



**Kibera v Chief Land Registrar & 4 others (Constitutional Petition
E031 of 2023) [2023] KEELC 19882 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19882 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CONSTITUTIONAL PETITION E031 OF 2023

JO MBOYA, J

SEPTEMBER 21, 2023

**IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 162(2)
(B), 258, AND 259 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 40, 42, AND 43 OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

JEREMIAH MUTEKA KIBERA PETITIONER

AND

CHIEF LAND REGISTRAR 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

EDWARD NJUGUNA KANG'ETHE 4TH RESPONDENT

HAJI OMARI (SUING ON BEHALF OF THE ESTATE OF TAABU

BINTI YUSSUF ALSO KNOWN AS TABU YASSUF MARIGI

(DECEASED) 5TH RESPONDENT

RULING

Introduction and Background

1. The Petitioner/Applicant herein contends that same is (sic) the lawful, legitimate and registered proprietor of the property otherwise known as Plot No. 36/1/133, Eastleigh Section 1, situate within the city of Nairobi. However, the Applicant further avers that despite being the lawful owner of the named property, the property in question was the subject of court proceedings vide Milimani ELC No. 1030 of 2013; between the 5th Respondent herein, as the Plaintiff and the 4th Respondent; who was the Defendant therein.



2. Furthermore, the Applicant contends that the suit/proceedings were undertaken and concluded without his involvement and participation, even though the property which was the subject of dispute belongs to and is registered in his name.
3. Arising from the fact that the suit property was (sic) being disputed by 3rd Parties who (sic) do not own same and following the issuance of the Judgment therein, the Applicant herein endeavored to be joined in the suit for purposes of vindicating and protecting his rights. Be that as it may, the Applicant's application for joinder was declined.
4. Based on the foregoing preliminary facts, the Applicant herein felt obligated to and indeed filed the instant Petition, wherein same has sought for a plethora of reliefs touching on and concerning his Fundamental Rights and Freedoms, essentially in terms of Article 40(3) of *the Constitution*.
5. Contemporaneous with the filing of the Petition, the Applicant also filed an Application for, inter-alia, conservatory orders. For good measure, the Application dated the 21st June 2023, seeks for the following reliefs;
 - i. the Instant Application be certified as urgent and same be heard ex-parte and in the first instance.
 - ii. Pending inter-partes hearing of the current application, the Honorable court be pleased to grant and issue a conservatory order, barring and prohibiting the execution of any eviction orders which were issued and obtained vide ELC No. 1030 of 2013 and which was filed by the 5th Respondent albeit without the participation and involvement of the Petitioner/Applicant and insofar as same affect and/or relates to L.R No. 36/1/133 Eastleigh Section 1.
 - iii. Pending the hearing and determination of the Petition, the Honorable court be pleased to grant and issue a conservatory order, barring and prohibiting the execution of any eviction orders which were issued and obtained vide ELC No. 1030 of 2013 and which was filed by the 5th Respondent albeit without the participation and involvement of the Petitioner/Applicant and insofar as same affect and/or relates to L.R No. 36/1/133 Eastleigh Section 1.
 - iv. The Honorable court be pleased to grant such other appropriate, effective and just reliefs pertaining to and concerning L.R No. 36/1/133 Eastleigh Section 1, with a view to vindicating and/or protecting the Petitioner/Applicant's proprietary rights to the suit property.
 - v. In the alternative and without prejudice to the foregoing, the Honorable court be pleased to grant an order of status quo pertaining to and concerning occupation, possession and use of the suit property; as well as the title thereto, which currently inheres in the Petitioner/Applicant, pending the hearing and determination of the Petition.
 - vi. The Honorable court be pleased to issue further directions to facilitate expeditious hearing and determination of the Petition.
 - vii. Costs of the Application be provided for
6. The instant Application is predicated and premised on various, albeit numerous grounds, which have been alluded to and enumerated at the foot of the Application. Furthermore, the Application is supported by the affidavit of the Applicant sworn on even date.
7. Instructively, upon being served with the Petition and the Application under reference, the 5th Respondent entered appearance and filed a Replying affidavit sworn on the 10th June 2023; and in



respect of which same has annexed assorted documents, inter-alia the pleadings and various decisions which were issued vide Milimani ELC No. 1030 of 2013.

