John & 8 others v National Envinronment Management Authority & 3 others (Environment & Land Petition E012 of 2023) [2023] KEELC 18375 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEELC 18375 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION E012 OF 2023

JO MBOYA, J

MAY 31, 2023

BETWEEN

DANIEL M. JOHN ..... 1ST PETITIONER

JAMES M.KAVAI ..... 2ND PETITIONER

GORDON NDETO ..... 3RD PETITIONER

LUDWICK MUTHANI ..... 4TH PETITIONER

JACKSON MUTUKU ..... 5TH PETITIONER

SIMON NDWATI ..... 6TH PETITIONER

WILLIAM TAWO ..... 7TH PETITIONER

EVANS OLUOCH ..... 8TH PETITIONER

SABINA MBURU ..... 9TH PETITIONER

AND

THE NATIONAL ENVINRONMENT MANAGEMENT AUTHORITY .... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

THE CHIEF LAND REGISTAR ..... 3RD RESPONDENT

NAIROBI CITY COUNTY ..... 4TH RESPONDENT

RULING

1. Vide Application dated the 1st March 2023, the Petitioners/Applicants herein have sought for the following Reliefs;

i. That this Application be Certified Urgent and service be therefore dispensed with in the first instance.

ii. That pending the hearing ad determination of this Application Inter-partes, Conservatory orders be issued restraining the First Respondent or any of the Respondents and any State Officer or organ of State from carrying on with the process of Evicting and/or demolishing any buildings, installations or erections situate or within the arear better described as Animal Farm Association Settlement near Eka Hotel along the Southern Bypass.

iii. That pending the Hearing and determination of this Application and the Petition, Conservatory orders be issued restraining the first Respondent or any of the Respondents and any state officer or organ of state from carrying on with the process of evicting and/or demolishing any buildings, installations or erections situate or within the arear better described as Animal Farm Association Settlement near Eka Hotel along the Southern bypass.

iv. Cost of the Application be provided for.

2. The instant Application is premised and anchored on various, albeit numerous grounds which have been alluded to at the foot thereof. Besides, the Application is supported by an elaborate affidavit sworn by one Gordon Ndeto, who is the 3rd Petitioner/Applicant herein.

3. Further and in addition, the Deponent of the supporting affidavit has also annexed various documents to the said affidavit, inter-alia, the impugned Notice of Eviction issued by National Environmental Complaints Committee dated the 9th February 2023 and in respect of which the named body has issued to the Petitioners 30 days' notice to vacate from the suit property which is Public land.

4. Upon being served with the Petition and the consequential documents, including the Notice of Motion Application herein, the 1st Respondent duly entered appearance and thereafter filed a Notice of Preliminary objection, inter-alia, challenging the Jurisdiction of the court from entertaining and adjudicating upon the dispute beforehand.

5. On the other hand, the 2nd and 3rd Respondent entered appearance and thereafter filed Grounds of opposition dated the 22nd March 2022 (which are curious, insofar as the Petition beforehand and the Application are dated the 1st March 2023).

6. On her part, the 4th Respondent filed a Notice of Appointment of advocate dated the 21st March 2023 and thereafter filed a Notice of Preliminary Objection dated the 22nd May 2023. Similarly, the 4th Respondent has challenged the Jurisdiction of the court to entertain and adjudicate upon the subject petition.

7. For good measure, the Notice of Motion Application herein came for hearing on the 4th May 2023; and on which date the advocates for the respective Parties agreed to canvass and dispose of the Notice of Motion Application, as well as the various objections, vide oral submissions.

Submissions By The Parties

a. Applicants' Submissions:

8. Learned counsel for the Applicants raised, highlighted and canvassed four pertinent issues for consideration by the Honourable court.

9. Firstly, it was the submissions of Learned counsel for the Applicant that this Honourable court is vested and bestowed with the requisite Jurisdiction to entertain and adjudicate upon the dispute beforehand.

In this regard, counsel submitted that the extent and scope of the Jurisdiction of the Environment and Land Court is denoted by the provisions of Section 13(2) and (7) of the *Environment and Land Court Act*, 2011.

10. Furthermore, Learned counsel submitted that by dint of the provisions of Article 23 of *the Constitution* 2010, the Environment and Land Court is seized of the Jurisdiction, not only to grant a conservatory orders, but also to issue orders of Judicial review, inter-alia, certiorari, prohibition and/or mandamus.

11. On the other hand, Learned counsel added that the impugned notice, which is the subject of the current proceedings was generated and issued by the 1st Respondent, albeit without the requisite Jurisdiction. In this regard, Learned counsel contended that the impugned notice was therefore issued ultra vires by a body not authorized under the law.

