constitution of Kenya, 2010](#) (hereinafter to as "The [Constitution](#)"), the Petitioner had a right to acquire and own property. The said right included the right to occupy, use and develop such property. The 1st Respondent had breached the Petitioner's right to acquire and own property under Article 40 of the [Constitution of Kenya 2010](#) by interfering with the Petitioner's property and making it impossible for the Petitioner to access and occupy the suit property and by literally curtailing the Petitioner's ability to freely use and enjoy the property without any interference, intimidation and general threats.
- l. The Respondent's officers (including police officers), employees and the County askaris had been storming the suit causing commotion therein, harassing, intimidating and threatening the Petitioner's officers, employees and agents. As a consequence, the Petitioner's ability and rights to access, occupy and use the suit property had been completely impeded contrary and in breach of Article 40 of the [Constitution](#).
- m. The 1st Respondent had been using the police to perpetrate its illegal activities on the suit property and against the Petitioner as demonstrated hereunder:
 - i. The police accompanied the 1st Respondent's employees and officers when the latter stormed the suit property, caused chaos and carted away Petitioner's container and the items stored inside the container.
 - ii. On numerous other occasions, the police had accompanied the 1st Respondent's officers to visit the suit property and commit acts of illegalities against the Petitioner.
- n. Under Article 245 (2) (b) of the [Constitution](#) and section 8 (1) of the [National Police Service Act](#), the 2nd Respondent was mandated to exercise independent command over the National Police Service. The 2nd Respondent violated Article 245 (2) (b) of the [Constitution](#) and section 8 (1) of the [National Police Service Act](#) by allowing the 1st Respondent to give command and direct the police to help the 1st Respondent in committing illegalities on the suit property.
- o. Under Article 239 (3) (a) of the [Constitution](#), the National Police headed by the 2nd Respondent herein must not act in a partisan manner. The 2nd Respondent breached Article 239 (3) (a) of the [Constitution](#) by acting in a partisan manner or permitting the National Police Service to act in a partisan manner by doing the following:
 - i. Ignoring and deliberately failing to act on the criminal reports made by the Petitioner against the 1st Respondent and its officers as well as other persons who had committed criminal acts against the Petitioner.
 - ii. Taking a partisan approach in the dispute between the Petitioner and the 1st Respondent by ignoring the criminal reports made by the Petitioner while aiding the



1st Respondent to commit illegalities against the Petitioner by causing and permitting police officers to accompany the 1st Respondent's employees, officers and county askaris to invade and raid the suit property and cart away items therefrom.

- p. The 2nd Respondent, being a public officer, was enjoined by Article 47 of the [Constitution of Kenya, 2010](#) to observe fairness in his actions. The 2nd Respondent had failed to observe fairness because he has permitted and caused the National Police Service to be abused and misused by the 1st Respondent in an unfair manner with a view to committing illegalities on the suit property and denying the Petitioner its constitutional rights.
- q. The 1st and 2nd Respondents' actions as pleaded herein were in breach of Article 3 of the [Constitution](#) of Kenya which mandates them to respect, uphold and defend the [Constitution](#). The Respondents did not respect, uphold and defend the [Constitution](#) when they breached and violated Articles 40,47,239 (3) (a),244 and 245 (2)(b) of the [Constitution](#).
- r. Under Article 244 of the [Constitution](#), the 2nd Respondent was mandated to strive for the highest standard of professionalism, to comply with constitutional standards and to be of highest possible standards of competence while discharging the duties of his office. The 2nd Respondent violated Article 244 of the [Constitution](#) by:
- i. Failing to act on criminal reports made by the Petitioner.
 - ii. Taking a partisan approach by siding with the 1st Respondent and against the Petitioner by inter alia, accompanying the 1st Respondent's officers to the suit property to commit illegalities thereon, steal the Petitioner's properties (container and its contents),to destroy the Petitioner's wall, harass the Petitioner's officers and agents and generally interfere with the Petitioner's rights, occupation and use of the suit property.
- s. The Respondents had generally abused the powers bestowed upon them as government agencies/officers to violate the Petitioner's rights, taken away the Petitioner's property and to do acts which are not permitted by the law so as to achieve ulterior motive of taking away the Petitioner's property or denying the Petitioner the right to own and use the suit property.
- t. It was in the interest of justice that the orders sought in this application be granted so as to avoid further trespass on the suit property and the wanton theft and destruction of the Petitioner's property by the Respondents and their employees and officers.
4. The application was presumed on the grounds, testimonies and the averments on the 27 Paragraphed Supporting Affidavit of Swaleh Awadh Hemed, sworn and dated on December 8, 2021 and the twelve (12) annexures marked as "SAH – 1 to 12" annexed thereto. He averred that:-
- a. The Petitioner was the registered owner of the leasehold interest of the property known as Mombasa/Block XLVI/138 (hereinafter "the suit property") situate in Mombasa County in an area commonly known as Mudhubaha from the Government of Kenya for a term of 99 years with effect from June 20, 1993.
 - b. The suit property abuts the Indian Ocean.
 - c. On September 8, 2021, the 1st Respondent's officers led by the County Executive Committee Member for Transport, Infrastructure & Public Works. Taufiq Balala visited the suit property and addressed a group of youth thereon and promised to construct a public road cutting across the suit property to the beach.



