



Okoti v Parliament of Kenya & 2 others; County Government of Taita Taveta & 3 others (Interested Parties) (Environment & Land Petition E33 of 2021) [2023] KEELC 18842 (KLR) (6 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18842 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION E33 OF 2021**

**LL NAIKUNI, J
JUNE 6, 2023**

BETWEEN

OKIYA OMTATA 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. This ruling relates to two (2) separate Notice of Motion applications dated 4th January 2023 and 5th January 2023 respectively filed by the Counties of Kwale and Makueni – the 2nd and 3rd Interested Parties herein. Each of these applications were responded to accordingly. I will deal with the two applications separately in this ruling as hereunder for ease of reference and flow of thought.



II. Notices of appeal.

2. I must state that, upon perusal of the record, being dissatisfied with the decision of the Court delivered on 3rd October 2022, The 2nd Interested Party lodged Notice of Appeal filed on 18th October 2022 with intention to prefer an appeal against the said Ruling. To date, the 2nd and 3rd Interested Parties have not made any effort to explain the pending appeals before the Court of Appeal as that would have also had a bearing in this case if such a step had been taken and perhaps there being any orders granted. Nevertheless, this Court would proceed and determine the two applications at hand.
3. In the given circumstances, this Court has restricted itself to the issues arising in the instant Applications as ideally, in my own view, the most plausible strategy or approach would have been to cause the Notice of Motion application dated 19th July 2021 by the Petitioner heard and determine instead of filing applications seeking the same prayers as previous ones. But that is neither here nor there. For ease of reference and flow, I will deal with each of these applications separately as stated herein below.

III. The Notice of Motion Application by the 2nd Interested Party.

4. The 2nd Interested Party moved this Honourable Court through filing a Notice of Motion application dated 4th January 2023 under a Certificate of urgency. The application is brought under the provision of Articles 25, 50, and 159 of *the Constitution* of Kenya, 2010, Section 10 of the *Judicature Act*, Section 3A of the *Civil Procedure Act*, Cap. 21, Rule 3(1) and (2) of the High Court (Practice and Procedure) Rules, Order 51 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. It was premised under the grounds, testimonial facts and averments made out under the 20 Paragraphed Supporting Affidavit sworn by KISIWA MOHAMMED KOJA who is the Solicitor of the County of Kwale, the 2nd Interested party herein and together with annexures marked as “KMK – 1 to 4” annexed thereof.
5. The 2nd Interested Party sought for the following orders:-
 - a. Spent
 - b. Spent
 - c. That the Honourable Court be pleased to stay any further proceedings in the matter pending hearing and determination of the application
 - d. That the Honourable Court be pleased to stay execution of the orders issued on 10th November 2022 pending hearing and determination of the application
 - e. That the proceedings of 10th November 2022 and all consequential orders be set aside in its entirety.
 - f. That the 2nd Interested Party / Applicant be granted leave to be heard on the Petitioner's Notice of Motion application dated 19th July 2022 to enable the Court reach a justiciable determination.
 - g. That the costs of the application be provided for .
6. The application is premised on the grounds, the testimonial facts and the averments mentioned on the face of it and the supporting affidavit. Briefly, the 2nd Interested Party averred that the interim orders delivered by the Court on 23rd March 2022 in respect of the Notices of Preliminary objection



filed by the 2nd, 3rd Respondents, the Senate, the 3rd and the 4th Interested Parties lapsed on or about 23rd September 2022 and was not extended. On 3rd October 2022 the Court delivered a decision on the 3rd Interested Party's Notice of Motion applications dated 11th October 2022 and 12th May 2022 directing the matter be mentioned on 12th October 2022 for either the hearing of the Notice of Motion application dated 19th July 2019 or the main Petition.