12. Owing to the fact that the impugned Notice was issued ultra vires the mandate and Jurisdiction of the 1st Respondent, Learned counsel has therefore submitted that such a decision cannot be subjected to an appeal before the National Environment Tribunal, inline with the provision of Section 129 of the Environment Management Coordination Act, 1999, either as contended in the various notice of Preliminary objection or at all.

13. Premised on the foregoing, Learned counsel for the Applicants has therefore submitted that the Doctrine of Exhaustion does not apply, because the impugned notice falls outside the mandate of the 1st Respondent. Consequently, Learned Counsel has pointed out that the only forum to challenge the impugned Notice is before this Honourable court and not otherwise.

14. Secondly, Learned counsel for the Applicants has submitted that the only constitutional body mandated and authorized to issue and serve Eviction notice as pertains to Public and Community Lands, is the National Land Commission and not otherwise. In this regard, Learned counsel has invited the Honourable court to take cognizance of the provisions of Article 62(2) and 67(2) of *the Constitution* 2010; and Section 152 (C) of The *Land Act*, 2012.

15. Nevertheless, Learned counsel for the Applicants has submitted that even though the mandate to issue and serve Eviction notice inheres in the National Land Commission, the 1st Respondent herein has purported to arrogate unto herself a mandate that does not belong to her.

16. In view of the foregoing, Learned counsel for the Applicants has submitted that the impugned actions and the consequential Eviction notice are thus void ab initio.

17. Thirdly, Learned counsel has submitted that the Applicants herein have resided and occupied the suit property, which is admittedly Public land for more than 30 years. In this regard, the Applicant has therefore contended that even though the Applicants may not be having legal title to the land, same no doubt have accrued a right to Housing over and in respect of the suit property, which right ought to be respected and protected by the State and all State organs, the Respondents not excepted.

18. Insofar as the Applicants have accrued and thus acquired the right to Housing over and in respect of the suit property, Learned counsel for the Applicants has thus submitted that the Applicants cannot therefore be evicted without due compliance with the provisions of Article 11 of the International Covenant on Economic, Social and Cultural Rights 1966 and Section 152 (c), (d) and (f) of The *Land Act*, 2012 (2016).

19. Lastly, Learned counsel for the Applicants has submitted that owing to the threats of eviction as conveyed vide the illegitimate and illegal notice dated the 9th February 2023, it is evident that the Applicants are faced with imminent eviction. In this respect, Learned counsel for the Applicants has

thus submitted that it is imperative to grant and issue an appropriate conservatory order, with a view to protecting the rights and interests of the Applicants.

20. Furthermore, Learned counsel has pointed out that the factual situation canvassed and enumerated at the foot of the supporting affidavit beforehand, have neither been challenged nor impugned by the Respondent. Consequently, the Applicants have invited the court to find and hold that the factual situation and by extension the imminent threat of eviction, have therefore been established and demonstrated.

21. In support of the contention that the Applicants have placed before the Honourable court sufficient material to warrant the grant of conservatory orders, Learned counsel for the Applicants have cited and relied on the decision in the case of Daniel Mugendi versus Kenyatta University (2013)eKLR, Board of management Uhuru Secondary School versus City County Director of Education & Others (2015)eKLR and William Odhiambo Ramogi versus The Attorney General (2020)eKLR, respectively.

b. The 1St Respondent's Submissions:

22. Learned counsel for the 1st Respondent intimated to the court that same had filed a Notice of Preliminary objection anchored and/or premised on the provisions of Section 129(2) of the Environment Management and Coordination Act, 1999. In this regard, Learned counsel has contended that insofar as the impugned decision was made by the 1st Respondent, it behooved the Applicants herein to approach and file an Appeal before the National Environment Tribunal and not otherwise.

23. In addition, Learned counsel has contended that where there is an alternative dispute resolution forum created and established by law then it behooves all and sundry, the Applicants not excepted, to first and foremost exhaust the established the Dispute Resolution Mechanism before resorting to and invoking the Jurisdiction of the court.

24. In the premises, Learned counsel for the 1st Respondent has contended that the instant Petition and consequential Application are therefore barred and prohibited by dint of the Doctrine of Exhaustion.

25. In a nutshell, Learned counsel for the Respondent has therefore invited the Honourable court to proceed and strike out the entire Petition and the consequential Application for being incompetent and otherwise being an abuse of the Due process of the Court.

c. The 2nd And 3rd Respondents' Submissions:

26. Learned Principal Litigation Counsel, Mr. Motari intimated to the Honourable court that same had filed Grounds of opposition dated (sic) the 22nd February 2022 and thus same adopted and relied on the contents thereof.

