Okoiti v Parliament of Kenya & 2 others; County Government of Taita Taveta & 3 others (Interested Parties) (Petition 33 of 2021) [2024] KEELC 706 (KLR) (12 February 2024) (Ruling)

Neutral citation: [2024] KEELC 706 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

PETITION 33 OF 2021

LL NAIKUNI, J

FEBRUARY 12, 2024

IN THE MATTER OF: ARTICLES 1 (3) (C), 22(1) & 22 (C) 23, 48, 50 (1) 159, 162(2) (B) 165 (5) (B) & 6, 258 (1) & 259 (1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE ALLEGED VIOLATION OF ARTICLES 1, 2, 3(1) 4(20), 6 (1), 10, 19, 20, 21,

24, 93 (2), 94 (3), 129, 130, 131(1) (B) & 2 (A) & (B) 156, 188 AND 258 OF THE CONSTITUTION OF KENYA

AND

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

UNDER ARTICLES 47 (1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: COMPELLING PARLIAMENT OF KENYA TO SET UP AN INDEPENDENT

COMMISSION TO RESOLVE THE BOUNDARY DISPUTE BETWEEN TAITA TAVETA AND KWALE AND BETWEEN TAITA TAVETA AND MAKUENI AND COMPELLING THE NATIONAL GOVERNMENT TO SURVEY AND ERECT RULING ELC. PET. 22 OF 2021 PAGE 1 OF 75JUSTICE L.L. NAIKUNI BEACONS TO CLEARY DEMARCATE THE BOUNDARIES IN ISSUE

AND

IN THE MATTER OF: THE DOCTRINE OF LEGITIMATE EXPECTATIONS

BETWEEN

OKIYA OMTATAH OKOITI ..... PETITIONER

AND

THE PARLIAMENT OF KENYA ..... 1ST RESPONDENT

THE NATIONAL EXECUTIVE OF KENYA ..... 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ..... 3RD RESPONDENT

AND

THE COUNTY GOVERNMENT OF TAITA TAVETA ..... INTERESTED PARTY

THE COUNTY GOVERNMENT OF KWALE ..... INTERESTED PARTY

THE COUNTY GOVERNMENT OF MAKUENI ..... INTERESTED PARTY

MINISTRY OF LANDS AND PHYSICAL PLANNING ..... INTERESTED PARTY

RULING

I. Introduction.

1. From the very onset, the Honourable Court observes that this matter though still at the interlocutory stage has been highly contested. The record indicates that this is the third ruling in respect of the matter herein while still at the very initial interlocutory stages of the Petition. Nonetheless, this Honourable Court has been called to render its determination on two (2) Notice of Motion applications dated 18th December, 2023 and 19th July 2021 respectively both by the Petitioner/Applicant – Mr. Okiya Omtatah Okoiti acting in person herein. One of the application dated 18th December, 2023 was filed for reliefs of seeking for the enlargement of time by the National Land Commission to fully comply by the orders made out through a Ruling by this Honourable Court delivered on 23rd March, 2022. While the second application – dated 19th July, 2021 was filed contemporaneously with the Petition of the even date under certificate of urgency, the Petitioner/Applicant sought among other orders that pending inter parties hearing and determination of the application and / or the Petition herein to be granted conservatory orders.

2. Upon service of these two applications, there were responses filed by the Respondents and the Interested parties and the Honourable Court particularly onto the application dated 19th July, 2021. Apparently, its only the 2nd and 3rd Interested Parties who filed grounds of opposition to the application dated 18th December, 2023. I will be dealing with them in a more elaborate manner in the course of this Ruling. For good order, the Honourable Court will hand the applications simultaneously and deliver an omnibus Ruling herein.

II. The Notice of Motion application dated 18th December, 2023 by the Petitioner/Applicant.

3. On 18th December, 2023, the Petitioner/Applicant herein moved this Honourable Court through filing a Notice of Motions application dated 18th December, 2023. It was brought under the provision of Articles 20, 22, 23(3), 50(1), 159(2)(d), 162(2)(b), 165(5), and 258 of the *Constitution* of Kenya, 2010; the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013; and all other. The Petitioner/Applicant sought for the following orders:-

    a. Spent;

    b. Thatpending "the inter-partes" hearing and determination of this application, this Honourable Court be pleased to issue and hereby issues an order extending by six (6) months,

with effect from 31st December, 2023, the time the Court gave the National Land Commission to investigate and report on the boundaries of Taita Taveta, Kwale, and Makueni counties.

c. Thatconsequent to the grant of the prayers above, the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.

d. Thatcosts be in the cause.

4. The application was premised on the grounds, testimonial facts and the averments made under the Supporting Affidavit of Okiya Omtatah Okoiti. He averred as follows:-

i. He was competent to swear this affidavit as the Petitioner/Applicant herein.

ii. The application was extremely urgent.

iii. This was the case as the time set by the Court for the National Land Commission to investigate and report on the boundaries of Taita Taveta, Kwale, and Makueni counties expired on 31st December 2023 but the Commission has not completed its work.

iv. On 22nd November, 2023, following consensus by the parties, the National Land Commission issued the following order among others:

v. The parties in these instant proceedings to move the court in Mombasa ELC Petition No. 33 of 2021 and seek extension of timelines imposed by the court by a further period of six (6) months with effect from 31st December, 2023.

vi. There was a delay in processing the Orders from the Commission and the Petitioner/Applicant only received them on 14th December 2023.

vii. Accordingly, it was in the interest of justice that the Orders prayed for herein be granted.

viii. It was therefore extremely urgent that this application was heard on priority.

ix. Granting the orders would not prejudice the Respondents in any way under the law, since the Commission made the orders after hearing all the parties to the dispute.

x. The orders sought herein are not determinative of the main motion.

xi. The balance of convenience favours the granting of the orders sought in this application.

xii. The application met the purposes of justice and equity and the overarching purpose of constitutional integrity and rule of law, to make the orders sought.

xiii. This Honourable Court has unfettered powers and jurisdiction to make the orders sought.

xiv. He swore this Affidavit in good faith and in support of the Notice of Motion application herein seeking extension of time orders.

III. The Grounds of Opposition by the 2nd Interested Party

5. The 2nd Interested Party opposed the Petitioner/Applicant's Notice of Motion Application dated 18th December 2023 on the following grounds that:-

a. The Application was an abuse of Court as the matter was referred to the National Land Commission by this Honourable Court on 23rd March 2022 but up to date the same was yet to be resolved.

b. A further extension, as sought by the Petitioner/Applicant, was prejudicial to the parties as it affects the disposal of the main Petition.

c. In the Environment and Land Court Appeal No. E036 of 2023: *Makueni County Government v National Land Commission & others*, there was a pending Application by the 3rd Interested Party herein seeking a stay of the proceedings before the National Land Commission which was scheduled for hearing on 23rd January 2024.

d. The Application presupposed the manner in which this Court shall determine the Petitioner/ Applicant's Application for conservatory orders which was scheduled for delivery of the Ruling on 12th February 2024.

e. The Application was unmerited and should be struck out in the first instance.

IV. The Grounds of Opposition by the 3rd Interested Party

6. The 3rd Interested Party filed their four (4) pointer Grounds of Opposition dated 9th January, 2024. It was based on the following grounds. These were:-

a. Vide the Environment and Land Court Appeal No. E036 of 2023: *Makueni County Government v National Land Commission & others*, the 3rd Interested Party had challenged the Jurisdiction of the National Land Commission to hear and determine the matter before it. An interlocutory application filed in the aforesaid matter sought an order for stay of the proceedings before the Commission was scheduled for '"Inter Parte" hearing on 23rd January 2024.

b. In this matter, a ruling on the interlocutory application for conservatory orders was scheduled for delivery on the 12th February, 2024. The Petitioner/Applicant was presumptuous of the manner the court would determine the interlocutory application.

c. The application was an abuse of the Court process because it was now about 22 months since the matter was first referred to the National Land Commission (in 23rd March, 2022) yet the same had never been resolved. Further extension was prejudicial to the parties and the substantive matter before this Court.

d. The Application was incompetent, bad in law and fatally defective.

V. The Notice of Motion application dated 19th July, 2021 by the Petitioner/Applicant.

7. The Notice of Motion application dated 19th July, 2021 by the Petitioner/Applicant was brought under the dint of Articles 20, 22, 23(3), 50(1),159(2) (d), 162 (2) (b), 165 (5) and 258 of the *Constitution* of Kenya, 2010; the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013;

8. The Petitioner/Applicant sought for the following orders:-

a. Spent;

b). Thatpending "the inter-partes" hearing and determination of the application and/or the petition herein, this Honourable Court be pleased to issue and hereby issues an interim order of status quo ante:

i). Appointing the County Government of Taita Taveta to be the sole authority issuing business permits and levying county taxes in Mackinnon Road Town just as its

predecessor did before the establishment of county governments in 2013, and to deposit all the revenues it so collects into an interest earning bank account opened jointly with the Kwale County Government.

ii). Appointing the County Government of Taita Taveta to be the sole authority issuing business permits and levying county taxes in Mtito Andei Town just as its predecessor did before the establishment of county governments in 2013, and to deposit all the revenues it so collects into an interest earning bank account opened jointly with the Makueni County Government.

c). Thatpending "the inter-partes" hearing and determination of the application and/or the Petition herein, this Honourable Court be pleased to issue and hereby issues an interim order of prohibition:

i). Prohibiting the County Government of Kwale and its agents from collecting revenues in any way whatsoever or howsoever in Mackinnon Town where its predecessor did Not collect revenues before the establishment of County Governments.

ii). Prohibiting the County Government of Makueni and its agents from collecting revenues in any way whatsoever or howsoever in Mtito Andei Town where its predecessor did notcollect revenues before the establishment of County Governments.