8. Additionally, the 5th Respondent has also averred that the entire Petition and the Application beforehand constitutes and amounts to an abuse of the Due process of the court, insofar as the Applicant herein had hitherto filed an application to be joined in ELC No. 1030 of 2013, but which application was dismissed.
9. Suffice it to point out that upon being served with the Replying affidavit by and on behalf of the 5th Respondent, the Petitioner/Applicant sought for and obtained Leave of the Honourable Court to file and serve a further/supplementary affidavit; and in this regard, same proceeded to and indeed filed a Supplementary affidavit sworn on the 23rd July 2023.
10. Other than the foregoing, the rest of the Respondents did not file any Response, either by way of Replying affidavit or Grounds of opposition or at all.
11. Moreover, the instant Application came up for hearing on the 17th July 2023, whereupon the advocate for the Applicant and the 5th Respondent, respectively, agreed to canvass and dispose of the Application by way of written submissions. Consequently, the court proceeded to and circumscribed the timeline for the filing and exchange of the written submissions.

Submissions by the Parties

a. Applicant's Submissions:

12. The Applicant filed written submissions dated the 21st July 2023; and in respect of which same has supplied a preliminary background in respect of the dispute beforehand and thereafter highlighted and canvassed three salient issues for consideration by Honourable the court.
13. Firstly, Learned counsel for the Applicant has submitted that the Applicant herein is the lawfully, legitimate and registered proprietor of the suit property, which was the subject of the court proceedings vide ELC No. 1030 of 2013 between the 5th Respondent, as the Plaintiff and the 4th Respondent, who was the Defendant.
14. Nevertheless, Learned counsel for the Applicant has submitted that even though the 4th and 5th Respondent tussled over ownership of the suit property, neither of the said parties owned the suit property, which is contended to belong to the Applicant.
15. Furthermore, Learned counsel for the Applicant has submitted that ultimately the court in respect of ELC No. 1030 of 2013 proceeded to and rendered a Judgment, whose import and tenor are calculated to deny and deprive the Applicant herein of his lawful rights to the suit property, albeit without him (Applicant) having been heard in respect of the said matter or at all.
16. Additionally, Learned counsel for the Applicant has submitted that upon the Applicant discovering the existence of ELC No. 1030 of 2013; and the resultant Judgment, same mounted an application for joinder in the said suit, with a view to ventilating his position; but the application was declined.
17. In short, Learned counsel for the Applicant has submitted that the Applicant's proprietary rights to property in terms to Article 40(3) of *the Constitution*, 2010 are bound to be affected, breached, violated and/or infringed upon, albeit without the Applicant having been afforded the right to be heard. In this regard, learned counsel has invited the court to take cognizance of Article 47 and 50 of *the Constitution* 2010.



18. In the premises, Learned counsel has submitted that the Applicant has established and/or proved the requisite threshold to warrant the grant or issuance of the conservatory orders, to protect the suit property pending the hearing and determination of the Petition.
19. Additionally, Learned counsel has cited and relied on various decision inter-alia Judicial Service Commission vs The Speaker of The National Assembly & Another (2013)eKLR and Wilson Kaberia Mkunja vs The Magistrate's & Judges Vetting Board & Others (2016)eKLR, respectively.
20. Secondly, Learned counsel for the Applicant has submitted that the Applicant herein has also demonstrated and proved that same has a prima facie case in terms of the breach, violation and/or infringement of his rights and fundamental freedoms to warrant the issuance of the orders sought.
21. In support of the submissions that the Applicant has established a prima facie case, Learned counsel has cited and relied on the decision in the case of Naftali Ruthi Kinyua vs Patrick Thuita Gachure & Another (2015)eKLR and American Cyanamid vs Ethicon Limited (1975) AC 396, respectively.
22. Thirdly, Learned counsel for the Applicant has submitted that the instant Petition and the application for conservatory orders, which have been filed by and on behalf of the Applicant herein do not constitute and/or amount to an abuse of the due process of the court, either as alleged by the 5TH Respondent or at all.
23. Further and in addition, Learned counsel for the Applicant has contended that the Petition and the Application have been mounted in pursuit of a just cause, whereby the Applicant is seeking to protect his fundamental rights to the suit property in accordance with the law.
24. To amplify the submissions that the instant suit and the application do not amount to abuse of the court process, Learned counsel for the Applicant has cited and relied on the decision in the case of Muchanga Investment Ltd vs Safaris Unlimited (Africa) Ltd & 2 Others (2009)eKLR.
25. Premised on the foregoing, Learned counsel for the Applicant has therefore submitted that the Applicant has established the requisite grounds to warrant the grant of, inter-alia the conservatory order sought, with a view to protecting the status of the suit property.