27. Further and in addition, Learned counsel sought to highlight and indeed highlighted three issues for due consideration by the court.

28. First and foremost, Learned counsel contended that upon being served with the subject Petition and consequential Application, same cross-checked with the Law Society of Kenya ; with a view to ascertaining whether the advocate, namely, Mr. Justus Mutunga, who had filed the subject pleadings was duly authorized to practice law.

29. Further, Learned counsel added that in the course of checking the portal of the advocate, same discovered that the portal was reflecting that the advocate herein is inactive. In this respect, counsel

therefore pointed out that the current Petition and the Application thereof have thus been filed by an advocate who is not authorized to practice law.

30. Based on the foregoing submissions, Learned counsel for the 2nd and 3rd Respondents has therefore submitted that the Petition and the consequential Application, which has been (sic) filed by unqualified advocate ought to be struck out and/or expunged by the court.

31. Secondly, Learned counsel for the 2nd and 3rd Respondents also submitted that the impugned Notice, which is being challenged by the Petitioners/Applicants arose as a Consultative process, involving a series of meetings between the Respondents and the Applicants herein.

32. In any event, Learned counsel submitted that insofar as the Applicants herein have hitherto attended the meetings where the issues now being deliberated upon, were discussed, same are therefore estopped from challenging the propriety and validity of the intended eviction process.

33. Essentially, Learned counsel emphasized that the Applicants herein were duly consulted and particularly advised on the risk of occupying and settling on the suit property.

34. Thirdly, Learned counsel for the 2nd and 3rd Respondents has submitted that the Applicants herein have acknowledged and conceded that the suit property is Public land and thus same do not have any legal capacity to approach the Honourable court and in particular, to commence the subject proceedings.

35. For good measure, Learned counsel has submitted that the Applicants herein have no demonstrable legal rights and/or interests over and in respect of the suit property which is duly admitted and acknowledged to be Public land.

36. Owing to the fact that the Applicants herein have no rights and interests over the suit property, Learned counsel for the 2nd and 3rd Respondents has therefore contended that no conservatory order can therefore issue to and in favor of the Applicants either as sought or at all.

37. Significantly, Learned counsel for the 2nd and 3rd Respondent has contended that in the absence of legal rights, the Application of conservatory orders has therefore been made and mounted in vacuum. Consequently, Learned Counsel has invited the Honourable court to strike out the Application for, inter-alia, being an abuse of the Due process of the court.

d. The 4th Respondent's Submissions:

38. Learned counsel for the 4th Respondent adopted and relied on the Notice of Preliminary objection dated the 22nd May 2023 and same amplified two issues for consideration by the Honourable court.

39. First and foremost, Learned counsel for the 4th Respondent has reiterated that insofar as the impugned Notice was issued by the 1st Respondent, then it behooved the Applicant herein to approach the National Environment Tribunal by way of an appeal in terms of the provisions of Section 129(2) of the Environment Management and Coordination Act.

40. Secondly, Learned counsel for the 4th Respondent has submitted that where there is an alternative dispute resolution mechanism provided for under the law, it is incumbent upon everyone, the Applicants herein not excepted, to first exhaust the statutory remedies provided for, before approaching the court for protection. In this regard, Learned counsel pointed out and highlighted the importance of the Doctrine of Exhaustion.

41. Invariably, it was the submissions of Learned counsel for the 4th Respondent that the Petitioners/Applicants herein cannot choose to bypass an established statutory mechanism.

42. In a nutshell, Learned counsel for the 4th Respondent has therefore implored the court to uphold the Preliminary objection dated the 2nd May 2023 and to effectively strike out the Petition and the consequential Application.

Issues for Determination:

43. Having reviewed the Notice of Motion Application, the supporting affidavit thereto and having taken into account the Responses thereto; and in particular, the Preliminary objections raised and canvassed by the Respondents, I am of the opinion that the following issues do arise and are thus worthy of determination;

    i. Whether the Petition and the consequential Application have been filed and mounted by an Advocate who is not authorized to practice law or better still, by unqualified person.

    ii. Whether the Honourable court is seized and possessed of the requisite Jurisdiction to entertain and adjudicate upon the subject petition and the incidental Application thereunder.

    iii. Whether the Applicants herein have established and demonstrated sufficient basis to warrant the grant of Conservatory orders, in the manner sought.

Analysis And Determination

Issue Number 1 . Whether the Petition and the consequential Application have been filed and mounted by an advocate who is not authorized to practice law or better still, by unqualified person.

44. Learned counsel for the 2nd and 3rd Respondent opened his submissions by contending that upon being served with the Petition and the incidental Application, same perused and cross-checked with the law society of Kenya to ascertain and authenticate whether Learned counsel Mr. Justus Mutunga, for the Petitioners/Applicants was duly authorized and mandated to practice law and by extension file pleadings before the court.