The application is premised on the grounds, testimonial facts and the averments made out under the Supporting Affidavit of Okiya Omtatah Okoiti, a citizen of Kenya, resident in Nairobi City County. He averred as follows that:-

a. He was competent to swear this affidavit as the Petitioner/Applicant acting in person.

b. He swore this Affidavit in good faith and in support of the Notice of Motion application herein seeking interim and conservatory orders.

c. Upon perusal of the application herein, he confirmed that the facts stated therein were true and correct.

d. He reaffirmed that the facts and averments stated and included in the Application, including each of the paragraphs (each individually as well as cumulatively), and solemnly state that the facts therein were true and to his own knowledge, information and belief.

e. He had sworn a supporting affidavit in support of the Petition and reiterated the averments in the said Supporting Affidavit and Petition and sought to rely on the annexure to the said Supporting affidavit in support of the application herein.

f. The Application and the Petition related to defence and were about the implementation of the *Constitution* of Kenya, 2010, including the enjoyment of fundamental rights and freedoms secured and guaranteed by the said Constitution.

g. The facts stated established a sufficient case with a high possibility of success in respect to the Petitioner/Applicant's claims and, that further, there was an overarching requirement of justice that the interim orders sought be granted.

h. He had a right of access to this Court to safeguard my rights and those of others, and to defend the *Constitution* of Kenya, 2010, which had been, was being and was in danger of further infringement.

i. He verily believed, that in regard to the continuing violation of the *Constitution*, it was of utmost importance and urgency that the violations and threats to the *Constitution* be stopped by this Honourable Court without delay.

j. This Honourable Court had unfettered powers and the jurisdiction to stop the blatant disregard for the rule of law.

k. It was just, for purposes of justice and equity and the overarching purpose of constitutional integrity and rule of law, to make the orders sought.

l. Unless the application was urgently heard and determined, the Petitioner/ Applicant and the people of Kenya would suffer great loss and damage in the likely event that best practice, rules, regulations, statutes and the *Constitution* continue to be violated.

m. In view of the above, and pursuant to this Honourable Court's duty to promote and safeguard constitutionalism and the rule of law. He believed that it was now incumbent for this Honourable Court to determine the issues raised in this Application to ensure that best practice, rules, regulation, statutes, and the *Constitution* was protected, and that the law would henceforth be applied with certainty.

n. The Petitioner/Applicant received a letter dated 12th July, 2021, from some residents of the County of Taita Taveta County asking him to intervene and help them find a solution to the boundary disputes between the Counties of Taita Taveta and Kwale on the one hand over Mackinnon Town, and the Counties of Taita Taveta and Makueni on the other hand over Mtito Andei Town.

o. Enclosed in the letter were copies of five affidavits sworn by affected parties and a copy of a document titled “Boundary Committee Report” prepared in the year 2015 by committee appointed by the County Government of Taita Taveta.

p. According to the Boundary Committee Report, the County of Taita Taveta (formerly Taita District under the repealed *Constitution* of Kenya) had had long standing boundary disputes with its Counties of Kwale and Makueni counties (formerly Kwale and Makueni Districts), and all previous efforts to resolve them had failed.

q. Further and in particular, there was a boundary dispute between the Counties of Taita Taveta and Makueni over the location of Mtito Andei town, which lied on what used to be the boundary between the former Coast and Eastern provinces of the repealed Constitution of Kenya. Whereas, on the one hand, the County of Makueni County claimed that the entire town belonged to it, the County of Taita Taveta, on the other hand, claimed that part of the town belonged to it pursuant to existing documentation and recent history.

r. There was also a boundary dispute between the Counties of Taita Taveta and Kwale over the location of Mackinnon Road Town, which was gazetted in the year 1947, and was part of Taita until the year 1961 when a colonial District Commissioner (DC) for Taita District, called A. F. Holford Walker, who was based in Voi Town, wrote to the then Coast Provincial Commissioner requesting to transfer it to Kwale District, citing administrative challenges. The move was heavily criticized and resisted by residents of the town and by the political leadership of Taita District and, within six months, was reversed. However, because it had already been gazetted, it required the following year's (1962) Boundary Review Commission to correct the anomaly and de-gazette the transfer. Unfortunately, to date, the transfer had not been de-gazetted resulting in the current boundary dispute between the two counties.

s. There were no beacons clearly demarcating the boundaries between the Counties of Taita Taveta and Kwale and the Counties of Taita Taveta and Makueni.

t. The two boundary disputes did not just concern the actual boundaries of the Counties of Taita Taveta County; they were also based on the allegation that the current county boundaries are unfair because they were based on historical injustices.

u. The boundary disputes between the Counties of Taita Taveta and Kwale over the location of Mackinnon Road Town on the one hand, and between Taita Taveta and Makueni over the location of Mtito Andei Town on the other, had created tension on the ground and had the very high potential of turning violent at the year 2022 General Elections, leading to the loss of lives and livelihoods. Hence, if left unresolved, these disputes had the potential of undermining the objects of devolution and national security.

v. The affidavits attached to the letter provided specific evidence of the traders' harassment by the counties.

w. At the centre of the disputes was the question of who collected levies in the disputed towns which was key tax collections points. The question of which county collected taxes was a key source of conflict in Kenya's devolved governance system.

x. The disputes had resulted in innocent traders who used to pay taxes to the predecessor of the County of Taita Taveta before the counties were established being forced to pay taxes twice to two different counties. In Mackinnon Road Town, they paid taxes to the Counties of Taita Taveta and Kwale; and in Mtito Andei Town, they pay taxes to the Counties of Taita Taveta and Makueni.

y. Due to the confusion, the traders did not know from which county they should demand services and accountability for the taxes they pay. The double taxation referred to herein was a gross violation of the affected traders' property rights under the provision of Article 40 (3) of the *Constitution*, which provides categorically that: "The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description."

z. The said double taxation also violated the provision of Article 47(1) of the *Constitution* which provides that:- "Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."

aa. Under the provision of Articles 94(3) and 188 of the *Constitution*, only Parliament is vested with the jurisdiction and responsibility to resolve such boundary disputes as recommended by an independent commission set up for that purpose by Parliament.

bb. Among the final prayers sought in the main motion was a plea to this Honourable Court to issue a mandatory order compelling the Parliament of Kenya to set up, within three months from the date of the Order, an independent commission to resolve the simmering boundary disputes pitting the Counties of Taita Taveta County against the Counties of Makueni and Kwale.

cc. There was also a plea to this Honourable Court to issue a mandatory order compelling the National Executive to, within twelve months from the date of the Order, survey and erect visible beacons clearly demarcating the boundaries of Kenya's 47 counties as per the *Districts and Provinces Act*, 1992, with preference being given to the boundaries between the Counties of Taita Taveta County and Makueni on the one hand, and the Counties of Taita Taveta and the County of Kwale on the other.

dd. Before the main motion was heard and determined, this Court was enjoined to protect the innocent traders whose constitutionally protected rights and fundamental freedoms are being trampled on by the feuding counties.

ee. Hence, it was in the interests of justice and of the compelling and overriding public interest that the status quo ante concerning the levying and collection of taxes should be restored pending the hearing and determination of both this application and/or the instant petition.

ff. The textual authority that justified the grant of conservatory orders and temporary injunctions was to protect and enforce the rights and fundamental freedoms in the Bill of Rights. The fountainhead of the orders sought herein was the provision of Article 23 (3) of the *Constitution*, on the authority of this Court to uphold and enforce the Bill of Rights.

gg. the *Constitution* considered conservatory orders as one of the appropriate reliefs that a court may grant for claims made under the provision of Article 22.

hh. By providing that, in any proceedings brought under the provision of Article 22, a court may grant appropriate relief, including a declaration of rights, injunction, conservatory order, or order of judicial review, the provision of Article 23 (3) gives meaning to Article 22 which grants individuals (including groups) the right to seek redress in the event of a denial, infringement, violation or threat to rights and freedoms.

ii. The orders sought herein were required to preserve the Petition from being rendered nugatory where successful as regards the ownership of the suit property.

jj. Unless the application was urgently heard and determined, the Petitioner/ Applicant and the people of Kenya would suffer great loss as the *Constitution* and the rule of law would continue to be violated and/or threatened by the Respondents.

kk. The Petitioner/ Applicant had a right of access to the Honourable Court to protect the *Constitution* and to safeguard his rights and those of other Kenyans under the provision of Articles 40 (3) and 47 (1) of the *Constitution* which had been, was being, and was in danger of further infringement.

ll. The Petitioner/Applicant had established "a prima facie case' with high chances of success. The orders sought herein would advance the cause of justice. Granting the orders would not prejudice the Respondents in any way under the law, since all the parties to the dispute have been enjoined to these proceedings. The orders sought herein were not determinative of the main motion. The balance of convenience favours the granting of the orders sought in this application. It was just, for purposes of justice and equity and the overarching purpose of constitutional integrity and rule of law, to make the orders sought. This Honourable Court has unfettered powers and jurisdiction to make the orders sought.