b. 5th Respondent's Submissions:

26. The 5th Respondent filed written submissions dated the 26th July 2023; and in respect of which same has raised and highlighted three(3) salient and pertinent issues for consideration and ultimate determination by the Honourable court.
27. First and foremost, Learned counsel for the 5th Respondent has submitted that this Honorable court is devoid and divested of the requisite Jurisdiction to entertain and/or adjudicate upon the entire Petition and the application beforehand and thus the court ought to strike out the entire proceedings.
28. Whilst amplifying the submissions on the question of lack of Jurisdiction, learned counsel for the 5th Respondent has contended that the dispute pertaining to and or concerning ownership of the suit property, has since been determined and disposed of vide Milimani ELC No. 1030 of 2013 and wherein the court found that the suit property belongs to the 5th Respondent.
29. Premised on the foregoing, Learned counsel for the 5th Respondent has therefore contended that this court which has concurrent jurisdiction with the court that heard ELC No. 1030 of 2013, cannot now be invited to entertain and adjudicate upon the subject dispute de-novo.



30. Secondly, Learned counsel for the 5th Respondent has submitted that the Applicant herein subsequently filed an application in respect of ELC No. 1030 of 2013, wherein same sought to be joined in the said suit, but which application was dismissed by the court.
31. Further and in addition, counsel for the 5th Respondent has submitted that upon the Application by the Applicant herein being dismissed, the Applicant herein filed a notice of appeal and a further application before the court of appeal which Application is still pending hearing and determination. In this regard, Learned counsel has contended that the filing of the current application and the Petition beforehand amounts to an abuse of the due process of the court.
32. Thirdly, Learned counsel for the 5th Respondent has submitted that other than the application that was filed by the Applicant before the Court of Appeal, arising from the refusal to admit and join the Applicant as a Party to ELC No. 1030 of 2013; the Applicant herein has since filed yet another suit, namely, ELC NO. 383 of 2022, which touches on and concerns ownership of the suit property.
33. In any event, Learned counsel has submitted that the said suit which has been filed by the Applicant herein is still pending hearing and determination and hence the subject Petition is inflicted by the Doctrine of Res-sub-judice.
34. In support of the submissions touching on and/or concerning the implication of the Doctrine of Res-sub-judice, learned counsel for the 5th Respondent has cited and relied on inter-alia Kenya National Commission on Human Rights vs The Attorney General; IEBC & 16 Others (Interested Parties) (2021)eKLR and Republic vs The Registrar of Title, Mombasa & 2 Others Ex-parte Emfil Ltd (2012)eKLR, respectively.
35. Based on the foregoing submissions, Learned counsel for the 5th Respondent has therefore submitted that the Applicant herein is not entitled to the reliefs sought at the foot of the Application.
36. Conversely, the counsel for the 5th Respondent has submitted that the Application beforehand is devoid of merits and thus same ought to be dismissed with costs to the 5th Respondent.

Issues for Determination:

37. Having appraised and reviewed the Petition, the Application beforehand and the response on behalf of the 5th Respondent; and upon consideration of the written submissions filed by and on behalf of the respective Parties, the following issues are pertinent and thus worthy of determination;
 - i. Whether the Honorable court is seized of the requisite jurisdiction to entertain and adjudicate upon the instant Application or otherwise.
 - ii. Whether the Petition and the Application constitutes and/or amounts to an abuse of the Due process of the court.
 - iii. Whether the instant Petition is barred and/or prohibited by the Doctrine of Res-sub-judice.
 - iv. Whether the Applicant herein has established, demonstrated and/or proved the requisite ingredients to warrant the grant of Conservatory orders sought or otherwise.



Analysis and Determination

Issue Number 1 Whether the Honorable court is seized of the requisite jurisdiction to entertain and adjudicate upon the instant Application or otherwise.