45. In addition, Learned counsel contended that in the course of checking the website, same gathered and established that the portfolio of Mr. Justus Mutunga, showed that the status was inactive. In this regard, counsel for the 2nd and 3rd Respondents therefore contended that inactive status of counsel, meant that same was not authorized to practice law.

46. Premised on the foregoing, Learned counsel for the 2nd and 3rd Respondents therefore implored the court to find and hold that the pleadings before the court (read Petition and Application), have been filed and mounted by a person without the requisite mandate to do so. Consequently and in the premises, counsel has implored the court to strike out the entire Petition.

47. On his part, Learned counsel for the Petitioners has submitted that same is a duly paid up member of the law society of Kenya and in any event9; same has paid the requisite practice fees for the year 2023. Further, Learned counsel for the Applicants added that if same was duly informed of the contention of whether or not he is licensed to practice law, same would have availed his requisite certificate to confirm the fact that he is qualified and duly licensed.

48. Moreover, Learned counsel contended that the issue that was being advanced by counsel for the 2nd and 3rd Respondents was an issue of evidence which cannot be agitated on the basis of Grounds of opposition and worse still; on the basis of submissions from the bar.

49. To start with, it is important to point out that Learned counsel for the 2nd and 3rd Respondents only filed Grounds of opposition dated the 22nd March 2022 (most probably which were meant to reflect 22nd March 2023). For good measure, the 2nd and 3rd Respondents did not file any Replying affidavit or otherwise.

50. Further and in addition, even though Learned counsel for the 2nd and 3rd Respondents filed grounds of opposition, same did not advert to or raise the issue pertaining to and/or concerning the fact that counsel for the Petitioners was neither qualified nor licensed to practice law. Clearly, the contention that Learned counsel for the Applicants was neither licensed nor qualified to practice law sprung from the air, if not blues.

51. Furthermore, it is imperative to state and underscore that whenever a litigant wishes to raise and canvassed a particular cause, whether factual or otherwise, it behooves that litigant to issue and serve the requisite notice containing the particulars of the cause/allegations, intended to be canvassed.

52. Invariably, such a notice, containing the allegations of the issues to be relied upon by one party as against the adverse party must thereafter be served on the adverse party and thereby put the adverse party on notice about the nature of the allegations intended to be raised and canvassed.

53. Instructively and for good measure, this is a Fundamental tenet of the law, the due process of the law, the doctrine of natural justice and most importantly; the right to fair hearing as espoused and entrenched in Article 50(1) and (2) of *the Constitution* 2010.

54. Notwithstanding the established and hackneyed position which requires that Parties do not litigate by ambush, Learned counsel for the 2nd and 3rd Respondents, who comes from the offices of the Hon Attorney General, chose to adopt an unorthodox tactic, which is contrary to Rule of law; and thus sought to defraud the cause of justice, by ventilating a position which had hitherto not been served on the adverse party.

55. In my humble view, time is ripe and the advocates and the litigants ought to be called upon to ensure that the import and tenor of Article 50(1) and (2) of *the Constitution*, 2010, which underscore fair hearing and fair trial, respectively, are adhered to and complied with, to avert litigations by ambush and surprised.

56. Be that as it may, this court wishes to register its displeasure in the manner in which issues which are ordinarily issues of evidence are being raised from the bar albeit without any factual foundation and worse still, without Notice to the adverse Party. With humility, it is time that such style of litigation be eschewed.

57. Furthermore, it is not lost on the Honourable court that what Learned counsel for the 2nd and 3rd Respondents was ventilating was an issue of facts/evidence and therefore it behooved counsel to procure the information alluded to from the law society of Kenya and thereafter filed the requisite affidavit before the court. Clearly, in the absence of affidavit evidence, one wonders how the court would be called upon to make a determination on such submissions, which are devoid of any factual basis.

58. Nevertheless, it is imperative to state and underscore, that where one files Grounds of opposition, such a Party cannot take it up upon him/herself to start canvassing factual issues. For the umpteenth time, it is elementary that he/she who wishes to canvass evidential issues must file an affidavit and a failure to do so deprives the concerned Party of an opportunity to adduce evidence before the court, unless the proceedings are converted to be prosecuted on the basis of viva voce evidence.