7. On 12th October 2022 when the matter was to come up for mention, the records of the Honourable Court indicates that Learned Counsels for the 2nd and 3rd Interested Parties who were present indicated that it had erroneously and/or inadvertently mentioned the matter on 11th October 2022 instead of 12th October 2022. Since only the 2nd and 3rd Interested Parties were represented it was important that the matter be mentioned on 17th October 2022 when all parties would be present. The Court also directed that the earlier mention date of 10th November 2022 be vacated.
8. On 17th October 2022, the Honourable Court was away on official duties and the matter could not proceed. Upon inquiry the 2nd Interested Party was informed by the ELC Registry that the matter had not been diarized for 17th October 2022 and instead it was scheduled for mention on 9th February 2023. The 2nd Interested Party stated that it perused the record and established that the matter proceeded on 10th October 2022 where the Court issued directions inter alia:-

“taking a position on the Petitioner's notice of motion dated 19th July 2019 in the absence of Counsel for the 2nd and the 3rd Interested parties, that the Notice of Motion application dated 19th July 2021 by the Petitioner be and is hereby compromised on condition that the conservatory orders granted on 20th September 2022 be sustained and / or maintained until the main petition is heard and determined in order to pave way and expedite the hearing and determination of the main Petition.

9. The 2nd Interested Party pleaded that the above occurred despite of the fact that the Court having vacated the said mention dated on 12th October 2022. The 2nd Interested Party stated it was greatly prejudiced by the order and thus was denied the right to be heard. The Deponent indicated that the 1st Interested Party had commenced execution proceedings and also threatened the 2nd Interested Party's CECM for Finance with contempt proceedings. He annexed a copy of a letter dated 24th November 2022 to that effect.
10. Another strenuously ground proffered by the 2nd Interested Party was that the order issued by the Honourable court on 10th November 2022 was contradictory as it purported to restore the status quo ante to the 1st Interested Party was and had been the one issuing business permits, levying county taxes and collecting cess in Mackinon Road Town. Further the said orders were contrary to the mandatory norms because the Petitioner had no prima facie case with probability of success. Indeed, the Petitioner would suffer no damage and the balance of convenience was not in the Petitioner's favour. The Deponent averred that the official map of Kenya Gazette No 1397 of Friday, 1st January..... was clear that the boundaries of Kwale County included Mackinon road. He annexed a copy of the said Kenya gazette notice.
11. The 2nd Interested Party stated that being absent in Court on 12th October 2022 was occasioned by the Court and would suffer prejudice as it was condemned unheard contrary to the rules of natural justice and fair hearing as founded under the provision of Article 50 of *the Constitution* of Kenya, 2010. Thus, he prayed that the orders sought from the said application be granted accordingly.



IV. Notice of Motion application by the 3rd Interested party.

12. For record purposes, it will be noted that vide a Notice of Change of Advocates dated 5th of January 2023 and filed in Court on 9th January 2023, the Law firm of Messrs. EK Mutua and Company Advocates took over the conduct of the matter for the 3rd Interested Party in place of the Law firm of Messrs. Mutheu Muthiani and Company advocates. The 3rd Interested Party then filed a Notice of Motion application dated 5th January 2023 under Certificate of Urgency.
13. The application was supported by a 19th Paragraphed Supporting affidavit sworn by RAEL MUMO MUTOKHA the acting County Secretary of the County of Makueni. The Application was brought under the provision of Articles 50 and 159 of *the Constitution* of Kenya, 2010, Rule 16 (2) and 25 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap. 21, Order 12 Rule 7 and Order 40 Rule 7 of the Civil Procedure Rules, 2010.
14. The 3rd Interested Party sought for the following orders: -
 - a. Spent
 - b. Pending hearing and determination of the application, there be stay of execution of a part of the order issued on 3rd October 2022, which part of the order appointed the County government of Taita Taveta to be the sole authority issuing business permits and levying county taxes in Mtito Andei Town.
 - c. The honourable Court be pleased to review and or set aside the order issued on 10th November 2022.
 - d. The Petitioners application for conservatory orders dated 19th July 2021 be conversed and or heard by way of written submissions without highlighting the said submissions.
 - e. The Honourable court be pleased to review or vacate the order issued on 23rd March 2022 on account of impossibility and the consequential adverse effect on service delivery at Mtito Andei town
 - f. Alternatively, in lieu of prayer 4 and considering the uncertainty, social and political tensions which have been brought about by the conservatory/ interim/ interlocutory orders issued in these proceedings, the honourable court be pleased to fast track hearing of the main Petition in order for the same to be determined within at least 21 days.
 - g. That the costs of the application be provided for.
15. The Application was premised on the grounds, testimonial facts and the averments on the face of it and the Supporting Affidavit sworn on 5th January 2023 and further affidavit sworn on 30th January 2023 by Rose Mumo Muthoka who is the acting County Secretary, County Government of Makueni. The Deponent begun by first adopting the contents of the Replying Affidavit sworn by Thomas Tuita dated on 11th October 2021.