38. The 5th Respondent herein has submitted that the honorable court herein is devoid and/or divested of the requisite jurisdiction to entertain and adjudicate upon the instant Petition and the Application beforehand. In this regard, it is therefore imperative that this court undertakes appropriate investigations of the factual situation as well as the relevant law, with a view to ascertaining whether the court has the requisite Jurisdiction or otherwise.
39. Further and in addition, it is important to underscore that Jurisdiction is so central and fundamental and that in the absence of jurisdiction it behooves a court of law to down his/her tools and to strike out the impugned proceedings. See the dictum in Owners of Motor Vessel Lilian S vs Caltex Oil (K) Ltd (1989)Eklr and Republic versus Karisa Chengo (2017) eklr, respectively.
40. In any event, there is no gainsaying that where a court of law is divested of jurisdiction, then any proceedings carried out and/or undertaken by such a court would amount to nothing and or otherwise constitute annulity. See the ratio decidendi in the case of Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR.
41. Furthermore, there is no gainsaying that jurisdiction of a court is derived from or donated by *the constitution* or the relevant statute or both. Besides, where the jurisdiction of the court is circumscribed either by *the constitution* or otherwise, the court must adhere to the circumscription. Instructively, a court of law cannot arrogate unto itself jurisdiction either by craft or innovation, whatsoever. See the dicta of the supreme court in the case of S. K Macharia & Another vs Kenya Commercial Bank Limited & Another (2012)eKLR.
42. With the foregoing in mind, it is now appropriate to decipher whether or not this court has Jurisdiction to interrogate and entertain the subject dispute, before venturing to address the merits or otherwise of the dispute beforehand.
43. Firstly, Learned counsel for the 5th Respondent contends that the dispute pertaining to and/or concerning ownership of the suit property has since been determined and/or adjudicated upon vide Milimani ELC No. 1030 of 2013, which was a dispute between the 4th and 5th Respondent herein.
44. Furthermore, Learned counsel has added that upon the rendition of Judgment in ELC No. 1030 of 2013, the Applicant herein, who admittedly was not a Party to the said suit, filed an application seeking to be joined therein as an Interested Party; but which application was dismissed.
45. Instructively, Learned counsel for the 5th Respondent admits and acknowledges that ELC No. 1030 of 2013; was a dispute between the 5th Respondent, who was the Plaintiff and the 4th Respondent, who was the Defendant. For good measure, there is no contention that the Applicant herein who lays and stakes a claim to the suit property, was a party.
46. Given that the Applicant herein was not a party to the said suit, namely, ELC No. 1030 of 2013; and neither was same heard therein, the question that does arise is whether the determination and the judgment rendered in that particular suit, where the Applicant was not a party, would debar and/or preclude the Applicant from ventilating his fundamental rights to the property in question.



47. Additionally, it is also important to observe that the right of a party, the Applicant herein not excepted, cannot be abrogated in any way whatsoever without such a party being heard in compliance with the provisions of Article 47 and 50 of *the Constitution*, 2010.
48. Other than the foregoing, it is not lost on this court that the Petition beforehand does not only pit the Applicant against the 5th Respondent only, but same also includes other public bodies, whom the Applicant accuses of impropriety in the registration of the suit property in favor of the 5th Respondent.
49. Taking the foregoing circumstances into account, can it be said that the dispute that forms the substratum of this Petition and by extension the Application beforehand, has hitherto been entertained and adjudicated upon by a court of competent jurisdiction, either as contended by learned counsel for the 5th Respondent or otherwise.
50. To my mind, the issues that color the instant Petition are distinct and pervasive so much so that same are contra-distinct from what the court in ELC No. 1030 of 2013 dealt with and/or adjudicated upon.
51. In any event, it is also important to point out that what is before this court is not an ordinary suit but a constitutional Petition, wherein the Applicant is seeking to ventilate his human rights and fundamental freedoms and which are contended to be under threat of violation and infringement.
52. Consequently and in the premises, I am unable to agree with learned counsel for the 5th Respondent that the dispute which colors the current Petition has hitherto been adjudicated upon and determined by a court of competent Jurisdiction.
53. Furthermore, I also do not find merit in the arguments contending that this court is devoid and/or divested of the requisite jurisdiction to entertain and adjudicate upon the subject Petition and by extension the Application beforehand. In this regard, the ground premised on want of Jurisdiction is dismissed.