- d. Thereafter, the 1st Respondent through its officers, employees, agents and county askaris accompanied and aided by police officers have interfered with the Petitioner's ownership, occupation, use and rights over the suit property and have made it impossible for the Petitioner to own, occupy, use, develop and enjoy the suit property by doing the following actions:
- i. On September 22, 2021, the 1st Respondent's officers and employees accompanied by about 100 county askaris and police officers visited the suit property with a huge bulldozer and demolished part of the suit property including the perimeter wall and the external staircase leading from the house on the suit property to the beach.
 - ii. On September 15, 2021, the 1st Respondent served upon the Petitioner through the Petitioner's sister business known as "Fayazvehicle on the Road/Public Pavement" dated September 14, 2021. The said Notice alleged that the Petitioner had abandoned containers, structures and vehicles at Mudhubaha Street/Road contrary to the County Government By-Laws 1968 and ordered the Petitioner to remove the same within 7 days. The 1st Respondent did not specify the nature and the exact item which had allegedly been abandoned and where exactly it was abandoned.
 - iii. On September 22, 2021, the 1st Respondent through its authorized employees and officers accompanied by about 100 county askaris and police officers visited the suit property and forcefully removed therefrom and carted away the Petitioner's Container Number MSKU 9887463 45G1 together with the contents of the said containers. The Petitioner had stationed and kept on the said container on suit property and was using it for storage purposes.
 - iv. On October 13, 2021, the Chief Magistrate's Court in ELC Civil Case No.466 of 2021 ordered the 1st Respondent herein to return the said Container. The Container was returned but the 1st Respondent through its authorized officers took it back again on November 17, 2021.
 - v. On various dates thereafter the 1st Respondent through its employees, officers and county askaris have frequently and on many occasions visited the suit property accompanied by police officers and caused commotion and disruption thereon and made it impossible for the Petitioner to quietly and peacefully occupy and use the suit property.
- e. The different acts of illegalities committed by the 1st Respondent through its employees and officers have been reported to the police but the police headed by the 2nd Respondent have deliberately refused, declined and neglected to take any action. Specific reports were made to Tononoka Police Station vide;
- i. OB No.13 dated May 29, 2020.
 - ii. OB No.80 of October 15, 2020.
 - iii. OB No.11 dated February 27, 2021.
 - iv. OB No.18 of July 19, 2021.
 - v. OB No.19 of September 22, 2021.
 - vi. OB.No.29/30/9/2021 of September 30, 2021.
 - vii. OB No.15 of 2021 of November 11, 2021.



viii. OB No.16 of November 17, 2021.

- f. Further and in addition to the 1st Respondent's illegal activities, there have been other illegalities committed by different persons on the suit property including trespass which have been reported to the police but the police headed by the 2nd Respondent have adamantly refused and declined to take any action.
- g. It is manifestly clear that the 2nd Respondent is either working jointly with the 1st Respondent to frustrate the Petitioner and/or is deliberately aiding the 1st Respondent and other persons in the ill-intended quest to illegally take over the suit property from the Petitioner and/or make it impossible for the Petitioner to own, occupy, use and develop the suit property in a manner that is in breach the Petitioner's constitutional rights.
- h. The 1st Respondent has alleged that the Petitioner's property has encroached on the 60 meter portion from the High Water Mark and has impeded easement rights of the members of the public contrary to the Survey Act and the Regulations thereunder, which was not true.
- i. The Petitioner's property never encroached on the 60 meters High Water Mark.
- j. The allegation by the 1st Respondent that the Petitioner's property had encroached on the High Water Mark is not true and had been made maliciously to justify the 1st Respondent's illegal activities on the suit property because:
 - i. The frontage of the suit property abutting the Indian Ocean was infamous for criminal activities and had become a den of thieves, robbers and drug dealers. To stem the crime, the Petitioner proposed to develop the said frontage of the suit property by constructing a religious mosque, a restaurant and a recreational facility which proposal was duly approved by the 1st Respondent.
 - ii. The Petitioner embarked on the construction of the said facilities in 2017 having received the full approval and consent of the 1st Respondent but in October 2017 the 1st Respondent abruptly stopped the development on the basis that the same was on public land.
 - iii. Thereafter, as can be seen in the letters referred to above, there have been many attempts to resolve the dispute whereby the officers of the Petitioner and the 1st Respondent have held several meetings but nothing tangible has come out of it.
 - iv. The 1st Respondent's allegation that the Petitioner had extended its property to include the 60-meter - High Water Mark was discriminatory because there were several developments along the Indian Ocean in the same area/locality and even beyond which extend up to the Ocean because they front the creek and not the beach. It was therefore very malicious and discriminatory for the 1st Respondent to single out the Petitioner's property.
- k. The Respondents' actions are in breach of the Petitioner's constitutional rights and was in violation of the Constitution of Kenya and statute as pleaded in the Petition.
- l. The main issue in dispute in this Petition was that the Respondents' actions as described in this Petition were in breach of the Constitution and the law and was in breach and violation of the Petitioner's constitutional rights.



- m. The 1st Respondent has breached the Petitioner's right to acquire and own property under Article 40 of the [Constitution of Kenya 2010](#) by interfering with the Petitioner's property and making it impossible for the Petitioner to access and occupy the suit property and by literally curtailing the Petitioner's ability to freely use and enjoy the property without any interference, intimidation and general threats.
- n. The Respondent's officers (including police officers), employees and county askaris had been storming the suit causing commotion therein, harassing, intimidating and threatening the Petitioner's officers, employees and agents. As a consequence, the Petitioner's ability and rights to access, occupy and use the suit property have been completely impeded contrary and in breach of Article 40 of the [Constitution](#).
- o. The 1st Respondent had been using the police to perpetrate its illegal activities on the suit property and against the Petitioner as demonstrated hereunder:
 - i. The police accompanied the 1st Respondent's employees and officers when the latter stormed the suit property, caused chaos and carted away Petitioner's container and the items stored inside the container.
 - ii. On numerous other occasions, the police have accompanied the 1st Respondent's officers to visit the suit property and commit acts of illegalities against the Petitioner.
- p. Under Article 245 (2)(b) of the [Constitution](#) and section 8 (1) of the [National Police Service Act](#), the 2nd Respondent is mandated to exercise independent command over the National Police Service. The 2nd Respondent violated the provision of Article 245(2)(b) of the [Constitution](#) and section 8 (1) of the [National Police Service Act](#) by allowing the 1st Respondent to give command and direct the police to help the 1st Respondent in committing illegalities on the suit property.
- q. Under Article 239 (3)(a) of the [Constitution](#), the National Police headed by the 2nd Respondent herein must not act in a partisan manner. The 2nd Respondent breached Article 239(3) (a) of the [Constitution](#) by acting in a partisan manner or permitting the National Police Service to act in a partisan manner by doing the following:
 - i. Ignoring and deliberately failing to act on the criminal reports made by the Petitioner against the 1st Respondent and its officers as well as other persons who had committed criminal acts against the Petitioner.
 - ii. Taking a partisan approach in the dispute between the Petitioner and the 1st Respondent by ignoring the criminal reports made by the Petitioner while aiding the 1st Respondent to commit illegalities against the Petitioner by causing and permitting police officers to accompany the 1st Respondent's employees, officers and county askaris to invade and raid the suit property and cart away items therefrom.
- r. The 2nd Respondent, being a public officer, was enjoined by Article 47 of the [Constitution of Kenya, 2010](#) to observe fairness in his actions. The 2nd Respondent had failed to observe fairness because he has permitted and caused the National Police Service to be abused and misused by the 1st Respondent in an unfair manner with a view to committing illegalities on the suit property and denying the Petitioner its constitutional rights.
- s. The 1st and 2nd Respondents' actions as pleaded in the Petition were in breach of Article 3 of the [Constitution of Kenya](#) which mandated them to respect, uphold and defend the [Constitution](#).