VI. The Replying Affidavit by the 2nd Interested Party

9. On 30th March, 2022, while opposing the application dated 19th July, 2021, the Learned Counsels for the 2nd Interested Party the Law firm of Messrs. V.A Nyamodi & Company filed 15 Paragraphed Replying Affidavit sworn by Onduko Alex Thomas and two (2) annextures marked as "OAT – 1 & 2" annexed thereto. He averred as follows:-

a. He was an adult of sound mind residing and working in Kwale County and of P. O. Box Number 4 - 80403 Kwale, in the Republic of Kenya.

b. He was the 2nd Interested Party's Chief Officer Finance and Economic Planning, duly authorized and well versed with the facts of this matter thus competent to swear this affidavit.

c. He had read and where necessary had explained to him by the his Advocates on record Petitioner/Applicant's Notice of Motion Application dated 19th July, 2021 and Supporting Affidavit sworn by Okiya Omtatah Okoiti and wished to respond thereto.

d. He was advised by his Advocates that the Application was riddled with falsehoods and misrepresentations about the administration of Mackinnon Road Town (hereinafter referred to as "the Town") and the alleged boundary dispute between the 1st and 2nd Interested Parties.

e. He was am not aware of any complaints submitted to the 2nd Interested Party by the residents of the Town about the alleged double taxation and harassment resulting from a boundary dispute between the 1st and 2nd Interested Party as alleged by the Petitioner/Applicant.

f. The Applicant had failed to adduce before this Honourable Court evidence of the alleged double taxation or the alleged harassment of the residence of Mackinnon Road Town as alleged in the Application.

g. The boundaries used by the 2nd Interested Party in the administration of the County were as provided under the provision of Article 6 of the *Constitution* of Kenya, 2010 the 1st Schedule to the *Constitution* and the National Assembly Constituencies and County Assembly Wards Order, 2012 contained in Legal Notice No. 14 of 2012. Annexed herein and marked "OAT-1" was a copy of Legal Notice No. 14 of 2012.

h. The boundary of Kwale District (as it was then) under the *District and Provinces Act* No. 5 of 1992 was clearly described in Part 2 of Second Schedule of the District and Provinces Act as commencing at the north-western corner of the Town and the District's boundary and County boundary was drawn in accordance with the said description.

i. The boundaries of Kwale County were defined in the National Assembly Constituencies and County Assembly Wards Order, 2012 contained in Legal Notice No. 14 of 2012. Mackinnon Road Town was part of Mackinnon Road Ward in Kinango Constituency which comprised of Vinyunduni, Makamini, Kilibasi, Dupharo and Mackinnon Rd Sub – Locations.

j. The 2nd Interested Party as well as its predecessor had strictly adhered to these boundaries in the administration of the County. County officials levy and collect tax within the said boundaries ensuring that they did not encroach on the 1st Interested Party's boundary.

k. He was aware that the 2nd Interested Party levied and collected taxes in Mackinnon Road Town in the manner its predecessor did. The Residents of the Town similarly obtained business permits and licenses from the 2nd Interested Party just as they did from its predecessor.

l. The 2nd Interested Party's Integrated Development Plan had made provision for the Town as an administrative and political unit. Strategic plans developed by the 2nd Interested Party therefore include the development and management of the boundaries. Annexed hereto and marked as "OAT-2" was the Kwale County Integrated Development in for 2018 to 2022.

m. The revenue collected from the Town was utilized in its administration and development as an administrative unit of Kwale County. Holding the money in a int account for a protracted amount of time will greatly prejudice the strategic plans to ensure development of Kwale County and would infringe on the residents Constitutional rights.

n. Granting the Petitioner/Applicant the prayers sought in the Application would lead to the violation of the rights and fundamental freedoms of the residents of the MacKinnon Road Town. This would also curtail the 2nd Interested Party's ability to perform its duties as provided by the *Constitution* and the *County Government Act* No. 17 of 2012. The status quo ante referred to by the Applicant herein regarding the Administration of the Town was the status quo as had been demonstrated herein-above and should consequently be maintained.

o. He verily believe that the residents of Mackinnon Road Town shall not be prejudiced nor would their rights be violated if the status quo was maintained by the 2nd Interested Party continuing to be the sole authority. The Applicant's prayers before this Court had the effect of disrupting the seamless administration of the Town to the prejudice of the Residents of Kwale County.

p. The Applicants prayer to have taxes from the Town which was a constitutionally recognized unit of Kwale County collected by another County and deposited in a joint account was unconstitutional and contrary to the *Public Finance Management Act* No. 18 of 2021.

ii. To issue an interim order of prohibition prohibiting the County Government of Kwale and the County Government of Makueni and their agents from whatsoever collecting revenues in any way in Mackinnon Road Town and Mtito Andei Town where their predecessors did not collect revenues before the establishment of County Governments.

iii. To issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice

VII. Submissions.

10. On 17th October, 2023 while all parties were present in Court, directions were given that the application dated 19th July, 2021 by the Petitioner/Applicant be disposed off by way of written submissions. The Honourable Court undertook to deliver its ruling on 12th February, 2024 by virtual means. Pursuant to that some of the parties filed their submissions.

A. The Written Submissions by the 2nd Interested Party.

11. The 2nd Interested Party filed their written submissions. Mr. Nyamodi Advocate stated that the application dated 19th July, 2021 by the Petitioner/Applicant was opposed by the 2nd Interested Party's Replying Affidavit deponed by Onduko Alex Thomas dated 30th March, 2022.

12. The Learned Counsel submitted that the following were the issues for determination by this Honourable Court;

Firstly, whether on the evidence and material placed before court, the Petitioner/Applicant had satisfied the conditions upon which a temporary injunction can be granted. He argued that the law on granting of interlocutory injunction is set out under Order 40 Rule 1 of the *Civil Procedure Rules*, 2010 as well as case law setting out the conditions for consideration in granting an injunction. The Court of Appeal in the case of:- "*Nguruman Limited v Jan Bonde Nielsen & 2 others* reiterated the principles of granting a temporary injunction as stated in the case of:- "*Giella v Cassman Brown and Co. Ltd* 1973 EA 360 " where it held that:-

" in an interlocutory injunction application the applicant has to satisfy the triple requirements to (a)establishes his case only at a prima facie level, (b) demonstrate irreparable injury if a

temporary injunction is not granted and (c) alby any doubts as to (6) by showing that the balance of convenience was in his favour.

i, Has the Petitioner/Applicant established a prima facie case?

13. The Leaned Counsel informed Court that that the boundaries of Kwale County were defined in the National Assembly Constituencies and County Assembly Wards Order, 2012 contained in Legal Notice No. 14 of 2012. Mackinnon Road Town is part of Mackinnon Road Ward in Kinango Constituency which comprises of Vinyunduni, Makamini, Kilibasi, Dupharo and Mackinnon Road Sub-Locations.

14. His contention was that the Petition was filed before this Court seeks orders to compel the 1st Respondent to alter the boundaries of the 1st , 2nd and 3rd Interested Parties due to an alleged dispute that existed between the 1st and 2nd Interested Parties over Mackinnon Road Town and between the 1st and 3rd Interested Parties over Mtito Andei Town.

15. The Learned Counsel asserted that, the procedure for the alteration of county boundaries was provided for in the provision under the provision of Article 188 of the *Constitution* of Kenya, 2010 that bestowed on Parliament the duty to alter County boundaries in accordance with the provisions of the *Constitution* on alteration of boundaries. It provides thus-

> " 188.
>
> (1) The boundaries of a county may be altered on by a resolution-
>
> (a) recommended by an independent commission set up for that purpose by Parliament; and
>
> (6) passed by:-
>
> (i) the National Assembly, with the support of at least two - thirds of all of the members of the Assembly; and
>
> (ii) the Senate, with the support of at least two-thirds of all of the county delegations.
>
> (2) The boundaries of a county may be altered to take into account:-
>
> (a) population density and demographic trends;
>
> (6) physical and human infrastructure;
>
> (c) historical and cultural ties;
>
> (d) the cost of administration;
>
> (e) the views of the communities affected;
>
> (f) the objects of devolution of government; and

(g) geographical features.

16. He asserted that the Petitioner/Applicant had failed to adduce evidence showing that he or the alleged residents of Mtito Andei Town and Mackinnon Road Town had exhausted all the constitutional avenues in place for purposes of altering the county boundaries, prior to approaching this Honourable Court.

17. He asserted that the Court of Appeal provided the basis and rationale for adherence to the Doctrine of exhaustion of remedies in the case of: "*Speaker of National Assembly v Karume* {1992} KLR 21where it stated that:-

> "Were there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by ary law must be strictly adhered to since there are good reasons for such special procedures."