Issue Number 2 Whether the Petition and the Application constitutes and/or amounts to an abuse of the Due process of the court.

54. Other than the contention by Learned counsel for the 5th Respondent that the Honorable court is devoid and bereft of the requisite Jurisdiction, learned counsel had also submitted that the instant Petition and the application beforehand amounts to and/or constitute to an abuse of the due process of the court.
55. If I understood learned counsel for the 5th Respondent well, what same was articulating is to the effect that upon delivery of the Judgment in ELC No. 1030 of 2013, wherein the Applicant was not a party; the Applicant herein proceeded to and filed an application seeking to be joined in the said suit as an interested party with a view to ventilating his position as concerns to the suit property.
56. Additionally, learned counsel for the 5th Respondent has further submitted that the application which was filed by the Applicant herein and wherein same sought to be joined as a Party; was dismissed by the court. Notably, there is no gainsaying that the Applicant was not made a party.
57. On the other hand, learned counsel for the 5th Respondent has contended that after the Applicant's application for joinder was dismissed, same filed a Notice of appeal to the Court of Appeal and also an application before the court of appeal, which application is said to be still pending.
58. Based on the foregoing, learned counsel for the 5th Respondent has therefore submitted that it was not open for the Applicant to file the current petition on the face of the pending application before the court of appeal.



59. Nevertheless, it is important to observe that the Notice of appeal which was filed by the Applicant indicating his desire to appeal to the court of appeal and the consequential application that was filed, relate only to the ruling which was rendered by the court in ELC No. 1030 of 2013, wherein the Honorable Judge dismissed the application for joinder and not otherwise.
60. For the avoidance of doubt, the issue pertaining to and/or concerning the claim by the Applicant as being the owner of the suit property was never dealt with and/or canvassed whatsoever. Instructively, the issue of such ownership could not have been dealt with because the Applicant was never admitted and/or joined as a party.
61. In view of the foregoing, I do not see how the filing of the Notice of appeal and the application to the Court of appeal, which relate to the ruling on joinder, would impact on and/or deny the Applicant herein of a right of access to justice by filing the instant Petition, whose crux is meant to protect his property rights in line with Article 40(3) of *the Constitution*, 2010; as read together with Sections 24 and 25 of the *Land Registration Act*, 2012.
62. Given the foregoing observations, I am not able to discern how the filing of the current Petition and the consequential application would therefore amount to an abuse of the due process of the court, either as posited by the counsel for the 5th Respondent or otherwise.
63. Additionally and in this respect, I have had occasion to interrogate the import, tenor and implication of what constitutes an abuse of the court process. However, I have not been able to discern any iota of ingredient to bring the current Petition within the definition, purview and ambit of an abuse of the court process.
64. For coherence, I have taken into account and cognizance the ratio decidendi in the case of Muchanga Investments Limited vs Safaris Unlimited (Africa) Limited (2009)eKLR, where the Honorable court of appeal had occasion to appraise what constitutes and/or amounts to an abuse of the due process of the court.
65. Similarly and without further ado, the contention that the Petition and the consequential application amounts to an abuse of the due process of the court, is no doubt, without merit.

Issue Number 3 Whether the instant Petition is barred and/or prohibited by the Doctrine of Res-sub-judice.

66. Besides, it has also been contended that the instant Petition is barred and/or prohibited by the Doctrine of Res-sub-judice, insofar as it has been averred that prior to and before the filing of the instant Petition, the Applicant had filed a previous suit, namely, ELC NO 388 of 2022, which is said to be pending before this court, namely, the Environment and Land Court – Milimani.
67. Insofar as there is the said previous suit, learned counsel for the 5th Respondent has submitted that the current Petition and the consequential application offend and/or contravene the provision of Section 6 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.
68. Furthermore, learned counsel for the 5th Respondent has invited the court to take cognizance of and to apply the ratio decidendi in the case of Kenya National Commission on Human Rights vs The Attorney General; IEBC & 16 Others (Interested Parties)(2020)eKLR, where the supreme court stated and held as hereunder;