The Respondents did not respect, uphold and defend the Constitution when they breached and violated Articles 40, 47, 239 (3) (a), 244 and 245(2)(b) of the Constitution.

- t. Under Article 244 of the Constitution, the 2nd Respondent was mandated to strive for the highest standard of professionalism, to comply with constitutional standards and to be of highest possible standards of competence while discharging the duties of his office. The 2nd Respondent violated Article 244 of the Constitution by:
 - i. Failing to act on criminal reports made by the Petitioner.
 - ii. Taking a partisan approach by siding with the 1st Respondent and against the Petitioner by “inter alia, accompanying the 1st Respondent’s officers to the suit property to commit illegalities thereon, steal the Petitioner’s properties (container and its contents), to destroy the Petitioner’s wall, harass the Petitioner’s officers and agents and generally interfere with the Petitioner’s rights, occupation and use of the suit property.
- u. The Respondents had generally abused the powers bestowed upon them as government agencies/officers to violate the Petitioner’s rights, take away the Petitioner’s property and to do acts which were not permitted by the law so as to achieve ulterior motive of taking away the Petitioner’s property or denying the Petitioner the right to own and use the suit property.
- v. As a result of the Respondents’ actions as described herein, the Petitioner had suffered loss particularized as follows:
 - i. A sum of Kenya Shillings One Million (Kshs.1,000,000.00) being the value Container Number MSKU 9887463 45G1 and the contents thereof.
 - ii. A sum of Kenya Shillings Fifteen Million (Kshs. 15,000,000.00) being the value of the wall of the property known as MOMBASA/BLOCK XLVI/138 demolished and destroyed by the 1st Respondent, its officers and employees.
 - iii. A sum of Kenya Shillings Five Million (Kshs. 5,000,000.00) being the value of the staircase erected on the property known as MOMBASA/BLOCK XLVI/138 demolished and destroyed by the 1st Respondent, its officers and employees.
 - iv. General damages for trespass on the property known as MOMBASA/BLOCK XLVI/138.
- w. The Petitioner filed suits against the 1st Respondent and other persons/entities being Mombasa Chief Magistrate’s Civil Suit No. E.264 of 2020 and Mombasa Chief Magistrate’s Courts ELC Civil Suit No.1466 of 2021 which have different subject matters from this suit as they did not concern constitutional violations and breaches of the Petitioner’s constitutional rights
- x. The Application was in support of both application and petition and urge the Honourable Court to allow the same.

III. The responses by the 1st Respondent

1. The 1st Respondent through a 23 paragraphed Replying Affidavit sworn by Paul Ogwenyo Manyala, a Director of County Physical and Land use Planning Department responded to the application where he averred that:



- a. The said application was opposed on its entirety as the same is vexatious and frivolous consequently an abuse of the court process and it should be dismissed on the face of it.
- b. The Petitioner has pending suits and applications in CMMCC (Mbsa) no. E1466 of 2021 (North Coast Development Company Limited – Versus - Mombasa County Government) and CMCC no. E264 of 2020 (North Coast Development Company Limited – Versus - Mombasa County Government, Madubaha Beach Landing Self - help group, Beach Management Unit (BMU) Mombasa County & Fibre Boat Builders) wherein the Petitioner had raised similar issues over the same subject matter in dispute. In the said Applications the Petitioner had sought for injunctive orders as in the present Application. This was a clear abuse of the Court process. He annexed hereto and marked as “POM - 2” a bundle of pleadings in the respective cases.
- c. Through forum shopping and use of unorthodox means the Petitioner was filing and the public at large, property set for public utility at the detriment of the residents of the County of Mombasa.
- d. The Petitioner was using the orders obtained herein, albeit un-procedurally and unlawfully, to perpetrate illegalities as they have proceeded to evict the members of the public carrying out fishing economic activities as an organized group known as Madhubaa Beach Landing Site Self - help Group which had been in existence for over 60 years, and was formally registered in the year 2019.
- e. Fishing being the major economic activity of the people of the coastal region, their fundamental rights as set out in the Constitution and various international instruments ratified by Kenya were being infringed and unless this Honourable court comes to their aid, they will suffer irreparable harm as they have been unable to provide for their families and/ or pay school fees for their children noting the drastic and tough economic times perpetuated by the COVID-19 pandemic.
- f. The Orders of injunction and or Conservatory in nature sought were aimed at perpetuating illegalities and “the ex - parte orders” obtained herein were being misused by the Petitioner to engage in illegal activities on the riparian area and/or fore shore to wit;-
 - i. Back-filling all the way into the ocean waters.
 - ii. Illegal reclamation of the ocean.
 - iii. Illegal construction on the foreshore stretching into the 60 meters marked between the high water mark onto the foreshore in contravention of the clear provisions of the Survey Act and the Regulations thereof.
 - iv. Preventing members of the public from accessing the public beach.
 - v. Depriving of the fishermen of the right to anchor their boats at the foreshore/riparian area and/ or access the ocean waters for their fishing activities from the shore.
- g. The being the provision of the Survey Act under Section 45 thereof as read together with the Survey regulations 110 (2) vis-d-vis demarcation of land for allocation clearly require the Commissioner of lands to maintain a reserve land of at least 60 meters between the High-water Mark and the literal lands.