18. This court in its ruling delivered on 23rd March, 2022 in "the Petition No. 33 of 2021, Okiya Omtata Okoiti v the Parliament of Kenya and Others acknowledged that the Petitioner/Applicant had not exhausted all the available remedies prior to approaching this Court. Consequently, this Court directed that the Petitioner/Applicant lodge a complaint with the National Land Commission. We submit that this is evidence of the Petitioner's violation of the doctrine of exhaustion of available remedies and hence, the failure to prove that the Petitioner/Applicant has established a prima facie case.

19. To buttress his point, the Learned Counsel referred Court to the famous case of: "*Mrao Ltd v First American Bank of Kenya and 2 others*, (2003) KLR 125 which was cited with approval in the case of: "*Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others*, (2014) eKLR, the Court of Appeal defined a prima facie case as:

> ".....a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later."

20. Further to the above, he argued that the orders sought by the Petitioner/Applicant were unconstitutional and had no legal basis. The provision of Article 207(1) of the *Constitution* of Kenya provides that:-

> "There shall be established a Revenue Fund for each county government, into which shall be paid all money raised or received by or on behalf of the county government, except money reasonably excluded by an Act of Parliament."

He stated that the provision of Section 109 of the *Public Finance Management Act* further provides that:-

> (1) There is established, for each county a County Revenue Fund in accordance with Article 207 of the *Constitution*.
>
> (2) The County Treasury for each county government shall ensure that all money raised or received by or on behalf of the county government is paid into the County Revenue Fund, except money that-

(a) is excluded front payment into that Fund because of a provision of this Act or another Act of Parliament, and is payable into another county public fund established fora specific purpose;

(b) may, in accordance with other legislation, this Act or County legislation, be retained by the county government entity which received it for the purposes of defraying its expenses ;or

(c) is reasonably excluded by an Act of Parliament as provided in Article 207 of the *Constitution*"

21. To him, all revenue collected by the County Government was paid to the Revenue fund pursuant to the *Constitution* of Kenya and the *Public Finance Management Act* no. 18 of 2012. The orders sought therefore had no legal basis and consequently cannot be implemented by the Interested Parties. The only money retained by the 2nd Interested Party was as authorized by Parliament via legislation.

He submitted that based on the material before this Honourable Court, the Court could not properly conclude that there existed a right that had been infringed. Such a conclusion in this matter was dependent on the findings of the National Land Commission, the material before this court never demonstrated the alleged double taxation or any complaints lodged by the residents of Mackinnon Road Town. Consequently, the Petitioner/Applicant had not demonstrated that he had "a prima facie case" with a probability of success.

Secondly, whether the Petitioner/Applicant had demonstrated irreparable injury if a temporary injunction is not granted. The term irreparable injury was defined in the case of: " *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR as follows:-

> " Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which be will protect himself from the consequences of the apprehended injury."

21. The Learned Counsel submitted that the Petitioner/Applicant would not suffer any loss if the orders in the Notice of Motion Application were not granted. The Petitioner/Applicant alleged that innocent traders in the Mackinnon Road Town and Mtito Andei Town were being subjected to double taxation by the Interested Parties but had failed to adduce evidence proving the alleged double taxation of the innocent traders.

As stated in the 2nd Interested Party's Replying Affidavit and demonstrated by the evidence adduced therein, the status quo ante was the status quo. The 2nd Interested Party collected and levies with strict adherence to the County boundaries stated in Part 2 of Second Schedule of the *District and Provinces Act* No. 5 of 1992 just as its predecessor did and in adherence to the boundaries currently defined in the National Assembly Constituencies and County Assembly Wards Order, 2012 contained in Legal Notice No.14 of 2012.Any order whose effect is to alter the county boundaries would be in violation of Article 188 of the *Constitution*.

22. The 2nd Interested Party had been administering Mackinnon Road Town ensuring that it discharges its Constitutional duty under the provision of Article 174 of the *Constitution*. This was evident from the County's Integrated Development Plan for the year 2018 to 2022 where Mackinnon Road Town

was included as an administrative unit that has been enjoying infrastructure and services from the 2nd Interested Party and its predecessor.

He opined that the Petitioner/Applicant's prayers if granted would lead to a violation of the rights and freedoms of the residents of Mackinnon Road Town because the 2nd Interested Party would be unable to dispense its constitutional duty towards them pending the determination of this suit.

23. Further to the above, holding the money in a joint account for a protracted amount of time would greatly prejudice the strategic plans to ensure development of Kwale County which may affect the rights of residents that may not be part of alleged group that was affected by the alleged boundary dispute.

Thirdly, whether the balance of convenience tilted in the Petitioner/Applicant's favor. He stated that the element of balance of convenience may be invoked only in instances where the Court was in doubt as to whether the Petitioner/Applicant's case raised "a prima facie case' or where the Petitioner/Applicant stood to suffer irreparable harm.

24. Be that as it may, he submitted that the balance of convenience in this case tilted in favour of the current status quo, where the 2nd Interested Party continued with the administration of Mackinnon Road Town, which was an administrative unit within Kwale County defined in the National Assembly Constituencies and County Assembly Wards Order, 2012 contained in Legal Notice No.14 of 2012.

25. In conclusion, the Learned Counsel held that the Petitioner/Applicant's Notice of Motion Application lacked merit and should consequently be dismissed with costs.

B. The Written Submission by the 3rdInterested Party

26. On 28th November, 2023 while opposing the Notice of Motion application dated 19th July, 2021, the Learned Counsel for the 3rd Interested Party the Law firm of E.M. Mutua & Company Advocates filed their written submissions. Mr. Mutua Advocate commenced his submissions by stating that owing to the various rulings delivered in this matter, the Submissions herein would succinctly address the question or issue whether or not the court should exercise its discretion to issue conservatory orders as sought in the application dated 19th July 2021. The Learned Counsel provided the Honourable Court with a brief background of the matter. In so doing, he pointed out that the contents made out under Paragraph 4 of the Petition summarized the Petitioner's/Applicant's case in the following words:-

    a. The Petitioner/Applicant, who had received a letter signed by some 178 residents of Kwale and Makueni Counties in Mackinnon Road Town and Mutito Andei Town, respectively, inviting the Honourable court to intervene and compel:

    b. Parliament of Kenya to appoint an independent commission pursuant to Articles 93 (2), 94 (3) and 188 of the *Constitution* to consider and resolve the simmering boundary disputes piting Taita Taveta County against Makueni County on the one hand and Taita Taveta County against Kwale County on the other.

    c. Parliament to enact enabling legislation to implement Articles 94(3) and 188 of the *Constitution*.

    d. The National Executive of Kenya to survey and enact visible beacons to clearly demarcate the boundaries of Kenya's 47counties, with preference being given to the boundaries between Taita Taveta County and Makueni County on the one hand, and Taita Taveta County and Kwale County on the other.

e. It was the Petitioner's case that, since the law on county boundaries was clear, and there was enough documentary evidence to resolve them the boundary disputes in issue herein should be resolved immediately and before the August 2022 General Elections."

27. Additionally, the Learned Counsel opined that the prayers sought in the Petition may be summarized and placed into three (3) categorizes namely:-

a. A declaration that forcing the residents of Mtito Andei Town to pay levy to both Counties of Makueni and Taita Taveta and residents of Mackinon Town to pay levy to both Counties of Kwale and Taita Taveta, amount to double taxation and a violation of the *Constitution*.

b. A declaration that Parliament of Kenya should set up an Independent Commission pursuant to Articles 94 (3) and 188 of the *Constitution* for purposes of resolving the simmering boundary dispute between Taita Taveta County against Makueni and Kwale Counties; and enact legislation to implement Articles 94 (3) and 188 of the *Constitution* of Kenya, 2010.

c A declaration that the National Executive has failed to lessen county boundary disputes and that it should survey and erect visible beacons to demarcate boundaries of all the 47 Counties and to give preference to boundaries between the Counties of Taita Taveta and Makueni County in one hand and Taita Taveta and Kwale County on the other.

28. He submitted that it was instructive that the Petition never sought a mandatory or a prohibitory injunction or a declaration in relation to collection of revenue by Taita Taveta, Makueni or Kwale Counties. The Learned Counsel averred that the Petitioner's/Applicant's case and grievance had nothing to do with violation of right of the alleged residents of Taita Taveta County on account of alleged double taxation. By an application dated 19th July 2021, the Petitioner/Applicant sought for the following orders:-

a). Spent

b). That pending the inter - partes hearing and determination of the application and/or petition herein, this Honourable Court be pleased to issue and hereby issues an interim order of status quo ante:

i). Appointing the County Government of Taita Taveta to be the sole authority issuing business permits and levying county taxes in Mackinnon Road Town just as its predecessor did before the establishment of county governments in 2013, and to deposit all the revenues it so collects into an interest earning bank account opened jointly with the Kwale County Government.

ii). Appointing the County Government of Taita Taveta to be the sole authority issuing business permits and levying taxes in Mtito Andei Town just as its predecessor did before the establishment of county governments in 2013, and to deposit all the revenues it so collects into an interest earning bank account opened jointly with the Makueni County Government.

b). That pending the inter - Parte hearing and determination of the application and/or the petition herein, this Honourable Court be pleased to issue and hereby issues an interim order of prohibition:

i). Prohibiting the County Government of Kwale and its agents from collecting revenues in any way whatsoever or howsoever in Mackinnon Town where its predecessor did Not collect revenues before the establishment of county governments.

ii. Prohibiting the County Government of Makueni and its agents from collecting revenues in any way whatsoever or howsoever in Mtito Andei Town where its predecessor did Not collect revenues before the establishment of county governments.

d). That consequent to the grant of the prayers above the Honourable Court be pleased to issue such further directions and order as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.

e). That costs be in the cause."