59. In this respect, it is appropriate to take cognizance of the succinct holding in the case of Daniel Kibet Mutai & 9 Others versus The Attorney General (2019)eKLR, where the court stated and held as hereunder;

> (34) The position before us is that the appellants averred to certain facts under oath in an affidavit. These facts were not controverted by the respondents either through an affidavit in response or through cross examination. An affidavit is sworn evidence. It occupies a higher pedestal than grounds of opposition that are basically issues of law intended to be argued. Two things flow from this. First, by the mere fact of the affidavits not having been controverted, there is an assumption that what is averred in the affidavit as factual evidence is admitted. Secondly, a question arises regarding the weight or probative value of the averred factual evidence. In other words, are the facts as averred in the affidavits sufficient to prove the appellants' claims?

60. Furthermore, the court proceeded and stated thus;

> (36) It is evident that the learned Judge treated oral evidence (which in this case was not available), as superior to affidavit evidence and thereby dismissed the appellants' affidavits as bare allegations. With due respect, the learned Judge failed to appreciate that what is sworn under oath is not a simple matter but a serious issue, for which a deponent can be charged with perjury if it turns out that the deponent has lied under oath. In other words, the consequences are the same as that for a witness who testifies orally and perjures himself by lying on oath. In our view, affidavit evidence is legally admissible evidence in a court of law. It occupies the same place as any other evidence that is admissible in a court of law.

61. Arising from the foregoing, it is my humble albeit considered view that if Learned counsel for the 2nd and 3rd Respondents, was keen to impugn the qualification of learned counsel for the Petitioners/Applicants or better still whether same was licensed, then it behooved the counsel to swear an affidavit and advert to such issues, whereupon if the issues adverted turned out to be false, then same can be subjected to the requisite Due process of the law as pertains to perjury.

62. Lastly and even if, Learned counsel for the Petitioners/Applicant had not taken out his current practicing certificate, either as alleged by counsel for the 2nd and 3rd Respondents, (which position has not been established), it would still be difficult to accede to the submission by Learned counsel for the 2nd and 3rd Respondents to strike out the Petition and the incidental Application, merely because same were filed by an advocate without the requisite practicing certificate.

63. To my mind, the law as pertains to the foregoing position has since been highlighted and clarified by the Supreme Court of Kenya in the case of National Bank of Kenya Limited versus Anaj Warehousing Limited [2015] eKLR.

64. For good measure, the Honourable court stated and held thus;

> (56) It is true, of course, that such are virtuous objects in a well-conducted socio-political order, that coincide with goals of public policy. However, within that context, and by the terms of the constitutional law, the Courts are under obligation to resolve live disputes on questions that are governed by quite specific propositions of law.
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> (57) Thus, the issue still remains: whether Section 34 of the *Advocates Act* actually invalidates all instruments of conveyance prepared by advocates who do not have current practising certificates. In our opinion, it is essential to establish the main objective of Section 34, as a basis for any conclusions. This Section prohibits unqualified persons from preparing certain documents. It is directed at "unqualified persons". It prescribes clear sanctions against those

who transgress the prohibition. The sanctions prescribed are both civil and criminal in nature. But the law is silent as to the effect of documents prepared by advocates not holding current practising certificates.

(58) In these circumstances, how does the citizen's position rest? If he or she were to walk into an advocate's office, for a conveyancing service at a fee, would there be an initial obligation resting on him or her to demand the advocate's practising certificate? Would he or she be in breach of the law if after the service, it turned out that the advocate lacked a certificate? The transgressor, in our view, is the advocate, and not the client. The illegality is the assumption of the task of preparing the conveyancing document, by the advocate, and not the seeking and receiving of services from that advocate. Likewise, a financial institution that calls upon any advocate from among its established panel to execute a conveyance, commits no offence if it turns out that the advocate did not possess a current practising certificate at the time he or she prepared the conveyance documents. The spectre of illegality lies squarely upon the advocate, and ought not to be apportioned to the client.

(59) Is such reasoning in keeping with a perception that Section 34 of the *Advocates Act*, invalidates all documents prepared by an advocate who lacks a current practising certificate? We do not think so. Section 19 of the *Stamp Duty Act*, upon which the Appellate Court placed reliance in arriving at its conclusion, does not in our view, provide a basis for invalidating the instruments in question. Section 19 of the *Stamp Duty Act* only seeks to render inadmissible for purposes of evidence, all documents which are unstamped. The question before this Court is not the admissibility in evidence, of unstamped documents, but rather the validity of instruments (which indeed are stamped) prepared by an advocate who lacks a current practising certificate.

65. With humility, it is my finding that even if counsel for the Petitioners had not taken out his practice certificate for the year 2023; I would not have non-suited the Petitioners on that basis. Clearly to do so would have amounted to dereliction of Judicial duty and worse still; driving away the Applicants from the seat of Justice without due regard to the provisions of Article 48 of *The Constitution* 2010.