- h. The Land question and in particular 60 meters thereof receding from the High-water mark was never available for allocation to the Petitioner. In the event that allocation was done encroaching on the Subject portion of the foreshore, such allocation cannot entitle the allottee to any right capable of superseding or overriding the rights of the members of the public who are entitled to equal rights of access to the foreshore and ocean waters through the riparian area. The right of access to the ocean by members of the public or any other owner of land along the Coast whether for economic recreational or aesthetic reasons was a public right secured by a public easement. It therefore followed that a person or private entity who had encroached on a foreshore cannot interfere with or limit the enjoyment of a public easement through acts of commission or omission. The Petitioner thus could not engage in acts of commission or omission such as developments which disenfranchises members of the public of their littoral rights to the foreshore /reserve area in question.
- i. It was noteworthy that any development improvement or structure on the Subject Parcel of land which included amongst others backfilling of the sea and or construction thereof required mandatory consents and or approvals from the following bodies which the Plaintiff has failed to seek nor obtain: -
- a. The physical planning department of the County Government of Mombasa.
 - b. Kenya Ports Authority.
 - c. Kenya Maritime Authority.
 - d. Kenya Forests Service.
 - e. Kenya Marine and Research Institute.
 - f. National Environment Management Authority.
- j. The above approvals go hand in hand in a conjoint fashion and not in isolation and as if stands no approval had been obtained by the Petitioner to entitle it to the use of the property contrary to the law in the manner envisaged.
- k. The suit property was a government land meant for public use which was unlawfully leased out to the Petitioner with the National Government as the head lessor.
- l. The title held by the Petitioner was null and void ab initio and the Petitioner had no right whatsoever over the said property.
- m. The Petitioner's suit was fatally defective and the same ought to be dismissed. The 1st Respondent had raised a notice of preliminary objection on the following grounds;
- a. This Honorable court lacked the jurisdiction to determine or make any orders thereof in regard to the suit against the 1st Respondent for the reasons that the suit herein was null and void ab initio as there existed a similar suit to the present suit being CMCC (Mbsa) No. E264 of 2020 and CMCC (Mbsa) No.1466. Both suits raised the same issues over the same subject matter in dispute.
 - b. This suit was incurably defective and it was repugnant to the provisions of the Law and ought to be struck out.
- n. The Petitioner was seeking to play to the gallery by misdirecting the court and casting red herrings as to the true nature of what transpired and it was indeed unjustifiably and regretably



so to deceive the Court in the hopes of obtaining a favourable outcome by claiming that the perimeter wall was demolished, yet no such action ever took place, and/or is taking place.

- o. There existed a perimeter wall which separated the Petitioner's land (part of which encroached the beach and fell within a riparian land) and the beach area. The Petitioner was well aware that the wall was still intact, and there had been no act from the 1st Respondent, its representatives, agents and/or myself towards the demolition of it, yet the Petitioner was still emphatic on persuading the Court to determine this Application on an act that was never undertaken.
- p. The Petitioner was thus willing to concoct any allegation to cause confusion with the hopes of misguiding the Court into believing that it was the victim and possibly have the Court issue Orders against the Respondent. It has extensively been litigated upon and resultantly Courts had held that where an Affidavit contains misleading, falsified Court process and/or doctored information, the Court should strike it out on the basis of abuse of the follow the footsteps of its predecessors and shun away from condoning actions that are meant to cause disrepute to the justice system and embarrass the Court through the adduction of evidence that was meant to lead it astray from the actual situation. He dissuaded this Honourable Court from falling into the trap of the Petitioner, which was to obtain a favourable outcome by all means even at the expense of justice.
- q. The Petitioner was precluded from claiming the right to the enjoyment of peaceful and quiet possession since the area in which such enjoyment was supposedly meant to happen does not belong to the Petitioner on the basis that it falls within public land, which was not subject of exclusive possession of any person.
- r. The disputatious space happens to be the buffer zone and/or a reserve land, which was not capable of being owned, between the ocean and the inhabitable land, and thus, the Petitioner is beseeching this Honourable Court to give recognition to an illegal right which was not subject of being enjoyed by anyone.
- s. He urged the court to exercise its discretion in favour of the Respondents.

IV. The Submissions

- 8. In the presence the parties on December 6, 2022, the Court ordered that the Notice of Motion application dated December 8, 2021 was to be disposed of by way of written submission and provided proper timelines to that effect. Pursuant to that, upon parties fully complying, the Honorable Court reserved the March 16, 2023 as the date for the delivery of the ruling accordingly.

A. The written Submissions by the Petitioner

- 9. On September 21, 2022, the Advocate for the Petitioner the Law Firm of Messrs. Oluga & Company Advocates filed their written submissions. Mr. Oluga Advocate submitted that before the Court was the Petitioner's Notice of Motion application dated December 8, 2021 seeking the following orders:
 - a. Spent
 - b. Pending the hearing and determination of this Petition, there be and is hereby issued a conservatory order to prohibit and restrain the Respondents jointly and severally, their agents, assigns, employees, officers and/or any person acting on behalf, authority, instructions and/or directives of the Respondents from trespassing on, stepping onto, visiting, vandalizing, demolishing, and generally interfering with the Petitioner's ownership, rights, use and occupation of the property known as MOMBASA/BLOCK XLVI/138.