29. He submitted that, in contradistinction to the Summary of the Petitioner's/Applicant's Case, in his application under consideration, the Petitioner/Applicant introduced the issue of double taxation as seen from the grounds in the face of the application. He posited that:- "disputes have resulted in innocent traders who used to pay taxes to the predecessor of Taita Taveta County the counties were established being forced to pay taxes to two different counties." It was on the basis of the above stance that the Petitioner/Applicant sought orders that pending the hearing and determination of the petition herein, ".....the status quo ante concerning levying and collection of faxes should be restored....."

30. In opposition to the application, the 3rd Interested Party filed a Replying Affidavit dated 11th October 2021 sworn by Mr. Thomas Tuta. Whereas the 3rd Interested Party acknowledged the existence of a boundary dispute between the counties of Makueni and Taita Taveta, it vehemently denied that the status quo ante was to the effect that prior to the establishment of County Governments in the year 2013. the predecessor of Taita Taveta County was levying tax in Mtito Andei Town.

31. By the said Affidavit, the 3rd Interested Party had demonstrated that from the year 1988 to 2013 the administrative and tariff history of Mtito Andei was under the jurisdiction of the 3rd Interested Party's predecessor. Further, the said affidavit contained documentary evidence of assets and financial transition of Mtito Andei Town Council to Makueni County pursuant to the *Transition to Devolved Government Act* 2013.

32. Having presented all the fore – going submissions, the Learned Counsel the 3rd Interested Party identified the following three (3) issues for the determination by the Honourable Court. These were:-

> Firstly, whether the Petitioner's/Applicant's case had "inherent merit" which established "a prima facie case" on account of double taxation. As stated above, by his own admission and as seen from the summary of the Petitioner's/Applicants case, the question of double taxation never occupied the centre stage in the Petition. More importantly, there was no evidence whatsoever that residents of Mtito Andei Town had ever paid tax to Taita Taveta County and or its predecessor. Further, there was no evidence of any kind of double taxation.
>
> The Petitioner/Applicant had produced a document headed:- "Taita Taveta County Boundary Committee Report" at page 1 of the exhibits. Both the Executive Summary (page 2) and the Problem Statement (page 3) never contained any statement or assertion that there was or had been double taxation. The Learned Counsel asserted that they had painstakingly combed through all the exhibits produced by the Petitioner/Applicant in support of the application and the Petition. All the annexures, starting from page 1 to 233 consist of receipts and documents which relate to administrative and tax management in respect of only Mackinon Town. There was no single receipt or document manifesting levy of tax in respect of Mtito Andei by either Taita Taveta County or its predecessor. None of the alleged

residents was able to produce any receipt or document to demonstrate any payment of tax or harassment or demand for tax in respect of Mtito Andei by the County of Taita Taveta.

33. Thus, the Learned Counsel argued that in absence of such evidence it could not be urged that the Petitioner's/Applicant's case had "inherent merit" on grounds to double taxation and that "a prima facie case' had been established. Accordingly, there was no basis both in law and fact, whatsoever, for the court to issue a conservatory order of status quo ante to appoint "Taita Taveta County Government to be the sole authority issuing business permits and levying taxes in Mtito Andei Town just as its predecessor did.....and to prohibit the Government of Makueni and its agents from collecting revenue in any way whatsoever or howsoever in Mtito Andei Town where its predecessor did not collect revenue .....".

To the contrary, the Learned Counsel opined that the 3rd Interested Party had adduced evidence that historically, Makueni County (then in Machakos) had had jurisdiction (both administratively and in levying tax) over Mtito Andei. There were numerous documents produced by the 3rd Interested Party in support of the above proposition. He invited the Honourable Court to note a handful of the same as follows:-

(i) Page 18 - Minutes of Finance Committee of Town Council of Mtito Andei held on 4th August 2011;

(ii) Page 26 - Council Statement of Financial Performance, year ended 30th June 2011;

(iii) Page 45 - Town Council of Mtito Andei Minutes of Special Full Council Meeting held on 27th January 2008;

iv). Page 46- Permit Invoice dated 24th February 2011 for business

(v) Page 59 - Town Council of Mtito Andei Barter Market Cess;

(vi) Page 69 - Application letter dated 13th January 2009 for allotment of a plot;

(vii) Page 74-Town Council of Mtito Andei Strategic Management Plan, 2007- 2011. NB-see historical background at page 77;

(viii) Page 113-Town Council of Mtito Andei Revenue Enhancement Plan 20/3/2014

(ix) Page 122, 123, 124 - Local Authority Transfer Fund 2013 in respect of Business Permits, Plot Rent and Barter Market Fee;

(x) Page 137 - Minutes of Town Council of Mutito Andei Special Full Council Committee held on 11th October 2012;

(xi) Page 152 - Town Council of Mtito Andei Special Council Meeting held on 12th June 2006;

(xii) Page 168 - Town Council of Mtito Wa Ndei Master Budget 2006/2007;

(xiii) Page 182-Letter dated 28th February 2005 by Town Clerk Town Council of Mutito Wa Ndei to PS Ministry of Local Government on Preparation of LASDAP FY 2005-2006;

(xiv) Page 234-LATF Form 8-2,2005 Mutitu Wa Ndei Town Council Page 241-Town Council of Mtito Andei Local Authority Service Delivery Action Plan (LASDAP) 2013/2014;

xvi) Page 296 - Performance Contract between Government of Republic of Kenya and Town Council of Mtito - Andei For Period 1st July 2011 to 30th June 2012;

(xvii) Page 361 and 362 Memo dated 11th September 2013 on, and Handing Over Report of Assets and Liabilities from Local Town Council of Mtito-Andei to County Government of Makueni

(xviii) Page 523- Makueni County Projects Implementation Report 2018/2019;

(xix) Page 562-Single Business Permit, Makueni County Government dated 25th February 2021

(xx) Page 572-Single Business Permit, Makueni County Government dated 2nd June 2016;

(xxi) Page 594-Single Business Permit, Town Council of Mtito-Andei dated 31st December 2010;

(xxii) Page 622- Development Approval, Makueni County Government dated 14th January 2021;

(xxiii) Page 643 - Payment for Preparation of Physical and Land Use Plan for Mtito Andei Town dated 2nd March 2020.

In view of the above evidence, it was crystal clear that the status quo and status quo ante in relation to levying of tax, was that Makueni County had sole and exclusive jurisdiction over Mtito Andei Town. In the premises, to issue an order for status quo anfe as sought in the application would amount to issuing a mandatory order of injunction yet the case never satisfied the requisite condition of a clear cut case.

34. The Learned Counsel asserted that one of the conditions to be satisfied for grant of a conservatory order, was that a party ought to demonstrate that the case before the court has an inherent merit or in other words it establishes a prima facie case. To buttress his point he cited the case of "*Centre for Rights Education and Awareness (CREAW)& 7 Others v Attorney General* [2011] eKLR, the Hon. Justice D. Musinga (as he then was)set out the conditions precedent for grant of conservatory orders as follows:-

> "It is important to point out that the arguments that were advanced by counsel and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the petitioner's application and not the petition. I will not therefore delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the *Constitution*."

In the case of "*Judicial Service Commission v Speaker of the National Assembly & Another* [2013]eKLR the Hon. Justice Odunga held that:-

> "Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the *Constitution*, the supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person."

35. The above two findings were amplified by the Supreme Court in the case of "*Gitirau Peter Munya v Dickson Mwenda Kithinji and 2 Others* [2014] eKLR where the court held that: -

> "Conservatory orders bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike. interlocutory injunctions, linked to such private-party issues as the "prospects of irreparable harm "occurring during the pendency of a case; or "high probability of success" in the

applicant's case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes (emphasis ours)."

The second issue for determination was whether the Petitioner/Applicant would suffer any prejudice. The Learned Counsel submitted that having established that the status quo and the status quo ante is that Mtito-Andei (administratively and fiscal) was under the jurisdiction of Makueni County, the Petitioner/Applicant did not stand to suffer any prejudice if the conservatory order was not issued. To the contrary, a conservatory order was highly prejudicial to the 3rd Interested Party because of its disruptive effect of denying revenue to the County which in turn would pose challenge in service delivery.

He cited the case of "Centre Rights Education and Awareness (CREAW) (*Supra*) the court held that:-

> '..... a party seeking conservatory orders must demonstrate that he has a prima-facie case with a likelihood of success and that if a court does not grant its likely to suffer prejudice as a result."

36. Additionally he referred Court to the case of:- "*Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board and others* [2016] eKLR, the court considered the principles applicable in grant of a conservatory order in Constitutional Petitions and concluded that:-

> "- - - an applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the *Constitution* ....."

