Kariuki & another (Suing on Behalf of Mpeketoni Plot Owners) v County Government of Lamu & 4 others (Environment and Land Petition E013 of 2025) [2025] KEELC 5031 (KLR) (3 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5031 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT AND LAND PETITION E013 OF 2025

EK MAKORI, J

JULY 3, 2025

IN THE MATTER OF: VIOLATION OF ARTICLES 1, 2, 3, 6, 10, 19, 20, 21, 22, 23, 24, 27, 40, 47, 60, 64, 174, 196, AND 201 OF THE CONSTITUTION OF KENYA AS WELL AS THE FOURTH SCHEDULE THERETO

-AND-

IN THE MATTER OF: IN THE MATTER OF SECTION 2 AND 5 OF THE LAND ACT

-AND-

IN THE MATTER OF: ARTICLES 19, 20, 21, 22, 23, 57, 162 (2) (B) AND 258 OF THE CONSTITUTION OF KENYA

-AND- IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015

-AND-

IN THE MATTER OF: THE LAMU COUNTY VALUATION AND RATING ACT,2015

-AND-

IN THE MATTER OF: ALLEGED ENACTMENT BY THE COUNTY ASSEMBLY OF LAMU LAW THAT IS INCONSISTENT WITH AND/OR IN CONTRAVENTION OF THE CONSTITUTION

-AND-

IN THE MATTER OF: ALLEGED VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF KENYANS

BETWEEN

SIMON MWAURA KARIUKI ..... 1ST PETITIONER

STEPHEN NG'ANG'A KARIARA ..... 2ND PETITIONER

SUING ON BEHALF OF MPEKETONI PLOT OWNERS

AND

COUNTY GOVERNMENT OF LAMU ..... 1ST RESPONDENT

CECM FINANCE, LAMU COUNTY ..... 2ND RESPONDENT

CECM LANDS LAMU COUNTY ..... 3RD RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF LAMU ..... 4TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ..... 5TH RESPONDENT

RULING

1. Through a Notice of Motion, the applicants have instituted this application pursuant to Articles 19, 20, 22, 23, 57, and 159(2)(d) of *the Constitution* of Kenya; and Rules 19, 23, and 24 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. Among other reliefs, the applicants seek:

    a. Spent;

    b. Spent;

    c. Spent;

    d. Pending the hearing and determination of the petition, a Conservatory Order is hereby issued, restraining the respondents, whether acting jointly or severally, by themselves, their servants, agents, representatives, or otherwise, from implementing, further implementing, administering, applying, and/or enforcing Sections 20, 21, 20,21,22, and 24 of the Lamu County Valuation and *Rating Act*, 2015, and from further levying land rates for parcels of land within Mpeketoni township.

    e. The costs of this application are to be provided for.

2. The application is contested, with the 1st, 2nd, and 3rd respondents each submitting a joint affidavit sworn by Mohamed Mbwana Ali, the County Executive Committee Member of Finance for Lamu County, dated April 15, 2025, in response to the application.

3. The 4th respondent, the County Assembly of Lamu, was served on April 8, 2025, and May 9, 2025, but neither appeared nor responded to the application.

4. The application was canvassed through written submissions, and the court recognizes the professionalism shown by the esteemed counsel for the applicant, Mr. Maina, as well as the esteemed counsel for the 1st to 3rd respondents, Ms. Swaleh.

5. The petitioners assert they are bona fide residents and owners within Mpeketoni, holding valid land titles registered at the Lamu Land Registry. They are authorized to make affidavits on behalf of Mpeketoni plot owners. Urgently, they approach the court against the 2nd and 3rd respondents' move to enforce the Lamu County Valuation and *Rating Act*, 2015, which imposes land and building rates that they allege threaten their socio-economic interests and social justice. Although enacted in 2015, the Act was not implemented due to the impact of terrorism on Mpeketoni, which caused economic decline and hardship. The petitioners argue that the Act conflicts with *the Constitution*, the National

Rating Act, 2024, and the *Public Finance Management Act*, 2012, as it lacked public participation, making it unconstitutional.