The Deponent deposed that the case by the 3rd Interested Party was that the Court inadvertently and in ignorance (sic) of its orders issued on 12th October 2022 which had vacated the date of 10th November



- 2022 proceeded to conduct proceedings on the said date of 10th November 202 in the absence of Counsel for the 3rd Interested Party. The 3rd Interested Party faulted the Court for making an order that the Notice of Motion application dated 19th July 2021 be compromised on condition that the conservatory orders granted on 20th September 2021 be sustained and/ or maintained until the main Petition was heard and determined in order to pave way and hence expedite the hearing and final determination of the Petition.
16. According to the 3rd Interested Party, on that material date it was not represented in Court and hence it did not have an opportunity to make representation in respect of the issues. The 3rd Interested Party was opposed to the confirmation of the interim orders without hearing it on its merit. Whereas the Petitioner, the 3rd Respondent and 1st Interested Party who were all present on this date and were aware of the said date having been vacated they did not bring the said fact to the attention of the Court.
 17. As such the interim/ conservatory order, the 3rd interested party which was responsible for service delivery within Mtito Andei town had been unable to offer such services because it no longer collected revenue within the said town. At the same time, the 1st Interested Party never offered any services within the town. Failure to offer services had led to security and health risks for the residents of Mtito Andei town. Since interim/conservatory orders was issued, there had been social and political tension in the town and it was in the interests of justice that the said orders be vacated, the Notice of Motion application dated 19th July, 2022 by the Petitioner be heard and/or the main Petition be determined expeditiously.
 18. In guise of restoring the alleged status quo ante, the Petitioner misrepresented facts to the Court and obtained what in effect was/ is interim/ conservatory order of injunction from performing its constitutional mandate with consequential implication under the *Public Finance Management Act* and had in effect altered the boundary of the County of Makueni. It was not possible to ascertain the amount of levy or revenue collected by the 1st Interested Party.
 19. There was no basis for sustaining the said conservatory orders at all. The 3rd Interested Party stated that the Petitioner had not lodged a complaint with the National Land Commission and given the trajectory that the proceedings herein had taken, to wit, the involvement of the National Land Commission, and considering the prayers in the main Petition, the collection of revenue had been rendered moot. In the Petition, the Petitioner never sought for any prayer that the 1st Interested Party be allowed to collect revenue in Mtito Andei or the 3rd Interested party be restrained from collecting revenue.
 20. The Petitioner made representations to the Court which representations the 3rd Interested Party never had an opportunity to respond to. The Petitioner mislead the Court that the National Land Commission had made progress in dealing with the matter. Further, the Deponent held that the interim orders were confirmed without the benefit of considering the Replying Affidavit of Thomas Thuita. The 3rd Interested Party was opposed to confirmation of the said Ex - Parte orders and wished to be heard on the Petitioner's Notice of Motion application dated 19th July 2021. By a letter dated 28th November 2022, the former Advocates for the 3rd Interested Party sought to find out from the Registry the circumstances under which the matter was listed on a date which had been vacated but no explanation was given. The deponent pleaded with the Court to be persuaded that the order of 23rd March 2022 and 10th November 2022 ought to be vacated.
 21. In a further affidavit sworn on 30th January 2023, the 3rd Interested Party brought to the attention of the Honourable Court that by a letter dated 23rd January 2023, the County of Taita Taveta had sought police involvement in collection of revenue. The said letter demonstrated that there was resistance and conflict in respect of collection of revenue in Mtito Andei town by citizens of the Counties. Ordinarily,



the police were never involved in civil processes of revenue collection and as such action would likely escalate tension. Interestingly, the County of Taita Taveta was requesting for police assistance from the County Commissioner of the County of Makueni. Further, the deponent asserted that the orders of the Court had altered the boundary of the County of Makueni without hearing and considering all the material before it by the County.