(67) The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same



subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

69. Granted, if the Petitioner/Applicant herein had filed a previous suit touching on and/or concerning the same subject matter between and the 5th Respondent and the said suit is still subsisting, then the subsequent proceedings would be caught up by the Doctrine of Res-sub-judice.
70. However, I had the occasion to peruse the supplementary affidavit filed by and on behalf of the Applicant with leave of the court and I have discerned that the Applicant herein indeed withdraw the previous suit vide the Notice of withdrawal dated the 3rd July 2023; long before the 5th Respondent even filed the replying affidavit sworn on the 10th July 2023.
71. Essentially, the import of the withdrawal of the previous suit renders same non-existent and unavailable. In this respect, it cannot now be contended that there is in existence a previous suit, namely, ELC No. E383 of 2022; which remains in existence to date, to warrant the invocation and application of the Doctrine of Res-sub-judice.
72. In the premises, the contention anchored on the basis of Section 6 of the *Civil Procedure Act*; which anchors the Doctrine of Sub- Judice; is certainly misconceived and legally untenable.

Issue Number 4 - Whether the Applicant herein has established, demonstrated and/or proved the requisite ingredients to warrant the grant of Conservatory orders sought or otherwise.

73. The Petitioner/Applicant herein has claimed that the suit property was sold to and thereafter transferred to him by the 4th Respondent, long before the filing of ELC No. 1030 of 2013.
74. Additionally, the Applicant has also contended that arising from the sale of the suit property and the consequential transfer and registration of same in his name, same entered upon, took possession and thereafter developed the suit property with what is contended to be a multi-storey complex. Further and in addition, it has also been contended that the suit property is duly leased and/or demised to various tenants who are in occupation thereof to date.
75. Notwithstanding the foregoing, the Applicant has further averred that even though same is the registered proprietor of the suit property; orders have since been issued in a separate and distinct matter, albeit without his participation and involvement and same is now threatened with eviction.
76. Other than the foregoing, the Applicant has further contended that upon establishing and/or discovering the existence of the said suit and the consequential Judgment, which affect his lawful rights to the suit property, same filed an application for joinder in the said suit, namely, ELC No. 1030 of 2013, with a view to defending his rights to the suit property, but the application was declined.
77. Notwithstanding the foregoing, the Applicant contends that his rights to and in respect of the suit property, which are protected vide Article 40(3) of *the Constitution*, 2010, are now threatened with violation and/or infringement, so much so that the suit property is on the verge of alienation.



78. Additionally, I understand the Applicant herein to be contending that the impugned actions relating to the suit property were arrived at without due notice unto him; without being afforded an opportunity to be heard and without compliance with the right to fair hearing, as espoused by Article 50(1) of *the Constitution*, 2010.
79. From the forgoing, the substratum of the Applicant's claim is that there is need to protect the suit property from alienation and/or any other adverse proceedings, pending the hearing of the current Petition.
80. To my mind, the Applicant herein, if indeed, same stakes a claim to ownership of the suit property ought to be afforded an opportunity to be heard in defense of his property rights to the suit property. Surely, the right to a hearing is fundamental and/or essential and it matters not that the Applicant herein would (sic) lose the claim at the tail -end or subsequent to the plenary hearing.
81. Notably, it is also immaterial that the court would still reach the same conclusion that the Applicant herein does not own the suit property. For good measure, where a decision is arrived at without compliance with the Rules of Natural justice, such non-compliance, if established and proved; would render the impugned decision a nullity.
82. In respect of the foregoing exposition of the law, it is appropriate to take cognizance and in any event to reiterate the ratio decidendi in the case of *David Oloo Onyango vs The Attorney General (1987)eKLR*, where the court stated and observed thus;
- “ A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at: *De Souza v Tanga Town Council [1961] E A 377* at page 338, letter E-G. In *Associated Provincial Picture Houses Limited v Wednesbury Corporation, [1948], KB 223*”
83. Having made the foregoing remarks, it is now appropriate to venture forward and to discern whether the circumstances obtaining in respect of the subject matter warrant the grant of inter-alia conservatory orders, to protect, conserve and preserve the status of the suit property, which is the substratum of the Petition.
84. To my mind, if the conservatory orders sought are not granted, the adverse execution proceedings, which are complained of; and in any event, which admittedly were arrived at without the involvement and participation of the Applicant herein, would be actualized and the substratum of the Petition would be destroyed, if not annihilated, beyond redemption.
85. In such a scenario, there is no gainsaying that the entire Petition would thus be rendered futile and academic. Furthermore, the rights and fundamental freedoms complained of by the Applicant and which are sought to be redressed vide the current Petition would then stand breached, violated and infringed upon, sadly with the blessing of the court. Such a situation, if same were to occur would be contrary to the import and tenor of Articles 10(1), 19(1), 20(1), 27(1), 40(3), 47, 48 and 50(1) of *the Constitution* 2010.
86. Simply put, I am of the considered view that the factual controversy depicted by and under the foot of the current Petition are such that a conservatory order ought and should issue.
87. To fortify the foregoing observation, it is instructive to reiterate the holding/ratio decidendi in the case of *Gitarau Peter Munya vs Dickson Mwenda Githinji & Another (2013)eKLR*, where the supreme court of Kenya held and stated 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.
88. Besides, the circumstances wherein a conservatory order can and ought to be issued were also adverted to and addressed in the case of Board of Management of Uhuru Secondary School v City County Director of Education & 2 others [2015] eKLR, where it was stated thus;
25. Foremost, the applicant ought to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. As was stated by Musinga J (as he then was) in the case of Centre for Rights Education and Awareness and 7 Others –v- The Attorney General [HCCP No. 16 of 2011]:
- “[Arguments] in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the Petitioner’s application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*”.
26. It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis. In these respects, I would quickly make reference to M. Ibrahim J (as he then was) in the case of Muslims for Human Rights [MUHURI] & Others –v- Attorney General & Others CP No. 7 of 2011, who whilst agreeing with Musinga J’s statement in Centre for Rights Education and Awareness [CREAW] and 7 Others –v- The Attorney General (Supra) stated as follows:-
- “I would agree with my brother that an applicant seeking conservatory orders in a Constitutional case must demonstrate that he has a prima facie case with a likelihood of success” (emphasis).
1. Recently the same pertinent observations were made by Ngugi J and Muriithi J sitting separately in Jimaldin Adan Ahmed & 10 Others –v- Ali Ibrahim Roba and 2 Others [2015] eKLR and Micro Small Enterprises Association of Kenya (Mombasa Branch) –v- Mombasa County Government [2014] eKLR respectively.
1. 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.