- c. Costs of this application be provided for.
10. The Learned Counsel submitted that the application was supported by the Supporting Affidavit of Swaleh Awadh Hemed, the Human Resource and Administration Officer of the Petitioner.
 11. From the brief facts, the Learned Counsel submitted that the Petitioner was the absolute and legal registered owner of the property known as Mombasa/Block XLV//138 (hereinafter ‘the suit property’) situate in Mombasa County in an area commonly known as Mudhubaha. On 8th September, 2021, the 1st Respondent’s officers led by the County Executive Committee Member for Transport, Infrastructure and Public Works, Taufiq Balala visited the suit property and addressed a group of youth and promised to construct a public road cutting across the suit property to the beach. Thereafter, the 1st Respondent through its officers, employees, agents and county askaris accompanied and aided by police officers interfered with the Petitioner’s ownership, occupation, use and rights over the suit property making it impossible for the Petitioner to own, occupy, use, develop and enjoy the suit property.
 12. The Learned Counsel further submitted that on September 22, 2021 the 1st Respondent’s officers and employees accompanied by about 100 county askaris and police officers visited the suit property with a huge bulldozer and demolished part of the suit property including the perimeter wall and staircase. On September 15, 2021, the 1st Respondent served upon the Petitioner through the Petitioner’s sister business known as Fayaz Bakers a “Notice to Remove Abandoned Containers Structures and vehicle on the Road/Public Pavement” dated September 14, 2021. The said Notice alleged that the Petitioner had abandoned containers, structures and vehicles at Mudhubaha Street/Road contrary to the County Government By-Laws 1968 and ordered the Petitioner to remove the same within 7 days. The 1st Respondent did not specify the nature and the exact item which had allegedly been abandoned and where exactly it was abandoned. On September 22, 2021, the 1st Respondent through its authorized employees and officers accompanied by about 100 county askaris and police officers visited the suit property and forcefully removed and carted away the Petitioner’s Container Number MSKU 9887463 45G1 together with the contents of the said containers. The Petitioner had stationed and kept on the said container on suit property and was using it for storage purposes. On various dates thereafter the 1st Respondent through its employees, officers and county askaris have frequently and on many occasions visited the suit property accompanied by police officers and caused commotion and disruption which made it impossible for the Petitioner to quietly and peacefully occupy and use the suit property. The different acts of illegalities committed by the 1st Respondent through its employees and officers have been reported to the police but the police headed by the 2nd Respondent have deliberately refused, declined and neglected to take any action thereby necessitating the current Petition and Application.
 13. The Learned Counsel submitted that the main issue for determination was whether the Petitioner/ Applicant had made out a case to warrant the grant of conservatory orders pending the hearing and determination of the Petition herein. On whether the Petitioner/ Applicant had made out a case to warrant the grant of orders, the Learned Counsel submitted that Article 23 (1) of the [*Constitution of Kenya, 2010*](#) vests this Honourable Court with the mandate to hear and determine applications for redress of a denial, violation or infringement of a right or fundamental freedom in the Bill of Rights. In order to fulfill this mandate the Court may grant appropriate reliefs which include but are not limited to an injunction, a conservatory order and an order for compensation. It was his contention that ”a



prima facie case” was well described in the “Locus Classicus” case of:- “mrao Limited - Versus - First American Bank of Kenya Limited & 2 Others [2003] KLR 125 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.”

13. The Learned Counsel submitted that the allegations by the 1st Respondent that the Petitioner's property has encroached on the 60 meters High Water Mark is not true and had been made maliciously to justify the 1st Respondent's illegal activities on the suit property. The frontage of the suit property abutting the Indian Ocean was infamous for criminal activities and had become a den of thieves, robbers and drug dealers and in order to stem the crime, the Petitioner proposed to develop the said frontage of the suit property by constructing a religious mosque, a restaurant and a recreational facility which proposal was duly approved by the 1st Respondent as shown by the evidence on record.
14. The Learned Counsel submitted that pursuant to the consent and full approval of the 1st Respondent, the Petitioner embarked on the construction of the said facilities in the year 2017 but in October of 2017, the 1st Respondent abruptly stopped the development on the basis that the same was on public land. This was also supported by the various correspondences between the Petitioner and 1st Respondent. It was also true that many attempts had been made by the officers of the petitioner and the 1st Respondent to resolve the dispute through various meetings but the same has been futile.
15. The Learned Counsel submitted that the 1st Respondent's allegations that the Petitioner had extended its property to include the 60 - meter-High Water Mark was extremely discriminatory because there were several developments along the Indian Ocean in the same area/locality and even beyond which extend up to the Ocean because they front the creek and not the beach. It was therefore very malicious and discriminatory for the 1st Respondent to single out the Petitioner's property. The Respondents' actions as described herein were in breach of the Constitution and the law and violate the Petitioner's constitutional rights as pleaded in the Petition filed. Under the provision Article 40 of the Constitution of Kenya, 2010, the Petitioner had a right to acquire and own property. This right included the right to occupy, use and develop such property. The 1st Respondent had breached the Petitioner's right to acquire and own property under the provision of Article 40 of the Constitution of Kenya 2010 by interfering with the Petitioner's property and making it impossible for the Petitioner to access and occupy the suit property and by literally curtailing the Petitioner's ability to freely use and enjoy the property without any interference, intimidation and general threats.
16. The Learned Counsel submitted that the Respondent's officers (including police officers), employees and county askaris have been storming the suit causing commotion by harassing, intimidating and threatening the Petitioner's officers, employees and agents. As a consequence, the Petitioner's ability and rights to access, occupy and use the suit property has been completely impeded contrary to and in breach of Article 40 of the Constitution and it was only with this Court's intercession that the Petitioner's rights may be protected until the culmination of the current Petition. The Petitioner's quiet possession had already been severely interfered with by the Respondents especially by the different acts of illegalities committed by the 1st Respondent through its employees and officers. The Respondents constant harassment has been reported to the police but the police headed by the 2nd Respondent had deliberately refused, declined and neglected to take any action. This had in turn emboldened other persons to trespass into the suit property which the Petitioner had also reported to the police but to no avail as they had refused and declined to take any action until now.