6. The petitioners contend that the 1st respondent recently issued demand notices with payments due by March 31, 2025, carrying a 2% monthly interest if unpaid. They challenge the valuation rolls, claiming they were prepared improperly and without public input, and argue that land rates on freehold properties are unconstitutional, primarily affecting vulnerable individuals, such as the 2nd petitioner. They seek a declaration that the Act is null and void due to constitutional violations during its enactment and implementation.

7. Conversely, the respondents 1st to the 3rd assert that the allegations made by the applicants, claiming that the process of public participation conducted by the respondents during the preparation of the valuation roll was a mockery and that this has led to the unjust, unsustainable, and unlawful imposition of land rates, are entirely without basis and lack merit.

8. Based on the materials and submissions presented before me, the issues this court needs to resolve are whether the applicants have met the requirements for granting Conservatory Orders and who should bear the costs of the application.

9. Counsels for the parties submitted written submissions citing various legal provisions and judicial precedents related to the considerations this court must follow before issuing a decision on whether to grant Conservatory Orders.

10. I agree with both counsels' submissions regarding the decision in Munya v Kithinji & 2 others [2014] KESC 30 (KLR). The Supreme Court described the connotation of "conservatory orders" as follows:

> " 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 applicant's case for orders of stay."

11. I also agree with the counsels for the parties in citing the decisions in Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board & others, [2016] eKLR, and Dagoretti District Land Owners Welfare Association v Nairobi County Government & 3 others, [2022] KEELC 2404 (KLR), regarding the key principles to consider before the issuance of conservatory orders. This is further reinforced by the decision in Board of Management of Uhuru Secondary School v City County Director of Education & 2 others, [2015] eKLR, where the court summarized the main principles for considering the granting of conservatory orders as follows:

> " 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....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....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....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....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. 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."

12. It should be noted that, at this stage, the court should refrain from issuing orders that are final in nature. I agree with the decision cited by the 1st to 3rd respondents in the Dagorretti District Land Owners Welfare Association Case (supra), where Angote J., citing Ibrahim J. (as he then was) in Muslim for Human Rights (Milimani) & 2 Others v Attorney General & 2 Others (2011) eKLR, stated as follows:

> " In determining whether or not to grant conservatory orders, the court is alive to the fact that it must be careful not to make a final determination."

13. At the core of the petition, the petitioners challenge the constitutionality of the enactment of the Lamu County Valuation Act, 2015. In the affidavit sworn by Simon Mwaura Kariuki, the petitioner contends that the Lamu County Valuation and *Rating Act*, 2015, is inconsistent with Article 10 of *the Constitution*, the National *Rating Act*, 2024, and Section 207 of the *Public Finance Management Act*, 2012, thereby rendering it unconstitutional and unenforceable.

14. The 1st petitioner asserts that the Impugned Act, promulgated on November 25, 2015, was enacted during a period when the County was significantly affected by terrorism and violent murders. This circumstance led to a prohibition on public gatherings. It fostered widespread fear of attacks, thereby further inhibiting public participation and resulting in minimal or no substantive input from the community in the legislative process. Consequently, this constitutes a violation of Article 10 of *the Constitution* concerning Public Participation, which delineates one of the National Values and Principles of Governance binding all state organs, state and public officers, and all persons in Kenya whenever they apply or interpret *the Constitution*, enact, implement, or interpret laws, or formulate or execute public policy.

15. Petitioners assert that Article 196(1)(b) of *the Constitution* imposes an obligation on the County Assembly to encourage public participation and engagement in its legislative activities and other matters through its committees. It is alleged that the Assembly did not facilitate Public Participation and failed to appear in this matter to address the allegations levied in this petition.

16. The petitioners additionally challenge the Act on the grounds that it violates Article 40(1) of *the Constitution*. A reading of Section 16(2) of the challenged legislation reveals that it imposes a uniform rate of 2% on all taxable properties, without differentiating between freehold and leasehold estates. The requirement to pay annual rates on freehold land seems to resemble a leasehold tax, thereby undermining the security of property ownership.

17. In this regard, Mr. Maina counsel for the petitioners cited the decision in Sheria Mtaani and Shadrack Wambui & 6 Others v Kajiado County Assembly & 3 Others (Environment & Land Petition 2 of 2024) [2024] KEELC 13540, where, while agreeing with the petitioners, the court, held that land titles must first be converted to leasehold before they can be subjected to land rates.