1. 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.
1. 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.
1. 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.

89. The exposition of the law, in terms of the excerpt quoted and cited in the preceding paragraphs, succinctly delineate the circumstances and ingredients which an Applicant must demonstrate and establish, before partaking of and benefiting from a conservatory order.
90. Notably, the Applicant herein has in my humble view met the said ingredients, by not only establishing credible stake in respect of the suit property, but also the fact that his rights and fundamental freedoms, as entrenched in the Bill of Rights, are indeed threatened with violation and/or infringement.
91. In a nutshell, my answer to issue number four (4) herein is in the affirmative; and hence the Applicant is entitled to a conservatory order, pertaining to and in respect of the suit property, with a view to conserving and preserving same, pendete lite.

Final Disposition

92. Having calibrated and addressed all the thematic issues, which were enumerated in the body of the Ruling herein, it must have become crystal clear that the Applicant herein is truly and justly entitled to the mercy of the court, by conserving and preserving the substratum/ crux of the Petition beforehand.
93. Consequently and in the premises, I come to the conclusion that the Application dated the 21st June 2021; is meritorious and same be and is hereby allowed in terms of prayer number (iii) thereof.
94. As concerns the question of costs, it is worthy to note that where an application like the one beforehand succeeds, ordinarily the costs ought to abide the main cause. See the dictum in *Giella vs Cassman Brown Limited* (1973) EA. In short, costs of the application shall abide the outcome of the Petition.
95. Furthermore, it is imperative to proceed and issue further directions. In this regard, the Respondents be and are hereby directed to file and serve their substantive responses, if any; to the Petition and same to filed and served within 21 days.



96. On the other hand, the Petitioner shall be at liberty to file and serve further/supplementary affidavit, if any, and same shall be filed and served within 14 days of service of the responses, if any, by the Respondents. Thereafter, the Petition shall be listed for directions with a view to fast-tracking the hearing and determination of same.

97. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF SEPTEMBER 2023.

OGUTTU MBOYA,

JUDGE

In the Presence of:

Benson - Court Assistant

Ms. Rachael Njoroge for the Petitioner/Applicant

Mr. Moses N. Siagi for the 4th Respondent

N/A for the 5th Respondent

N/A for the 1st, 2nd and 3rd Respondents