22. Contemporaneously filed with the application was a Notice of Motion application dated 5th January 2023 pursuant to Rule 17 of the High Court (organization and Administration) (General Rules and Rule 13 of the High Court (Practice and Procedure Rules) at the time of filing the application, the Court was on vacation. The matter was placed before the Court (S. M. Kibunja J), accordingly directions were issued by the Learned Judge to wit that:-

- a. No urgency has been established to warrant any applications being heard during the few remaining days of the recess/ vacation.
- b. Each Applicant do serve their application on all the parties within the next five (5) days and evidence of service be filed with the Court.
- c. That the Respondents to file and serve their respective replies within ten (10) days after service, and the applicant is at liberty to respond to any new issue within five (5) days after service.
- d. That the Applicant in each application files and serves their written submissions in twenty one (21) days from today, and each Respondent files and serves theirs in ten (10) days after service.
- e. That the two applications will be mentioned for further directions before the trial court, ELC No. 3 on the date earlier fixed, that is 9th February 2023.

V. Grounds of opposition by the 1st Interested Party.

23. The 1st Interested Party filed grounds of opposition dated 6th February 2023 in respect of the application dated 5th January 2023. They stated that the Applicants has not met the threshold for being granted of orders sought. The Applicants had not shown or demonstrated any prejudice suffered as a result of the orders; That this Court was functus officio in respect of the orders sought and if the Applicant was aggrieved by the orders, the only avenue available to them would have been preferring an appeal against the issuance of the said orders; That the application was a waste of precious judicial time.

VI. Submissions.

24. On 9th February, 2023 while all the parties were present before the Honourable Court, they were directed to have the two (2) applications dated 4th and 5th January, 2023 respectively be disposed off by way of written submissions based on set out time frame. Pursuant to that all the parties complied accordingly. Further to this, the Learned Counsels were accorded an opportunity to orally highlight their submissions a task Mr. Mutua, Mr. Nyamodi, Mr. Okiya Omtatah, Mr. Bwire and Mr. Penda Advocates executed with great diligence, dedication and devotion. The Honourable Court was grateful for the professional prowess displayed thereof. Thereafter, the Court reserved a date for delivery of this Ruling accordingly.

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

25. On 23rd March, 2023 the Learned Counsels for the 2nd Interested Party being the Law firm of Messrs. V.A Nyamodi & Company Advocates duly filed submissions and identified two issues. Mr.



Nyamodi Advocate commenced the submissions by posing the following two (2) issues for Court's consideration.

26. Firstly, whether the proceedings of 10th November, 2022 and all consequential orders be set aside in their entirety. The Learned Counsel submitted that it was trite that the setting aside proceedings and/or order was a matter of the discretion of the Courts whose main purpose is to ensure that justice is done. To this end they relied on the case of "Stephen Wanyee Roki v K-Rep Bank Limited & 2 others 2018] eKLR and Nuh Nassir Abdi v Ali Wario & 2 others [2013] eKLR