Thirdly, the Learned Counsel raised the issue for the consideration by Court on whether it was in public interest to grant a conservatory order. He cited the case of:- "Peter Munya case (*Supra*) the Supreme Court stated that:-

> ".....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 courses."

Further, the Learned Counsel cited the case of:- "Wilson Kaberia Nkunja case (supra) the court determined that one of the principles for consideration on whether to grant conservatory orders is that "the public interest must be considered before grant of a conservatory order."

He admitted that it was in the public interest to resolve the boundary dispute between the two counties of Makueni and Taita Taveta. However, it was not in the public interest to stop Makueni County, which had been levying tax and offering service to the people of Mtito Andei Town, from exercising its constitutional duty of management of financial affairs of Mtito Andei Town. Further, it was not in the public interest to issue a conservatory mandatory order at this interlocutory stage whose effect was to grant Taita Taveta County the right to start (for the first time) levying tax at Mtito Andei Town

37. In conclusion, the Learned Counsel argued that the facts and evidence placed before the court by the Petitioner/Applicant never met the "inherent merit" and "prima facie case" tests for grant of a conservatory order. It had not been demonstrated how the Petition or the rights alleged violated would be rendered nugatory or the prejudice to be suffered if a conservatory order was not issued. Lastly, the

totality of the circumstances and facts point to a disposition that it was in the public interest for the prevailing status quo to be maintained.

VIII. Issues for determination.

38. The Honourable Court has keenly perused all the pleadings being the Notice of Motion application dated 19th July, 2021 and the annextures, the responses by the Respondents and the Interested Parties, the written submissions by all the Parties together with the myriad of cited and other authorities, the relevant provisions of the *Constitution* of Kenya, 2010 and the statures thereof

39. In order to arrive at an informed, reasonable, Equitable and fair decision, the Honourable Court has crystalized the subject matter into the following three (3) salient issues for its determination. These are:-

    a. Whether the Notice of Motion dated 18th December, 2023 the Petitioner/Applicant for the enlargement of time for the NLC to fully comply with the orders of this Court issued on 23rd March, 2022 has any merit.

    b. Whether the Notice of Motion dated 19th July 2021 by the Petitioner/Applicant meets the threshold for grant of conservatory orders?

    c. Whether the parties herein are entitled to the reliefs sought.

    d. Who will bear the costs of the two (2) applications.

IX. The Law and analysis.

Issue No. a). Whether the Notice of Motion dated 18th December, 2023 the Petitioner/Applicant for the enlargement of time for the NLC to fully comply with the orders of this Court issued on 23rd March, 2022 has any merit.

40. Under this Sub heading, the Honourable Court deciphers the main substratum being the enlargement of time for the Commission to accomplish a direction it was granted by this Honourable Court on 23rd March, 2022. Conventionally, this power is discretionary. However, discretion which is a science, not to act arbitrarily according to men's will and private affection, has to be judicial in nature and must confined to the rules of reason and justice. Discretion vested in the Court is dependant upon various circumstances, which the Court has to do real and substantial justice to the parties to the suit. Extension of time is governed by various provisions of the Law. They are Rule 30 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013. It provides thus:-

> " The Court may extend time limited by these Rules, or by any decision of the Court"

Further the provision of Section 95 of the *Civil Procedure Act*, Cap. 21 states:-

> "Where any period is fixed or granted by the Court for doing of any act prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired"

The other relevant provisions of the law are Order 50 Rules 6 and 7 of the *Civil Procedure Rules*, 2010. There have been a myriad of authorities cited and made by Court over the subject matter and thus the Court will not belabour the matter nor re – invent the wheel but cite a few of them herein. In the case of:- "*Nicholas Kiptoo Arap Salat v Independent Electoral and Boundaries Commission & 7 others*

(2014) eKLR set out the considerations to guide the Court in exercising its discretion in cases of this nature. It sated thus:

> i). Extension of time is not a right of a party. It is an equitable remedy only available to a deserving party at the discretion of the Court.
>
> i. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court.
>
> ii. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case - to - case basis.
>
> iii. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court.
>
> iv. Whether there will be any prejudice suffered by the Respondents if the extension is granted.
>
> v. Whether the application has been brought without undue delay;
>
> vi. Whether in certain cases, like election Petitions, Public interest should be a consideration for extending time....."

41. Additionally, I am privy to the fact that while exercising this discretion, Court must balance and consider the competing and equitable interest of all the parties in a matter. In saying so, I strongly wish to cite the case of: "*National Union of Mineworkers v Council of Mineral Technology* (1993) ZALC 22 at Para 10, where the Court held:-

> "The approach is that the Court has a discretion to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degrees of lateness, the explanation, the prospects of success and the importance of the case. These facts are interrelated; they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay....."

42. In the instant case, the Petitioner/Applicant sought the time that was accorded to the National Land Commission by this Court on 23rd March, 2022 to have undertaken investigation and presented a report onto the boundaries dispute and other historical issues affecting the three Counties of Makueni, Kwale and Taita Tavetta respectively was expiring on 31st December, 2023. Despite of the time granted, the Commission had not completed its work. The Petitioner/Applicant informed Court that on 22nd November, 2023, following consensus by the parties, the National Land Commission issued an order among others that the parties in these instant proceedings to move the court in Mombasa ELC Petition No. 33 of 2021 and seek extension of timelines imposed by the court by a further period of six (6) months with effect from 31st December, 2023. He stated that it was in the interest of justice that the Orders prayed for herein be granted as in so doing the Respondent would not be prejudiced in any way under the law, since the Commission made the orders after hearing all the parties to the dispute.

43. The application was opposed by both the 2nd and 3rd Interested Parties through filing of grounds of opposition. They stated that the application was an abuse of Court as the matter was referred to the National Land Commission by this Honourable Court, almost 22 months ago - on 23rd March 2022

but up to date the same was yet to be resolved. To them, a further extension, as sought by the Petitioner/Applicant, was prejudicial to the parties as it affected the disposal of the main Petition. Additionally, in the Environment and Land Court Appeal No. E036 of 2023: *Makueni County Government v National Land Commission & others*, there was a pending Application by the 3rd Interested Party herein seeking a stay of the proceedings before the National Land Commission which was scheduled for hearing on 23rd January 2024. The application presupposed the manner in which this Court shall determine the Petitioner's/Applicant's Application for conservatory orders which was scheduled for delivery of the Ruling on 12th February 2024. The Application was an abuse of the due process, incompetent, bad in law and fatally defective and ought to be dismissed.

44. It is not in dispute that this matter is of great public interest. It involves such an emotive and complex issues surrounding boundary disputes touching on three Counties and historical injustices. Certainly, it is imperative that these issues ought to be resolved in a technical and professional manner within the available legal parameters. It is from being informed with that background, that this Court in its own wisedom through its Ruling delivered on 23rd March, 2023 felt it wise to rope in the National Land Commission, a statutorily and Constitutional established State organ, to undertake intensive investigation and make practical recommendations on how to resolve the dispute pursuant to the provision of Article 67 (2) e of the *Constitution* of Kenya, 2010. From the said decision, the Commission were granted six (6) months but to which they sought an extension which Court gladly extended to 31st December, 2023. Through this application, the Commission has sought for a further six (6) months. Without appearing to be micro - managing the Commission, there has been extremely scanty information of their proceedings over the progress of the matter. The Honourable Court may never know exactly what progress – in terms of achievements the Commission has earmarked so far on the one hand nor the challenges and/or problems it may be facing all together. In the given circumstances, I may be tempted to join the choir and to fully concur with the submission of the Learned Counsels for the 2nd and 3rd Interested Parties to the effect that the Commission may not have achieved anything for the period of 22 months (from 23rd March, 2022) since they were mandated the task by this Court. However, from a keen assessment of the documents attached marked as "Exhibit – 0004" by the Petitioner/Applicant being the direction by the Commission issued on 22nd November, 2023 holds as follows:-

    1. "The Respondents will have fourteen (14) days to file and serve their responses to claim from the date of this directions/orders.

    2. The Claimant will have corresponding leave of fourteen days thereafter to file and serve any supplementary affidavit"

45. From the above, it evident that the proceedings at the Commission are in progress. Nonetheless, the Petitioner/Applicant has not fully demonstrated in terms of tangible and pragmatic particulars of the progress made and what else is this that the Commission wishes to undertake within the period requested for six (6) months. In other words, what is so spectacular about the requested period of time.

    Be that as it may, the Honourable Court guided by the legal principles herein – the importance of the matter, the fairness to all parties and taking that the application was filed without undue delay, the Honourable Court has tended to bend backward and grant an extension but for only three and half months (3 1/2) form 31st December, 2023 and not the six (6) months requested to enable the Commission finalise the task mandated on them this Court. The parties should not be made to wait any longer as clearly they will be prejudice immensely by the unreasonable delay. For these reasons, therefore, the application succeeds.

Issue No. b). Whether the Notice of Motion dated 19th July 2021 by the Petitioner/Applicant meets the threshold for grant of conservatory orders?