18. Regarding implementation, it is further argued that the Valuation Rolls, upon which the rates are based, were prepared without meaningful Public Participation, contrary to the principles of governance outlined in Article 10 of *the Constitution*.

19. Furthermore, the act discriminates against low-income and vulnerable groups, such as the individual represented by the 2nd petitioner/applicant, Stephen Ng'ang'a Kariara. He claims to be an older person, as defined under Article 57 of *the Constitution* of Kenya, and a recipient of the Inua Jamii cash transfer program, receiving Kshs—2,000 from the National Government. However, the distribution of these funds is inconsistent and unreliable.

20. The petitioners argue that they have demonstrated a risk of suffering irreparable harm if the unconstitutional rating regime is enforced. This injury cannot be adequately remedied if conservatory orders are not issued.

21. They further contend that the public interest will necessitate their involvement in the process affecting them, hence supporting the orders sought.

22. The 1st to 3rd respondents assert that all procedural formalities were adhered to during the enactment of the Impugned Act. They further contend that there was adequate public participation. Moreover, there exists an uncontested presumption that any legislative Act is constitutional unless proven otherwise by the petitioners. This is exemplified in the case of Okoiti v Cabinet Secretary for Treasury & Others (Petition E021 of 2019) [2023] KEHC 2707 (KLR) (Constitutional and Human Rights) (30th March 2023) (Judgment).

23. Having thoroughly examined the materials and submissions presented, as well as the principles outlined regarding considerations before the issuance of Conservatory Orders, I agree with Ms. Swaleh, representing the 1st to 3rd respondents, that the core of the petitioners' case is summarized in ground (e) of the application. This ground suggests that the process of enacting the Lamu County Valuation and *Rating Act*, 2015, and its subsequent implementation, was plagued by clear procedural and substantive illegality. Additionally, it is alleged that the respondents intentionally minimized the process of public participation during the preparation of the valuation roll, leading to the unjust, unsustainable, and unlawful imposition of land rates. Furthermore, there is a challenge to the imposition of the tax regime on freeholds, and the Act discriminates against vulnerable people.

24. Regarding whether the petitioners have established a prima facie case with a likelihood of success on the issues I have identified as the foundation of the petition, the 1st to 3rd respondents, through affidavits on record, have demonstrated that public notices were issued in Taifa Leo and Daily Nation newspapers on June 8, 2023 concerning the Impugned Act

25. Subsequently, after completing the Valuation Roll and before submitting it to the County Assembly, a public notice was issued, inviting individuals with objections to submit their concerns to the department within 21 days. Additionally, a notice was issued after the County Assembly approved the valuation roll, informing the public of its approval and availability for inspection.

26. Furthermore, the applicants' claims in their submissions that the notices issued under Section 3 of the *Valuation for Rating Act*, Cap 266 of the Laws of Kenya, and published in Taifa Leo and the Daily Nation newspapers on June 8, 2023, were issued under a repealed Act are entirely misleading. The said Act was repealed by the National *Rating Act*, 2024, which came into effect on December 24, 2024.

27. Besides the public notices, the 1st to the 3rd respondents have shown that meetings involving public participation, including with rateable owners, were held on various dates, as recorded in the public participation report dated November 30, 2023. Additionally, the applicants' statements indicate

that a public participation meeting took place at some point in 2023, followed by another meeting approximately three weeks later. Attendees from Mpeketoni informed the County Government officials that the land rates would cause significant hardship for local residents, especially since Mpeketoni town remains underdeveloped and sluggish, mainly due to the lasting effects of Al-Shabaab attacks. Furthermore, part of the reason for issuing freehold titles was the expectation that residents would not be required to pay land rates.

28. Regarding attendance at the meetings, the 1st to 3rd respondents have shown that individuals with residential plots within Mpeketoni township rejected the imposition of land rates on residential plots, arguing that they do not rely on essential services such as garbage collection, sewerage systems, street lighting, and road maintenance provided by the County Government. As a result, they believe it is unfair to be charged for services from which they do not benefit. Based on the admissions made by the applicant, I agree with the 1st to 3rd respondents that there is prima facie evidence of public participation regarding the 2023 valuation roll in Mpeketoni, and that members of the public, including residential plot owners, attended and were allowed to provide their input.