They pleaded that it had demonstrated at Paragraphs 6, 7, 8, 9, 10, 11 and 12 of the Supporting Affidavit sworn by Mohamed Kisiwa Koja on 4th January 2023 that the proceedings and consequential orders of 10th November, 2022 were irregular and unlawful as this Honourable Court in its discretions of 12th October 2022 had vacated the mention date of 10th November 2022 be and hereby vacated.
27. To the 2nd Interested/Applicant it had demonstrated that their absence on the 10th of November 2022 was occasioned by this Honourable Court's directions issued on 12th October 2022 to the effect that the mention date of 10th November 2022 be and hereby vacated. It was the Counsel's contention that in conducting the proceedings of 10th November 2022 and issuing the consequential orders, the 2nd Interested Party/Applicant was condemned without being heard contrary to the 2nd Interested Party/Applicant's right to fair hearing guaranteed by the provision of Article 50 of *the Constitution* of Kenya, 2010 and the rules of natural justice. It was trite that Courts could not sustain/validate orders which had lapsed and/or ceased to exist. To this end the 2nd Interested Party relied on the cases of "National Social Security Fund v John Ochieng Opiyo [2006] e KLR; Nuh Nasser Abdi v Ali Wario & 2 Others [2013] eKLR and Karachiwala Nairobi Ltd v Sanjivan Mukherjee [2015] eKLR.
28. It was the 2nd Interested Party's case that it had clearly demonstrated at Paragraphs 2, 3 and 4 of the Supporting Affidavit sworn by Mohamed Kisiwa Koja on 4th January 2023, that the interim orders issued by this Honourable Court on 20th September 2021, appointing the 1st Interested Party as 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 revenues it so collected into an interest earning bank account opened jointly with Kwale County Government, were extended on 23rd March 2022 for a period of six months only from the said date. The interim orders issued on 23rd March 2022, lapsed on or about the 23rd September 2022 and were not extended by the Petitioner. This position could be confirmed from this Honourable Court's record. The orders issued on 20th September 2021 and extended on 22nd March 2022 had lapsed on 23rd September, 2022 and thus not capable of being sustained and or maintained.
29. Further that the 2nd Interested Party had demonstrated a sufficient cause warranting the setting aside of the proceedings and consequential orders issued by this Honourable Court on 10th November 2022. Further submit that there was no prejudice that the Petitioner would suffer if the orders sought in this application was granted as on 10th November, 2022 there were no interim orders in respect of the 2nd Interested Party capable of being sustained and/or maintained as the same lapsed on or about the 23rd of September, 2022. Further, the 2nd Interested Party's absence on 10th November, 2022 was occasioned by this Honourable Court's directions issued on 12th October, 2022.
30. Secondly, on the issue of whether the 2nd Interested Party/Applicant should be granted leave to be heard on the Petitioner's Notice of Motion Application dated 19th July, 2022? The Learned Counsel argued that the interim order issued on the 10th November was contradictory as it purported to restore status quo ante to the 1st Interested Party yet the real status quo ante means otherwise as the 2nd Interested Party/Applicant was and had been the one issuing business permits, levying county taxes and collecting



Cess Mackinnon Road Town. Additionally, the 2nd Interested Party/Applicant had demonstrated at Paragraph 15 of the Supporting Affidavit of Mohamed Kisiwa Koja sworn on 4th January 2023 that the orders as issued on the 10th November 2022 are contrary to the mandatory norms for grant of Interim orders as set out in the locus case of “Giella v Cassman Brown [1973] E. A 358 initially because the Petitioner had no prima facie case with probability of success, he would suffer no damage and the balance of convenience was not in their favour as the Official Map of Kenya Gazetted vide Gazette B, 1397 of Friday 1st January, 2013 was clear that the 2nd Interested Party/Applicant’s boundaries included Mackinnon Town.

31. It was therefore the contention of the Learned Counsel for the 2nd Interested Party that it was in the interest on justice that the 2nd Interested Party be accorded an opportunity to be heard on the Petitioner’s Notice of Motion Application dated 19th July 2021 to enable this Honourable Court to reach a just determination.

B. The Written & Oral Submissions by the 3rd Interested Party’s

32. On 2nd February, 2023 the Learned Counsel for the 3rd Interested Party, the Law firm of Messrs. E. K. Mutua & Co. Advocate complied and filed written submissions dated 31st January 2023. Mr. Mutua Advocate for the 3rd Interested Party under express instructions submitted that in order to appreciate the contests in the Petition especially the relief sought by the Petitioner under Prayers c, d, e, f, g, I, j and k of the main Petition whereby it seeks two substantive declarations:-

- a. Parliament of Kenya to set up independent Commission pursuant to the provision of Article 94 (3) and 188 of *the Constitution* for purposes of resolving the simmering boundaries disputes between the County of Taita Taveta against Makueni and Kwale Counties; enact legislation to implement article 94 (3) and 188 of *the Constitution*.
- b. The national executive to 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 and Taita Taveta and Kwale county.