17. The Learned Counsel submitted that it was therefore manifestly clear that the 2nd Respondent was either working jointly with the 1st Respondent to frustrate the Petitioner and/or was deliberately aiding the 1st Respondent and other persons in the ill-intended quest to illegally take over the suit property from the Petitioner and/or make it impossible for the Petitioner to own, occupy, use and develop the suit property in a manner that is in breach with the Petitioner's constitutional rights. And they humbly urged this court to protect the Petitioner from these constant, unwarranted interferences by granting the orders sought.
18. On whether there was likely to be prejudice and irreparable harm, it was the Learned Counsel submission that the Respondents were not likely to suffer any prejudice should the orders sought be granted by this Honourable Court; rather it was the Petitioner who would suffer prejudice and harm if the conservatory orders sought were not awarded. The Petitioner has already had to deal with the constant interference by the 1st Respondent and its agents who had even taken away the Petitioner's property and had engaged in intimidation tactics with the support of the 2nd Defendant and its officers. The 1st Respondent had been using the police to perpetrate its illegal activities on the suit property and personally against the Petitioner. On numerous occasions the police accompanied the 1st Respondent's employees and officers, when the latter stormed the suit property, caused chaos and proceeded to cart away the Petitioner's container and the items stored inside the container.
19. As a consequence, the Learned Counsel submitted that the Petitioner's ability and rights to access occupy and use the suit property had completely been impeded contrary to and in breach of Article 40 of the Constitution. Under Article 245 (2) (b) of the Constitution and section 8 (1) of the National Police Service Act, the 2nd Respondent was mandated to exercise independent command over the National Police Service. However, the 2nd Respondent has consistently violated the Constitution and the provisions of the National Police Service Act by allowing the 1st Respondent to give command and direct the police to help the 1st Respondent in committing illegalities on the suit property.
20. The Learned Counsel submitted that the 2nd Respondent had been very partisan in its dealings with the Petitioner by ignoring and deliberately failing to act on the criminal reports made by the Petitioner against the 1st Respondent and its officers as well as other persons who had committed criminal acts against the Petitioner. They urged the court to allow the orders sought because they believed that these acts will continue if the conservatory orders were not granted.
21. On the issue of irreparable harm, the Counsel submitted that, from the foregoing it was obvious that the Respondents had no qualms about destroying the Petitioner's property contrary to the provisions of the Constitution. The Respondents' constant invasion and trespass on the suit property and the removal of the container therefrom had occasioned the Petitioner loss particularized as follows:
 - a. A sum of Kenya Shillings One Million (Kshs.1,000,000.00) being the value Container Number MSKU 9887463 45G1 and the contents thereof.
 - b. A sum of Kenya Shillings Fifteen Million (Kshs.15,000,000.00 being the value of the wall of the property known as Mombasa/Block XLVI/138 demolished and destroyed by the 1st Respondent, its officers and employees.
 - c. Kenya Shillings Five Million (Kshs. 5,000,000.00) being the value of the staircase erected on the property known as Mombasa/Block XLVI/138 demolished and destroyed by the 1st Respondent, its officers and employees.
22. The Learned Counsel submitted that the Respondents had blocked and impeded the Petitioner from using, occupying and developing its property resulting into irreparable harm. The Respondents'



actions as pleaded in the Petition and application are not only illegal but simply amount to hooliganism and utter lawlessness. It was ironical that the police who should be protecting the Petitioner were the ones who were perpetrating illegalities against the Petitioner. The conservatory order sought are intended to protect the Plaintiff from the acts of lawlessness committed by the Government officer - 3. If the conservatory orders were not granted, the Respondents would be more emboldened in their actions and would further perpetrate their acts of lawlessness against the Petitioner. The abuse and blatant disregard of the law would simply not stop. They were guided by the Court in the case: “Law Society of Kenya – Versus - Officer of the Attorney General & another Judicial Service Commission (interested Party) [2020] eKLR” in granting conservatory orders said:

“is clear that every member of the public whether individually or collectively is enjoined to respect, uphold and defend *the Constitution* and any alleged violation of *the Constitution* by any individual is a very serious matter and an affront to the Constitutionalism, and sets a dangerous precedent in the violation of the constitutions which can, if not checked, result in serious harm to the country and every citizen. It is therefore proper and prudent for the Courts to act in public interest and consider granting the appropriate relief in the circumstances where such orders are deserved”

23. The Learned Counsel urged the Honourable Court to check the acts of lawlessness by the Respondents by granting the conservatory order sought in the application. The 1st, 2nd and 3rd Respondent filed a replying affidavit sworn by one Paul Ogweni Manyala on February 1, 2022 and filed on February 2, 2022, the 1st Respondent contends that the Petitioner is guilty of filing multiplicity of suits. However, the 1st Respondent only exhibited documents relating to CMCC NO.E264 OF 2020 and not any other suit. The said suit (CMCC NO.E264 OF 2020) is however not a bar to the granting of the orders sought in this application because:

- i. The issues raised in this Petition are breaches of constitutional rights of the Petitioner which were not pleaded in CMCC No.E264 of 2020 and which in any event do not fall within the jurisdiction of the magistrate’s court.
- ii. The issues pleaded in this petition including police harassment were not pleaded in CMCC No.E264 of 2020.
- iii. Other than the 1st Respondent herein, the County Government of Mombasa, the rest of the parties in this petition were not parties to CMCC No.E264 of 2020 and similarly the 2nd, 3rd and 4th Defendants in CMCC No.E264 of 2020 are not parties herein.
- iv. The issues in the two cases are totally different.
- v. The issues pleaded in this petition occurred after the filing of CMCC (Mbsa) No. E264 of 2020.

24. The Learned Counsel submitted that the 1st Respondent alleged that the Petitioner’s intention is to evict members of Madhubaa Beach Landing Site Self - help group. The documents filed by the 1st Respondent however betrayed that allegation. The Ground Status Report dated December 22, 2020 by Teddy M. Musula (Exhibit marked as “POM - 5” attached from the Mr. Manyala’s Replying Affidavit) was inadmissible in this Court because it was prepared for purposes of the Civil Case CMCC No. E264 of 2020 as clearly indicated in its heading. This Honorable could not and should not admit evidence prepared for another case as doing so would embarrass the hearing and fair trial of CMCC No. E264 of 2020 where the evidence was meant for. If this Court accepted the Ground Report and made a finding of facts on it, the Magistrate’s Court would be highly prejudiced because the Magistrate’s



Court is bound by the decision of this court. The Magistrate would not be able to make an independent decision based on the Report. Further, this Honourable Court is the right Court that is intended to hear appeals from the Magistrate's court touching on land matters. If this court accepted the Ground Report and uses it to make a finding in this case, the Court would be highly embarrassed should an appeal be preferred to this court emanating from the Magistrate's decision in CMCC No. E264 of 2020 because this Court's position shall have been known. Therefore, the Counsel urged the Court to reject and the Ground Report and not rely on it.