29. As clearly articulated by Ms. Swaleh, the primary focus of the petition revolves around questions regarding Public Participation, which is core to the petition itself. Granting conservatory orders at this point could potentially undermine the entire petition.

30. The foregoing issue is closely related to whether the court can determine if the said Act discriminates against vulnerable individuals at this stage. I believe this issue will also be addressed during the main trial.

31. Regarding whether rates should be imposed on freeholds, the decision cited by Mr. Maina, learned counsel for the petitioners - Sheria Mtaani and Shadrack Wambui & 6 Others v Kajiado County Assembly & 3 Others (Environment & Land Petition 2 of 2024) [2024] KEELC 13540, has been distinguished by dint of the new regime introduced under the National *Rating Act*, 2024, which came into force on December 24, 2024. An examination of its preamble reveals that it is:

> " AN ACT of Parliament to provide a comprehensive framework for imposition of rates on land and buildings by county governments; to provide for the valuation of rateable property; to provide for the appointment and powers of valuers; to provide for the establishment, powers and functions of the National Rating Tribunal and for connected purposes."

32. With the enactment of the new Act, it appears that the reatable properties will undergo changes, which will consequently affect the current arrangements regarding whether rates are payable on leaseholds versus freeholds. Therefore, Section 2 states:

> " In this Act, unless the context otherwise requires —
>
> "annual rental value" means the amount of annual rental value arrived at based on the—
>
> (a) actual annual rent realisable on the rateable property; or
>
> (b) annual equivalent of comparable rents or annual rent paid on leased land or would be payable were the land to be leased in the open market;"

33. With the enactment of the aforementioned National *Rating Act*, the extent of its impact on the main petition will necessitate that the matter be reserved for determination within the main petition.

34. Concerning whether the applicants will suffer prejudice if Conservatory Orders are not issued or if the petition may be rendered nugatory, I concur with the sentiments expressed by Ms. Swaleh. Aside

from the general allegations contained in grounds of the application—that the filing of the petition and application was intended to prevent the imposition of land rates on the grounds that such imposition is procedurally and substantively illegal, excessive, unsustainable, oppressive, and unconstitutional, and therefore null and void, given that the petitioners are already burdened with taxes—and that the imposition of land rates outside the dictates of *the Constitution* by the challenged legislation is unsustainable and inequitable—the applicants have not sufficiently demonstrated or prove the alleged damage or prejudice that they will suffer incase Conservatory Orders are not granted at this stage.

35. It has not, for example, been claimed that the petitioners'/applicants' members cannot afford to pay the rates mentioned earlier. In such situations, it is the court's view that the petitioners have not shown, let alone proved, that they face an immediate, real, and concrete danger or that they are likely to experience harm due to the alleged violation or potential violation of *the Constitution*.

36. Furthermore, the arguments presented suggest that the substratum of the petition would not be rendered insignificant if the Conservatory Orders are not granted. In any case, should the court ultimately rule in favor of the petitioners, there remains the authority of this court to nullify and revoke the implementation of the Draft Valuation Roll, 2019, or to declare the Valuation Roll null and void.

37. Considering the circumstances of this case, this court concludes that public interest weighs against suspending the activities related to the Draft Valuation Roll, 2019, at this stage. As previously stated, should the petitioner ultimately prevail, the respondents shall be ordered to refund any amounts that may have been levied.

38. In the circumstances of this case, it is evident that the applicants have neither demonstrated nor substantiated the prejudice or damage they might suffer as a consequence of the alleged violation of *the Constitution* and the *Land Act*. This is particularly pertinent to the argument that, should the Conservatory Orders not be granted, the substratum of the petition would be rendered worthless.

39. Considering whether the public interest supports granting the orders sought, I believe that in this situation, the public interest leans against granting them, as it would hinder the County Government of Lamu from fulfilling its lawful responsibilities under Article 209(3) of *the Constitution* and Section 132(1) of the *Public Finance Management Act*, 2012. Let the issues raised here be discussed at the main hearing of the petition.

40. Due to the foregoing, the Motion Application dated March 28, 2025, is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY IN MALINDI ON THIS 3RD DAY OF JULY 2025.

E. K. MAKORI

JUDGE

In the presence of:

Mr. Maina for the Applicants

Ms. Swaleh for the 1st -3rd Respondents

Happy: Court Assistant