33. The Learned Counsel rehashed the proceedings of the matter since filing and in particular, that of the 10th November 2022 which I need not to dwell on. The events were on record and captured in this ruling as below. The Learned Counsel framed four (4) issues for consideration as stated herein.

Firstly, on whether the order issued on 10th November 2022 should be reviewed and or set aside. According to the Learned Counsel, it was common that on 12th October 2022, the Court vacated the date of 10th November 2022 which had been fixed for a mention and instead fixed the matter for 17th November 2022. The matter was erroneously fixed for mention on 10th November 2022 when the Counsel for the 3rd Interested Party was absent which a consensus was arrived at leading to the orders of the said date. He argued that the 3rd Interested Party was aggrieved by not having been granted an opportunity to be heard and its right to be heard violated. Accordingly, the right to be heard was not just a constitutional principle, right or value but a right which was inherently fused to management of human affairs. To buttress his point, the Counsel laid reliance was in the case of “JMK v MWM & Another 2015 eKLR, cited with approval the words of Nyarangi JA in “Onyango v Attorney General [1986-1989] EA 456; Mbaki & Others v Macharia & Another [2005] 2EA 206, INDIAN CASE OF Mohinder Singh Gill v Chief Election Commissioner AIR 1978 SC 851.



34. Secondly, on whether the application dated 19th July 2021 ought to be heard on its merit and if so by way of written submissions. The 3rd Interested Party was of the belief that the Petitioner never deserved the Conservatory orders issued on 20th September 2022 and reiterated on 23rd March 2022. He averred that the response by the 3rd Interested Party raises weighty constitutional issues on jurisdiction, non disclosure of material facts and want of merit of the application. The 3rd Interested Party took a position that it was desirable that the Court interrogates the issues before it may confirm the interim order and sought that prayer 4 of the application ought to be allowed.
35. The Learned Counsel stated that it was highly prejudiced by the fact that the conservatory order was confirmed without hearing of the Petitioner's application on merit. The representation made by the Petitioner to the Court that the National Land Commission had conducted proceedings was a misrepresentation. The Petitioner had not lodged a complaint with the commission. Further, he argued that the NLC may not competently resolve disputes in the contexts of the reliefs sought in the Petition. Whereas jurisdiction to deal with historical land injustices, the said issue was intertwined with county boundary dispute. Without involvement of Parliament and an independent commission, the NLC could not determine the dispute herein. The Learned Counsel placed reliance in the case of "The County Government of Isiolo v Cabinet Secretary of Interior and Co - ordination of National Government & 3 Others".
36. Thirdly, on whether the order issued on 23rd March 2022 should be vacated. The Learned Counsel for the 3rd Interested Party pleaded with the Honourable Court to set aside the order issued on 10th November 2022. To the Learned Counsel, the said order had caused social and political tension between the neighbouring Counties of Makueni and Taita Taveta. It is as a result of the said tension that it is difficult to execute the order.
37. The Learned Counsel asserted that the orders issued on 23rd March 2022 ought to be reviewed and or set aside on the basis that the wording of the said orders leads one to the conclusion that the court had directed that the matter be expedited by the NLC. The Mutunga Rules empowered Court to review its rulings and orders and that was what the parties were seeking from Court. The Petitioner had failed to observe the urgency because he had not lodged any complaint. The Learned Counsel contended that the 3rd Interested Party had not been served with any documents filed with NLC and had not participated in any proceedings before NLC. In the premises, it was futile for the Court to await determination by the National Land Commission since it was not seized of the matter. He argued that the NLC had the NLC (Historical Injustices Regulations) in place and that was what governed its proceedings. The Learned Counsel submitted that whereas the interim order stated it was interim in nature, it was not indicated whether the said order was to be in force pending hearing and determination of the application or the Petition. As worded, save for the word interim, it amounted to a final order.
- Finally, on whether the hearing of the main suit has been fast tracked. The Learned Counsel for the 3rd Interested Party concluded that the Court should allow the application dated 5th January 2023 or alternatively the main Petition be determined expeditiously.