25. The Learned Counsel submitted that as they were saying, despite its inadmissibility, the Ground Report contradicted the 1st Respondent's allegation that the Petitioner's intention was to evict members of Madhubaa Beach Landing Site Self – Help Group. The Ground report stated as follows at Item 4 Bullet Number 3:

“The Madubaha BMU area hosts a fish landing (jetty) and vessels anchorage area as well as a beach. It is accessible via an existing road along the western boundary of parcel 138/XLVI/MN.”

26. The Learned Counsel submitted that the content of the Ground Report highlighted above showed the following:

- i. There existed a fish landing jetty and vessels anchorage area as well as a beach. The members of Madhubaa Beach Landing Site Self-Help Group were at liberty to use those existing facilities without any hindrance.
- ii. There existed a road along the boundary wall of the suit property. Again, members of Madhubaa Beach Landing Site Self – help Group were at liberty to use the access road without any hindrance.

27. The Learned Counsel argued that further, it was contradictory for the 1st Respondent to allege that the Petitioner evicted fishermen and prevented them from undertaking their economic activity yet Mr. Manyala at Paragraph 7 of his Replying Affidavit expressly averred that there was “a beehive of activities by the public along the foreshow” and attached photographic evidence to confirm the beehive of activities. This was a contradiction as there could be no beehive of activities if the Petitioner had prevented members of the public from undertaking activities along the shoreline as alleged by the 1st Respondent.

28. On the allegation made out at Paragraphs 8 and 9, the Learned Counsel averred that Mr. Manyala's Replying affidavit that there were illegal activities, he relied on the letter dated February 8, 2022 included in the Petitioner's Supplementary List of Documents filed alongside these submissions which clearly showed at paragraph 1 that the Petitioner's suit property extended up to the High Water Mark and that the riparian reserve formed part of the Petitioner's Title. The Petitioner could not therefore be accused of back-filling and reclaiming up to the ocean (60 meters high water mark) because the Petitioner's property extended all the way to the High-Water Mark.

29. The Learned Counsel concluded the submissions by holding that it was interesting to note that the 1st Respondent alleged that the Petitioner had no rights over the suit property (as seen from the contents of Paragraphs nos. 13 and 14 of Mr. Manyala's Replying Affidavit). The Petitioner's title had neither been challenged by the 1st Respondent nor declared illegal. Therefore, he held that the Petitioner had the constitutional right to own, occupy and use its property without any hindrance from the Respondents. The Counsel urged the Honorable Court to allow the application and award costs thereof to be paid by the Respondents jointly and severally.



VII. Analysis and Determination

30. I have critically considered all the filed pleadings in this matter including both written and oral arguments in support of and against the application, the cited authorities and the appropriate and relevant provision of the *Constitution of Kenya, 2010*. The application before court is for conservatory orders. At this point, the Court is not being called upon to go into the merits of the Petition and render a conclusive and definitive determination. In order for the Court to reach an informed, reasonable and just decision on this aspect, it has framed the following three (3) salient issues for its determination. These are:-
- a). Whether the Petitioner has satisfied the parameters for granting Conservatory orders.
 - b). Whether the Petitioner has raised sufficient grounds that would make this Court intervene and grant the Conservatory orders sought.
 - c). Who will bear the Costs of the application.

Issue No. a). Whether the Petitioner has satisfied the parameters for granting Conservatory orders.

31. As indicated, at this interlocutory stage taking that what the Court is being urged to strictly consider whether to grant Conservatory orders or not Hence, it will be very brief and to the point. The grounds upon which conservatory orders can be granted are well settled in this country. There are myriad of decisions arrived at from the High Court through to the Supreme Court in support of this legal position. This Court will be citing some of them at the opportune moment. A conservatory order is granted when an applicant succeeds to show to the satisfaction of the court that he has an arguable case and that if conservatory orders are not granted, he will continue to suffer prejudice and or that violation of his rights and fundamental freedoms will continue. In other words, an applicant must establish a prima facie case for the court to intervene. A prima facie case does not mean the case will eventually succeed at the end of the trial. The applicant is only required to show that there are triable constitutional issues in his case.
32. In the case of “Kevin K Mwiti & others – Versus - Kenya School of Law & others, [2015] eKLR the Court considered an application for conservatory orders. It stated that the Court must consider whether an applicant has established “a prima facie case’ . In the view of the Court, it stated that:-
- “A prima facie case..... is not a case which must succeed at the hearing of the main case, but must be a case that is not frivolous. The Petitioner has to show that he has a case which discloses arguable issues and in this case, arguable constitutional issues, but the court should not at this stage make definitive findings either of fact or law as that is the province of the court that will intimately hear the Petition.”
33. Additionally, in the case of:- “Kenya Association of Manufactures & 2 others – Versus - Cabinet Secretary Ministry of Environment and Natural Resources & 3 others [2017] eKLR the Court again observed that:-
- “In an application for a conservatory order the court is not invited to make any definite or conclusive findings of fact or law on the dispute before it because that duty falls within the jurisdiction of the court that will bear the substantive dispute. The jurisdiction of the court at this point is limited to examining and evaluating the materials placed before it to



determine whether the applicant has made out a prima facie case to warrant grant of a Conservatory order”

34. While in the case of: ”Judicial Service Commission – Versus - Speaker of the National Assembly & another [2013] eKLR the Court expressed itself thus:-

“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.”

35. On this aspect, the Supreme Court reinforced the above views in the case of “Gitirau Peter Munya – Versus - Dickson Mwenda Kithinji and 2 others [2014] eKLR stated that:-

“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.”