Issue Number 2 . Whether the Honourable court is seized and possessed of the requisite Jurisdiction to entertain and adjudicate upon the subject Petition and the incidental Application thereunder.

66. The Respondents herein and especially the 1st and 4th Respondent have contended that the Applicants herein ought to have approached the National Environment Tribunal pursuant to and by dint of Section 129(2) of The Environment Management coordination Act, 1999.

67. In addition, the 1st and 4th Respondents have also contended that where there is an express dispute resolution mechanism established by statute, then it behooves all and sundry, to exhaust the provided dispute resolution mechanism before approaching the Jurisdiction of the court. In this regard, the 1st and 4th Respondents have adverted to and canvassed the Doctrine of exhaustion.

68. On the other hand, the Petitioners/Applicants herein have submitted that the eviction notice, which is being challenged by the Petitioners herein was issued by the 1st Respondent, albeit without the requisite mandate and jurisdiction. In this regard, Learned Counsel for the Petitioners has submitted that the impugned notice was therefore issued ultra vires the Jurisdiction of the 1st Respondent.

69. Furthermore, the Applicants have submitted that where a statutory body acts ultra vires her Jurisdiction then the question of lack of such Jurisdiction can only be investigated by a court of law and not a Judicial or Qausi- Judicial tribunal like the National Environment Tribunal.

70. Before venturing to resolve whether or not this Honourable court is seized of the Jurisdiction to interrogate and adjudicate upon the issues at the foot of the Petition, it is imperative to recall that the Applicants herein were served with an Eviction notice generated and issued by the 1st Respondent herein.

71. Further and in addition, it is also not lost on the court that the impugned notice gave the Applicants 30 days within which to vacate from the suit property, which is contended to be Public land belonging to the Government of the Republic of Kenya.

72. From the foregoing, what is evident and apparent is that the Applicants herein were issued with a 30 days' notice to vacate what is deemed to be Public Land and that in default of vacating the suit Property then the Respondents; and more particularly, the 1st Respondent was to undertake the eviction of the Applicants and their families from the suit property.

73. At this juncture, it is important to point out that the only body that is vested with the requisite mandate and Jurisdiction to issues and serve and Eviction notice, which is intended to recover vacant possession over and in respect of Public land, is none other than the National Land Commission.

74. For good measure, it is instructive to take cognizance of the provisions of Section 152(C), (E) and (D) of The *Land Act*, 2012 (2016). For ease of reference same are reproduced as hereunder;

I52C. The National Land Commission shall cause a decision relating to an eviction from public land to be notified to all affected persons, in writing, by notice in the Gazette and in one newspaper with nationwide circulation and by radio announcement, in a local language, where appropriate , at least three months before the eviction.

152D.

(1) The County Executive Committee Member responsible for land matters shall cause a decision relating to an eviction from unregistered community land to be notified to all affected persons, in writing, by notice in the Gazette and in one newspaper with nationwide circulation and by radio announcement, in a local Langage, where appropriate, ?t least three months before the Eviction.

(2) In the case of registered community land, the procedure prescribed in section

I52E shall apply. 1528

(1) if, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction.

(2) the notice under subsection (1) shall –

(a) be in writing and in a national and official language;

(b) in the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;

(c) specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and

(d) be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area

75. From the provisions of Section 152(C) of the *Land Act*, there is no gainsaying that it is the National Land Commission that is mandated to issue an serve and Eviction notice against unlawful occupiers of (sic) Public and community land. Furthermore, where need arises for issuance of such Eviction notice, the duration is statutorily provided and circumscribed.

76. For good measure, it is important to point out that no eviction can ever be carried out and/or conducted without prior issuance and service of a 90 days statutory notice as prescribed and envisaged by dint of the provisions of Section 152(C) of the *Land Act*, 2012 (2016); and without affording the Parties served with the eviction notice an opportunity to access the court.

77. As a result of the foregoing, it is common knowledge that the eviction notice which was generated and issued by the Respondents herein, appears, (and I repeat, appears) to be illegal and invalid. In any event, it also appears that same is contrary to the established provision of the law.

78. Having pointed out the fact that the 1st Respondent herein has no statutory mandate to issue and serve an eviction notice, what then comes to mind is whether the action and decision culminating into the issuance of the eviction notice was ultra vires or otherwise.

79. Additionally, the incidental question that arises is whether an ultra vires decision taken by the 1st Respondent can be subjected to an appeal before the National Environment Tribunal in terms of Section 129(2) of the Environment, Management and Coordination Act, 1999.

80. To my mind, the decisions that can be subjected to and which falls under the Jurisdiction of National Environment Tribunal under Section 129(2) of the Environment Management and Coordination Act, 1999; are those decisions that are taken by the said Bodies created under the Act, but which relates to their statutory mandates and not otherwise.