C. The oral Submissions by the Petitioners.

38. Mr. Okiya Omtatah, the Petitioner herein acting in person made very brief submissions herein. He informed Court that he would be relying on the Grounds of Opposition dated 28th March, 2023 and the pleadings already filed herein. He submitted that the Applicants had not demonstrated any prejudices by any of the orders that that this Honourable Court had issued previously pertaining to



this matter. Ideally, acting in good faith, he had offered to compromise the interlocutory application for purposes of expediting the hearing and final determination of the main Petition.

39. Further, he argued that the Applicants had not shown how the people being asked to pay double taxation from the three Counties of Kwale, Makeni and Taita Taveta would be exonerated and in particular on the issue of public interest. The Applicants failed to attack the powers granted to Court under the provision of Article 23 of *the Constitution* of Kenya, 2010 enabling it to grant the orders as it did.
40. Additionally, the Petitioner averred that the Applicants had not offered any explanation on the issue of the mix up of the dates and how it purportedly affected. According to him, this should have been an issue raised by Court and not the parties.
41. He observed that the Court was within its right to have referred to the matter to the National Land Commission being one on boundary dispute affecting the three Counties and emanating from historical injustices under Article 67 of *the Constitution* of Kenya, 2010. Despite of this, the NLC had not yet enacted its own rules of engagement and hence its erroneous to have expected him to have first and foremost filed an application lodging a complaint with NLC as alluded to by the Applicants. Besides, he had appeared and served them with the notices whereby they took up the matter and that was adequate as far as the Law was concerned. They had formally raised the objection at the NLC and it's the body to make the decision.
42. The Petitioner observed that the Court had been told that there was no nexus between the application seeking interim orders and the Petition. But as answer to that, he indicated that these reliefs, particularly on double allocation were well founded from the main Petition. He argued that the Honourable Court managed to secure those rights by directing that there be a placement of the collected revenue into a joint Escrow bank account. He further stated that, on the contrary, by looking at their alternative prayer in the application, it was evident that they were fearful of the time it would take to hear and disposal of the Petition. So why not allow the interlocutory applications be compromised and the interim orders sustained?

D. The oral Submissions by the 1st Interested Party.

43. Mr. Muliro Advocate of the Law firm of Messrs. John Bwire & Associates for the 1st Interested Party submitted that he would be relying on the Grounds of opposition filed on 6th February, 2023. He summed the grounds as such. That the Applicants had failed to meet the threshold for granting of the orders sought. They had not demonstrated any prejudice suffered as a result of the orders granted. Further that the Court had become "functus officio" in respect of the said orders and if the Applicant was aggrieved by the said orders, the only available avenue to them was to prefer an appeal of which they never did.
44. He further held that the Conservatory orders were not conditional susceptible to the proceedings before the NLC. Secondly, the irregularity on record did not challenge the merit of the orders issued by this Court on 23rd March, 2022 and confirmed in October, 2022 thereof. If these orders were to be regularised, it would mean parties going back to the point of March, 2022. His understanding was that the relief being sought by the Applicants herein was one on review of the Court orders. Should that be the case, then the applications were misplaced as there was no new discovery or reason or mistake on the face of the matter. Instead, the Applicants were more concerned on the merit of the orders granted. For that reason, he reiterated that what they ought to have done was to prefer an appeal against the orders instead.



VII. Issues for determination .

45. From the foregoing, I have extensively examined the two (2) Notice of Motion applications dated 4th January 2023 and 5th January 2023 filed by the 2nd and 3rd Interested Parties including the Supporting Affidavits, further affidavits, the annexures, the responses to the applications, written and oral submissions, authorities cited by the parties, the relevant provisions of the Constitution of Kenya, 2010 and statutes.
46. In order to arrive at an informed, just, reasonable and equitable I find that the following to be the issues for determination:
- a. Whether the Court has jurisdiction to hear and determine the instant applications?
 - b. Whether the order issued by this Honorable Court on 10th November 2022 should be set aside, varied and/or discharged?
 - c. Whether the orders issued by this Honorable Court on 20th September 2021 and extended on 23rd March 2022 should be set aside, varied and discharged pending hearing and determination of the Application?
 - d. What should be the appropriate direction towards expediting the hearing and final determination of the main Petition.
 - e. Who will bear the Costs of these two (2) applications.