Issue No. b). Whether the Petitioner has raised sufficient grounds that would make this Court intervene and grant the Conservatory orders sought.

36. Under this sub title, I strongly believe the above cited authorities are adequate. Definitely, they will assist this Court navigate through the framed issues herein. Applying the above legal principles to the present application, it is not disputed that the registered owner of the property known as Mombasa/ Block XLVI/138 (hereinafter “the suit property”) situate in Mombasa County in an area commonly known as Mudhubaha, unless otherwise stated, are the Petitioner herein. The right to quiet and peaceful enjoyment of land is one of the fundamental rights in the Bill of Rights and to that extent and a matter touching on land. Under Article 40 of the Constitution of Kenya, 2010 , the Petitioner has a right to acquire and own property. The said right includes the right to occupy, use and develop such property.
37. However, 1st Respondent’s officers led by the County Executive Committee Member for Transport, Infrastructure & Public Works, Mr. Taufiq Balala visited the suit property and addressed a group of youth thereon. He promised to construct a public road cutting across the suit property to the beach. The Petitioner further contends that there after the 1st Respondent with county enforcement officers have interfered with the Petitioner’s property. In so doing, it is my own view that the 1st Respondent has for no apparent good reason nor justifiable cause not only violated, infringed, denied but also breached the Petitioner’s right to acquire and own property under Article 40 of the Constitution of Kenya 2010 by interfering with the Petitioner’s property and making it impossible for the Petitioner to access and occupy the suit property and by literally curtailing the Petitioner’s ability to freely use and enjoy the property without any interference, intimidation and general threats.
38. As a defence on its part, the 1st Respondent contended that the Petitioner was using the orders obtained herein, albeit un-procedurally and unlawfully, to perpetrate illegalities as they had proceeded to evict



the members of the public carrying out fishing economic activities as an organized group known as Madhubaa Beach Landing Site Self - Help Group which had been in existence for over 60 years, and was formally registered in the year 2019.

39. Based on these surrounding facts and inferences, it is therefore important to bear in mind that in considering whether or not to grant a conservatory order, the Court should always opt for the lower risk as opposed to the higher of injustice. Applying this legal principle in the case of:- Suleiman – Versus - Amboseli Resort Limited [2004] 2 KLR 589, Ojwang, J (as he then was) stated that:-

“Although the Court is unable at this stage to say that the applicant has a prima facie case with a probability of success, the Court is quite convinced that it will cause the applicant irreparable harm if his prayers for injunctive relief are not granted; and in these circumstances, the balance of convenience lies in favour of the applicant rather than the respondent. There would be a much larger risk of injustice if the court found in favour of the defendant, than if it determined this application in favour of the applicant”.(emphasis)

40. Ideally, taking the above considerations into account and the circumstances of this case juxtaposed to the fact that it is the Petitioner’s fundamental rights and freedoms that are at stake of being violated and continue to be violated, I am satisfied that the Petitioner has demonstrated, ‘a prima facie, that continued violation of the Petitioner’s rights and fundamental freedoms has a higher risk of injustice to warrant this court’s intervention, than declining the application.
41. Furthermore, it is also clear that if the court does not respond to the Petitioner’s plea at this stage, it will continue to suffer prejudice in that violations of its fundamental rights already occasioned will continue given that the disputed right to use of land which land may be wasted and the Petitioner denied of its full potential if the conservatory prayers are not granted. Thus, the Court is fully satisfied that the Petitioner ought to be granted the Conservatory order pending the hearing and final determination of the main Petition herein.

ISSUE No. c). Who will bear the Costs of the application?

42. It is not well established that and from Rule 26 (1) and (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules 2013, the award of costs is at the discretion of the Cost.
43. In exercising its discretion to award costs, the court shall take appropriate measures to ensure that every person has access to court to determine their rights and fundamental freedoms.
44. The Proviso of the Provisions of Section 27(1) of the Civil Procedure Act Cap 21 holds that costs follow the event. By event it means the results of the legal action or process in any litigation (see the Supreme Court Case of Jasbir Rai Singh Rai – Versus- Tarhochan Singh (2014) eKLR and Mary Wambui Munene –Versus- Ihururu Dairy Cooperative Societies eKLR (2014)
45. In the instant case the Petitioner has succeeded in protecting its case and gotten the orders sought. They are entitled to costs. However, taking that the matter is still proceedings to full trial let the costs of the application be assessed at the conclusion of the Petition.

V. Conclusion & Disposition

46. Ultimately, having conducted an indepth analysis of the three framed issues herein, the Honorable Court arrives at the conclusion that the Petitioner has succeeded in establishing that the suit property



requires preservation pending the hearing and determination of the main Petition. In view of the foregoing and for avoidance of doubt I do order as follows:-

- a. That the Notice of Motion application dated December 8, 2022 by the Petitioner be and is hereby allowed with costs.
- b. That a conservatory order is and do hereby issue pending the hearing and determination of this Petition, there be and is hereby issued a conservatory order to prohibit and restrain the Respondents jointly and severally, their agents, assigns, employees, officers and/or any person acting on behalf, authority, instructions and/or directives of the Respondents from trespassing on, stepping onto, visiting, vandalizing, demolishing, and generally interfering with the Petitioner's ownership, rights, use and occupation of the property known as Mombasa/Block XLVI/138.
- c. That for the expediency purpose the Petition through the Petition to be set down for hearing within the next 90 days by both the submissions and Viva voce evidence.
- d. That costs to abide by the result of the main Petition.

IT IS SO ORDERED ACCORDINGLY.

RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS SIGNED AND DATED AT MOMBASA THIS16TH DAY OFMARCH..... 2023.

HON. JUSTICE MR. L.L NAIKUNI(JUDGE)

ENVIRONMENT AND LAND COURT,

MOMBASA

In the presence of:-

- a. M/s. Yumna – the Court Assistant
- b. Mr. Oluga Advocates for the Petitioner
- c. No appearance for the 1st, 2nd, 3rd, Respondents.

RULING ELC. PET. 54 OF 2021 Page 19 of 19 HON. LL. NAIKUNI (JUDGE)