46. Under this Sub heading, the Honourable Court deciphers that the main substratum is granting of Conservatory orders pending the hearing and final determination of the main Petition lodged by the Petitioner/Applicant. As indicated before, this matter is at the application stage. With that regard, this Honourable Court shall proceed carefully. I say so taking cue of the decisions which apparently some of which have been cited by all the parties in this case of:- "*Centre for Rights Education and Awareness (CREAW) & 7 Others v Attorney General* (2011) eKLR, *Platinum Distillers Limited v Kenya Revenue Authority* (2019) eKLR and *Kenya Association of Manufacturers & 2 Others v Cabinet Secretary – Ministry of Environment and Natural Resources & 3 Others* (2017) eKLR which vouch the cautionary approach at the interlocutory stage of the Petition thus:.

> " A Court, therefore, dealing with an application for conservatory orders must maintain the delicate balance of ensuring that it does not delve into issues which are in the realm of the main Petition. In this discourse, I will, therefore, restrain myself from dealing with such issues.

47. This Court takes note that the Petitioner/Applicant is appearing in person seeking the Court to issue interim order of status quo ante. Before I make further steps, it is important that this court examines the anatomy of status quo orders. First, the *Black's Law Dictionary*, Butter Worths 9th Edition, defines "Status Quo as a Latin word which means "the situation as it exists". The purpose of an order of status quo has been reiterated in a number of decisions. "In *Republic v National Environment Tribunal, Ex - Parte Palm Homes Limited & Another* [2013] eKLR, Odunga J (as then he was) stated:-

> " When a court of law orders or a statute ordains that the status quo be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining status quo is meant to preserve existing state of affairs...Status quo must therefore be interpreted with respect to existing factual scenario..."

48. Additionally, in the case of:- "*TSS Spinning & Weaving; Company Limited v Nic Bank Limited & another* [2020] eKLR, the Court unpacked the purpose of a status quo order as follows:

> " In essence therefore, a status quo order is meant to preserve the subject matter as it is/existed, as at the day of making the order. Status quo is about a court of law maintaining the situation or the subject matter of the dispute or the state of affairs as they existed before the mischief crept in, pending the determination of the issue in contention.'

49. Further in the case of "*Kenya Airline Pilots Association (KALPA) v Co-operative Bank of Kenya Limited & another* [2020] eKLR, the purpose of a status quo order was explained as follows:-

> " ..... By maintaining the status quo, the court strives to safeguard the situation so that the substratum of the subject matter of the dispute before it is not so eroded or radically changed or that one of the parties before it is not so negatively prejudiced that the status quo ante cannot be restored thereby rendering nugatory its proposed decision."

50. Apart from preserving the substratum of the subject matter, the court has also found an order of status quo as a case management strategy, where the court is keen to prevent prejudice as between the parties

to a matter pending the hearing and determination of the main suit. In the instant case, facts on status quo is highly contested, parties have taken different approaches as to what status quo is with the 1st , 2nd and 3rd Interested parties from their filed pleadings stating that they were the ones levying taxes as its predecessor did, this are issues which can only be determined upon hearing of the main Petition.

51. Now turning to the concept of granting Conservatory orders. The "locus Classicus" case in the realm of Conservatory orders in the Supreme Court case of:- "*Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* Civil Application No. 5 of 2014 [2014] eKLR where the apex court observed:-

> (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.
>
> (87) The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:
>
> (i) the appeal or intended appeal is arguable and not frivolous; and that
>
> (ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.
>
> (88) These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the *Constitution* of Kenya, 2010, a third condition may be added, namely:
>
> (iii) that it is in the public interest that the order of stay be granted.
>
> (89) This third condition is dictated by the expanded scope of the Bill of Rights, and the public-spiritedness that run through the *Constitution*.

52. The applicable principles for granting of conservatory orders were magnified in the both cases of the Court of Appeal and the Supreme Court of:- "*Centre for Rights Education and Awareness (CREAW)* (*Supra*) and of "*Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others* [2015] eKLR, the Court summarized the principles for grant of conservatory orders as: -

> i. The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.
>
> ii. The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
>
> iii. Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the Petition or its substratum will be rendered nugatory.

iv. Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.

53. Justice M. Thande in the case of "*Okiya Omtatah Okoiti & Others v the Cabinet Secretary for National Treasury & Planning & Others*, Petition No. E181 of 2023 stated:-

> 67. A conservatory order is one of the appropriate reliefs available to a party who alleges and proves denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. The purpose of conservatory orders is to preserve the substratum of the petition before Court pending the hearing and determination of the same. Rule 23 of the Mutunga Rules provides that despite any provision to the contrary, a Judge before whom a petition is presented shall hear and determine an application for conservatory or interim orders.

54. The Supreme Court set out the test for the grant of conservatory orders in 3 limbs. A party seeking conservatory orders must demonstrate to the Court that first, the Petition is arguable and not frivolous. Second that unless the orders sought are granted the suit, were it to succeed, would be rendered nugatory. The first 2 limbs though linked to injunctions in private party matters, are also applicable in public law. The Supreme Court added the third test in the context of the *Constitution*, namely, that it is in the public interest that the orders sought are granted.

Issue No. b). Whether the parties herein are entitled to the reliefs sought.

55. Having set out the guiding principles on whether to grant Conservatory orders or not, I will now proceed to consider whether the instant application is merited.

a. A prima-facie case:

56. Has the Petitioner/Applicant through the filed application demonstrated an arguable "prima facie case" with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice? A prima facie case was elaborately defined in the case of *Mrao v First American Bank of Kenya Limited & 2 Others* (2003) KLR 125 to mean: -

> .... In a civil application includes but is not confined to a 'genuine and arguable case'. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.

57. The Court of Appeal case of "*Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another* (2015) eKLR while dealing with what a prima facie case is, made reference to Lord Diplock in *American Cyanamid v Ethicon Limited* (1975) AC 396, when the Judge stated thus: -

> If there is no prima facie case on the point essential to entitle the Plaintiff to complain of the Defendant's proposed activities, that is the end of any claim to interlocutory relief.

58. Further, in the case of:- *Re Bivac International SA (Bureau Veritas)* (2005) 2 EA 43, the Court while expounding on what a prima-facie case or arguable case is, stated that such a decision is not arrived at by tossing a coin or waving a magic hand or raising a green flag, but instead a Court must undertake an intellectual exercise and consider without making any findings, the scope of the remedy sought, the grounds and the possible principles of law involved.

59. In the case of "*Isaiah Luyara Odando & another v Kenya Revenue Authority & 6 others; Nairobi Branch Law Society of Kenya (Interested party)* [2022] eKLR A. C. Mrima J stated:-

109. In sum, therefore, in determining whether a matter discloses a prima-facie case, a Court must look at the case as a whole. It must weigh, albeit preliminarily, the pleadings, the factual basis, the respective parties' positions, the remedies sought and the law. In so doing, a Constitutional Court must be guided by Articles 22 (1) and 258(1) of the *Constitution* which provisions are on the right to institute Court proceedings whenever a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened or the when the *Constitution* has been contravened, or is threatened with contravention.

60. Having expounded on the legal principles, let us now returning to the case at hand. The Petitioner/ Applicant states that there is boundary disputes which have been simmering for a long time since pre-independence days between what are today's Counties of Taita Taveta, Kwale and Makueni Counties. He posits that the Residents of the two towns and its environs are complaining of harassment by officials from the said counties competing for control of the towns. In particular, the residents are forced to pay taxes twice to two different counties which is tantamount to double taxation and due to the confusion they do not know which county they should demand services and accountability for the taxes they pay.

61. Mr. Thomas Thuta who is the Sub - County Administrator of Kibwezi East sub county, of the County of Makueni administering Mtito Andei ward, Ivinzoni/Nzambani ward, Thange ward and Masongaleni ward in his affidavit sworn on behalf of the 3rd Interested Party has among other documents annexed; a letter dated 31st May 2021 seeking resolution of the county assembly of Makueni on the grounds of the existing boundary dispute between Counties of Makueni and Taita Taveta at Mtito Andei and a report by the county assembly of Makueni by the Sectoral committee on lands and urban planning titled:- "A report on the statement regarding the boundary dispute between Makueni and Taita Taveta counties at Mtito Andei'. He requested for statements which members of the county assembly sought to know whether department was aware of the plans by the County of Taita Taveta to start collecting revenue from Mtito Andei and the concerns raised to safeguard business in Mtito Andei from exploitation.

62. Graphically, Mr. Thuta admits that there exists a boundary dispute between the County Government of Makueni and the County Government of Taita Taveta over Mtito Andei. Further, in his Replying Affidavit opposing the notice of motion application dated 19th July 2021. Mr. Thuta states that it was not disputed that there was an existing boundary dispute between Makueni County, the 3rd Interested Party and Taita Taveta the 1st Interested Party.

63. In the prevailing circumstance, can any mind, including the Honourable Court, properly directing itself to the material advanced by parties herein conclude that there is no boundary dispute? I do not think so. Clearly, the facts speak for themselves. Facts are stubborn. While perusing the record, it is apparent that there is a boundary dispute which is being used by the mentioned counties to compete for resources whereupon is the gist in the instant Petition. Each of the three counties are claiming that each of its predecessor was issuing business permits and collecting revenues which in effect the residents of Mackinon Road Town and Mtito Andei are subjected to double taxation.