81. In my humble view, where a statutory body purports to make and/or issue a decision which does not fall within her remit, then such a decision would ipso facto be a nullity and thus the only forum to challenge same would before a court of law, seized of the mandate to interrogate the question of Jurisdiction.

82. Clearly and to my mind, the tribunal would not be seized of such Jurisdiction to address and deal with whether the state organ or statutory body acted ultra vires or otherwise.

83. On the other hand, it is also imperative to recall that the Applicants herein have also sought for orders of Judicial review, namely, certiorari and mandamus, which orders can only be issued by the Honourable court and not the tribunal. In this respect, it is instructive to take cognizance of the provisions of Article 23 of *the Constitution* 2010, as well as the Provisions of Section s 8 and 9 of the *Law Reform Act*, Chapter 26, Laws of Kenya.

84. Finally, there is also the question as to the appropriateness or otherwise of the established dispute resolution mechanism. In particular, there is the question as to whether that particular dispute resolution mechanism would be seized of the mandate to issue appropriate and effective remedies aimed at addressing the obtaining dispute.

85. Arising from the foregoing discourse, I hold the firm opinion that there is no established dispute resolution mechanism, where the Applicants could go or approach with a view to challenging the illegality attendant to the eviction notice issued ultra vires by the 1st Respondent.

86. Additionally, assuming that the position held in terms of the preceding paragraph is erroneous (which I highly doubt), then the doctrine of exhaustion would still be inapplicable insofar as the National Environment Tribunal would not be seized of the requisite Jurisdiction to grant appropriate and effective reliefs, inter-alia certiorari and mandamus, which are orders that can only be issued by the Superior courts of Record; and not otherwise.

87. In a nutshell, I come to the conclusion that the doctrine of exhaustion which has been alluded to by the Respondents in arguing the position that the court is devoid of Jurisdiction is clearly inapplicable to the obtaining circumstances.

88. To this end, it is appropriate to adopt and reiterate the holding in the case of William Odhiambo Ramogi versus Attorney General & Others (2020)eKLR, where the court stated and held thus;

> 59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others Ex Parte The National Super Alliance Kenya (NASA) (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:
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> > What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.)
>
> 60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.
>
> 61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR.
>
> 62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion.

This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.

63. Article 165(1) of *the Constitution* vests in the High Court vast powers including the power to 'determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened' and the jurisdiction 'to hear any question respecting the interpretation of *the Constitution*.'

64. Though the 4th Petitioner's case against the 5th Respondent is largely with respect to the *Competition Act*, the ripple effect thereof is the subject of the alleged violation of their fundamental rights and freedoms. The issues are therefore intertwined. The statutory provisions available on dispute resolution under the *Competition Act*, cannot be construed in a very restrictive manner to oust this Court's jurisdiction, to determine the issues in dispute which qualify under the exceptions set out herein. From the foregoing it is our considered view that the doctrine of exhaustion though relevant, is not applicable in this case having regard to the nature of the grievance, and the public interest involved.

89. Either way, I am not prepared to abdicate my judicial responsibility and mandate and thus leave the Applicants herein at the mercy of the Respondents who despite being privy to the provisions of Section 152(C) of the *Land Act*, 2012; are still keen on propagating and perpetuating what appears to be an illegality.

90. Consequently and in the premises, I hold the considered view that this Honourable court is seized and possessed the requisite Jurisdiction to entertain and adjudicate upon the issues raised at the foot of the current Petition. Furthermore, I have pointed out that the orders sought at the foot of the Petition cannot be procured and obtained before the National Environment Tribunal or at all.

Issue Number 3. Whether the Applicants herein have established and demonstrated sufficient basis to warrant the grant of Conservatory orders, in the manner sought.

91. On the 9th February 2023, the Petitioners/Applicants herein were issued and served with an eviction notice which stated inter-alia as hereunder;

> " Upon listening to both parties, the meeting made the following determinations;
>
> a. That the residents were requested to relocate since that was for their own safety and since the land belonged to another person.
>
> b. That due to hard economic times, the community gave the residents 30 days as reasonable time to vacate the area.
>
> c. That the security committee would over see the eviction of the said residents after 30 days; and
>
> d. The chief would facilitate the orderly movement from the site within the 30 days after issuing the resident with a notice to vacate the site.
>
> Notice:
>
> This is therefore to give the area residents Dafam informal settlement a final notice to vacate the area within 30 days from the date of the decision on 6th February 2023, failure to vacate voluntary, the National Government Administration Office should assist them to vacate the site.

92. It is the said eviction notice that has provoked the filing of the current Petition and the incidental application for issuance of a conservatory order.

93. The question that the court must deal with is whether the impugned notice is ex-facie lawful; whether the notice has been issued by the requisite statutory body; and whether the victims of the intended eviction have been afforded reasonable opportunity to engage with the authorities and whether, the social and economic rights of the victims are bound to be violated and/or infringed upon.

94. I beg to point out that the issues raised and alluded to in the preceding paragraphs would have to await the plenary hearing and determination of the Petition. However, on a prima facie basis, there is a reasonable apprehension that unless a conservatory order is issued then the Applicants herein are likely to be subjected to the imminent eviction, which will no doubt occasion irreparable harm and untold sufferings.

95. On the other hand, it is also not lost on this court that the suit property may be very well be Public land and the Applicant may very well have no Legal title to the suit property, but the fact that the Applicants have been in occupation of the suit property for more than 30 years vests the Applicants the right to Housing, which cannot be taken away from them albeit on a 30 days eviction notice, in the manner espoused by the Respondents.

96. To my mind, the contents of the supporting affidavit, which contained detailed averments including the likelihood prejudice to be suffered, denotes a basis to warrant the grant of a conservatory order, with a view to averting and forestalling the imminent Eviction.

97. In this respect, I am duly guided by the decision of the Supreme Court in the case of Gatirau Peter Munya versus Dickson Mwenda Kithinji & 2 others [2014] eKLR, where the court held thus;

> (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.

98. Additionally, I am also cognizant of the holding of the court in the case of Board of Management Uhuru Secondary School versus The City County Director of Education (2015)eKLR, where the court stated and observed as hereunder;

> 28. Once the applicant has established to the court's satisfaction a prima facie case with a likelihood of success the court is then to decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights: see Patrick Musimba –v- The National Land Commission & 4 Others HCCP 613 of 2014 (No. 1) [2015] eKLR and also Satrose Ayuma & 11 Others –v- Registered Trustees of Kenya Railways Staff Retirements Benefits Scheme [2011] eKLR.
>
> 29. Thirdly, flowing from the first two principles, is whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is indeed the business of the court to ensure and secure so far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice. In these respects the case of Martin

Nyaga Wambora –v- Speaker of the County Assembly of Embu & 3 Others CP No. 7 of 2014, is relevant, especially paragraphs [59] [60] and [61] thereof.

30. The fourth principle which emerges from the various cases and is well captured by the Supreme Court of Kenya in the case of Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others [2014] eKLR is that the court must consider conservatory orders also in the face of the public interest dogma.

31. Finally, the court is to exercise its discretion in deciding whether to grant or deny a conservatory order. The court must consequently consider all relevant material facts and avoid immaterial matters. The court will consider the applicants credentials, the prima facie correctness of the availed information, whether the grievances are genuine legitimate and deserving and finally whether the grievances and allegations are grave and serious or merely vague and reckless: see Centre for Human Rights and Democracy & 2 Others –v- Judges and Magistrates Vetting Board & 2 Others CP No. 11 of 2012 as well as Suleiman –v- Amboseli Resort Ltd [2004] 2 KLR 589.

99. To my mind, the Applicants herein have demonstrated that same have a prima facie case with probability of success and furthermore that unless a conservatory order is granted, same are bound to be evicted based on an eviction notice which is ex-facie invalid. In this regard, unless the conservatory orders are granted the substratum of the Petition would be destroyed and the proceedings herein would be rendered academic.

100. In a nutshell, the Applicants merits the exercise of discretion and in particular; the issuance of the orders so as to vindicate their position albeit during the pendency of the Petition.

Final Disposition

101. In conclusion, there is no gainsaying that unless the orders sought are granted, the Respondents herein and more particularly, the 1st Respondent, would proceed and execute the impugned Eviction notice, irrespective of the dire consequences and repercussions attendant thereto.

102. Premised on the foregoing and in a bid to avert a repeat of what was spoken to by the Supreme Court of Kenya in the case of William Musembi & Others versus Moi Educational Company Ltd & Others (2021); I am minded to allow the application in terms of prayer 3 thereof.

103. For coherence, the Notice of Motion Application the 1st March 2023 be and is hereby allowed in terms of prayer 3 only. Further, cost of the Application shall await the outcome of the Petition.

104. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MAY 2023.

OGUTTU MBOYA

JUDGE.

In the Presence of;

Mr. Justus Mutunga for the Petitioners/Applicants

Ms. Muyai for the 1st Respondent

Mr. Motari Principal Litigation Counsel for the 2nd and 3rd Respondents

Ms. Irene Odhiambo for the 4th Respondent