64. Juxtapose, the Interested Parties' common position is that the application lacks merit having failed to establish "a prima - facie case". All said and done, this Honourable Court has carefully weighed the rival positions and arrived at the logical conclusion that indeed the Petitioner/Applicant has demonstrated and established "a prima facie case. The issues raised in the application and the Petition cannot, therefore, be wished away. They are serious constitutional issues worth consideration. It is on that background that this Court finds that the Petitioner/Applicant raises a prima-facie case in the

circumstances of this case. I have carefully considered this aspect of the dispute. One or more of the parties concededly stand to suffer prejudice either way this Court decides on this issue.

65. Whereas the 1st , 2nd and 3rd interested parties depends on taxes and levies to finance its budgetary projections and county operations, the *Constitution* and the law sets does not envisage a situation where counties compete for resources and the end result in double taxation, if this is to be allowed then the country shall be plunged into chaos. I take note of the impact of the matter herein which calls for an expeditious determination of this matter. I am urging the parties to shun away from filing applications and proceed on for the hearing of the main petition.

66. I reiterate and in my view the Petitioner/Applicant has established "a prima facie case", it will be unfair to the citizens of Mackinon Road Town and Mtito Andei for this Court to fold its hands, this will not be at par with the aspirations of the said residents in view of the *Constitution* of Kenya 2010. In any event, the prayers sought are to ensure one county levies and collects revenue and deposit in a joint interest earning account whose effect is that no revenue shall be lost. This is the opposite if this Court allows the 1st , 2nd and 3rd Interested Parties to compete for resources by double taxing the residents of the said towns, the residents will not be able to recover payments made to either of the three interested parties.

b. Irreparable harm.

67. On this second requirement for the to grant conservatory orders, the Petitioner/Applicant must demonstrate that if the application is not allowed. I dare say that, the substratum of the Petition will be lost and as such the main claim will be rendered nugatory and the Petitioner/Applicant will be prejudiced. In effect, the Petitioner/Applicant must sufficiently establish that if the Court does not grant conservatory orders then the purpose of the suit shall be defeated occasioning violation of the rights and fundamental freedoms provided under the *Constitution*.

c. The submissions made out by the Learned Counsels for the 2nd and 3rd Interested Parties is that their respective counties will not be able to deliver its constitutional and statutory duties if the orders are granted. As far as the 2nd and 3rd Interested Parties are concerned, the orders sought does not have any legal basis as there is no provision where one county can hold its revenue in a joint interests earning account with another county. I guess there is major misconception here advanced by these two disputant parties. At this juncture and at this rate, I definitely need to clarify the position taken by Court on this sensitive aspect. As I have set out above, the revenue collected is only to be held in joint interests earning account until the hearing and determination of the Petition.(Emphasis is Mine). One could imagine how the residents of Mackinon Road Town and Mtito Andei would if the Court was to fold up its hands whose effect shall be double taxation of the residents living in Mackinon Road Town and Mtito Andei. The answer is they would be more prejudiced.

d. Public Interest.

68. Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order to the Petitioner/Applicant vide his application of 19th July, 2021. Public interests is defined by the *Black's Law Dictionary* 10th Edition at page 1425 as: -

> " The general welfare of a populace considered as warranting recognition and protection. Something in which the public as a whole has stake especially in something that justifies government regulation'.

In the recent Court of Appeal case of "Civil Application no. E577 of 2023 – The *National Assembly & Another v Okiya Omtata Okoiti & others* (consolidated) the Court held:

> "Public interest is expressed by legislative enactments, constitutional constraints or judicial pronoucements. Hence, public interest is a legal principle founded on the concept of public good. Even though the decision may disturbed one part of the community, the Court should weigh the whole of the community while applying public interest considerations.....the other important point to bear in mind is hat public interest is represented by constitutional values. Therefore, the application of public interest must conform with the *Constitution*".

69. This concept requires the court to consider whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order. The Court has already aforesaid exhaustively spoken on the concept of "Discretion" in this ruling. Time without numbers, and its not in dispute at all this is a matter of great public importance. It touches on boundary disputes affecting three Counties, and collection of taxes and historical injustices. The decision of this Court is not only highly awaited by a large multitude of residents of these areas but the whole Country of Kenya where such similar issues are prevalent and a time keg simmering waiting to explode. It is not a light matter by any standards.

70. I have already set out that the public interests will not be served if this court decline to grant conservatory orders sought. For these reasons, therefore, I will exercise this discretion judiciously and grant the Petitioner/Applicant the Conservatory orders as prayed accordingly.

Issue No. c). Who will bear the costs of the two (2) applications.

71. On the issue of the costs of the application, the Black Law Dictionary defines "Cost" to means, "the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other".The provisions of Rule 26 (1) of "the *Constitution of Kenya (Protection of Rights & Fundamental Freedoms) Practice and Procedure Rules,* 2013" (The Mutunga Rules). holds that:

    (1) the award of costs at the discretion of Court.

    (2) In exercising its discretion, to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms.

    In the case of "*Reids Heweet & Company v Joseph* AIR 1918 cal. 717" and "*Myres v Defries* (1880) 5 Ex. D. 180", the House of the Lords noted:-

    > " The expression "Costs shall follow the events" means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word 'event' should be read distributive and the costs of any particular issue should go to the party who succeeds upon it....."

72. From these provisions of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in the instant case is that the Petitioner/Applicant has succeeded in his case. Ideally, for that very fundamental reason, therefore, the costs of this suit would be made to the Petitioner/Applicant by the Respondents herein jointly and severally. However, from the nature of this case, and being of great public importance and taking that the main Petition is still looming hearing and final determination, its just reasonable, fair and equitable that each party bears their own costs whatsoever.

XII. Conclusion & Disposition.

73. The above analysis yields that the Petitioners/Applicants have laid a basis for the grant of the orders sought in the application. As I have already stated elsewhere in this ruling, given the nature of the Petition herein, there is need for its expeditious disposal. In the end and in view of the foregoing elaborate analysis, I make the following orders:-

a. That the Notice of Motion application dated 18th December, 2023 has merit and hence be and is hereby allowed whereby the time for the accomplishment of the orders made out in Court on 23rd March, 2022 to the NLC be extended from 31st December, 2023 to 15th April, 2024.

b. That the Notice of Motion application dated 19th July, 2021 has merit and hence its allowed as prayed under the terms and conditions stated herein.

c. That pending hearing and determination of the Petition a conservatory order be and is and hereby issued thus:-

i. the appointing the County Government of Taita Taveta to be the sole authority issuing permits and levying county taxes in Mackinon Road town just as its predecessor did before the establishment of county governments in 2013, and to deposit all the revenues it so collects into an interest earning bank account opened jointly with Kwale County government.

ii. the appointing the County Government of Taita Taveta to be the sole authority issuing business permits and levying county taxes in Mtito Andei town just as its predecessor did before the establishment of County Governments in the year 2013, and to deposit all the revenues it so collects into an interests earning bank account opened jointly with the Makueni County Government.

iii. an order of prohibition prohibiting the County Government of Kwale and its agents from collecting revenue in anyway whatsoever or howsoever in Mackinon Town where its predecessor did Not collect revenue before establishment of County Governments.

iv. an order of prohibition Prohibiting the County Government of Makueni and its agents from collecting revenues in anyway whatsoever or howsoever in Mtito Andei where its predecessor did Not collect revenues before establishment of the County Governments.

d. That an order made with stringent time frame towards the expeditious disposal off the main Petition by way of Affidavits/Written Submissions as follows:-

i. The matter to be mentioned on 22nd April, 2024 to ascertain full compliance and affirm the directions and orders of this Court.

ii. The Petitioner/Applicant granted 21 days leave with effect from 22nd April, 2024 to file and serve written submissions.

iii. Thereafter, the 1st, 2nd & 3rd Respondents; the 1st, 2nd and 3rd Interested parties granted 14 days leave to file and serve their written submissions.

iv. Each party be granted 10 minutes opportunity to highlight the submissions on 6th June, 2024.

e. That the Judgement of the main Petition to be delivered on 26th June, 2024.

f. That there shall be no order as to costs.

It is so ordered accordingly.

RULING DELIVERED THROUGH MICROSOFT VIRTUAL TEAMS SIGNED AND DATED AT MOMBASA THIS 12TH DAY OF FEBRUARY 2024.

.....

HON. MR. JUSTICE L.L NAIKUNI

THE ENVIRONMENT AND LAND COURT AT MOMBASA

Ruling delivered in the presence of:

a. M/s. Yumna Hassan, the Court Assistant.

b. Mr. Okiya Omtatah Okoiti acting in Person as the Petitioner.

c. M/s. Mutua Advocate for the 1st Respondent.

d. Mr. Penda Advocate for the 2nd Respondent & the 4th Interested Party.

e. No appearance for the 3rd Respondent.

f. Mr. Mwangi Advocate for the 1st Interested Party.

g. M/s. Cherono holding brief for Mr. Nyamodi Advocate for the 2nd Interested Party.

h. Mr. E. Mutua Advocate for the 3rd Interested Party