VIII. Analysis and Determination

The background.

47. Before embarking on the analysis of the framed issues herein, it is important that the Honourable Court sets out the genesis and a brief background of the matter. From the filed pleadings, on 23rd July 2022, the Petitioner filed the instant Petition dated 19th July 2021 on behalf of 178 residents of the County of Taita Taveta offering to help them find a solution onto the protracted county boundaries disputes involving the three Counties of Taita Taveta and Kwale over Mackinon Town and Taita Taveta and Makueni over Mtito Andei respectively. The Petition sought for several other reliefs thereof. The Petition was accompanied by a Notice of Motion application dated the even date. The matter was placed before the Court (C.K Yano J) on 26th July 2021. The Court directed that the application be served for “inter parties” hearing on 20th September 2021. The matter was mentioned before Court on 20th September 2019 where parties sought time to file response to the application while the Petitioner was granted leave to file Supplementary Affidavit and submissions. The Honourable Court then granted the Petitioner prayer 2 of the application in order to preserve the matter in the mean time until “inter parties’ hearing on 27th October 2021.
48. Before the Petitioner’s Notice of Motion application dated 19th July 2021 could be heard, On 12th October 2021 Notice of Motion application dated 11th October 2021 filed under Certificate of Urgency was placed before the Court seeking to set aside order 2 (b) of the Petitioner’s Notice of Motion application dated 19th July 2021. Subsequently 3 notices of preliminary objections were raised as follows. The 2nd and 3rd Respondent’s and 4th Interested party’s preliminary objection dated 19th October 2021, the Senate 1st Respondent’s preliminary objection dated 21st October 2021 and the 3rd Interested Party’s preliminary objection dated 19th October 2021 The Court directed that the notices



of preliminary objections be disposed with first by way of written submissions. This Court then retired to consider the notices of preliminary objections and vide ruling dated 23rd March 2022 dealt with the preliminary objections .

49. After delivery of the ruling, Ms. Muthiani Advocate for the 3rd Interested Party indicated that the ruling had not addressed the issues founded from the Notice of Motion application to set aside orders and sought directions on the application dated 11th October 2021 which had been hold on pending the determination of the preliminary objections. On the said date, the Honorable Court issued directions on the said application and directed the matter be mentioned on 10th October 2023. The record demonstrates that the matter came up on 4th April 2022 in the presence of parties and the Court issued directions while fixing the matter for highlighting of submissions on 6th June 2022.
50. The 2nd Interested Party then filed a Notice of Motion application dated 12th May 2022 under Certificate of Urgency. The Application was placed before Learned Lady Justice N. A Matheka on 17th May 2022. The Court did not find any urgency in the Application and directed that the Application be heard on 6th June 2022 before this Court. The Court was not sitting on the scheduled date and the matter mentioned before the Deputy Registrar of the Court. On 8th June 2022 I directed parties to exchange replies and submissions so the I can deliver a ruling in respect of the two applications by the 3rd and 2nd Interested Parties taking that the issues and the prayers sought are identical and similar in nature. The Court then set 26th September 2022 for ruling which would also provide directions in so far as the hearing and determination of the Notice of Motion application dated 19th July 2021 by the Petitioner and the main Petition.
51. It must be noted that the Court delivered its ruling dated 3rd October 2022 in respect of the two applications dated 11th October 2021 and 12th May 2022 filed by the 3rd and 2nd Interested Parties respectively. In the said ruling, the Honourable Court dismissed both applications for lacking merit. For expediency sake, the Court directed either parties to agree by consensus on hearing of the Notice of Motion application dated 19th July 2021 by the Petitioner by way of written submissions or in the alternative fix the main petition to proceed for hearing. The Honourable Court also directed that the matter be mentioned on 12th October 2022.
52. On 26th September 2022 and 3rd October 2022, the matter proceeded on. During these dates, the Honourable Court retained the mention date of 12th October 2022 for taking directions on the hearing of either Notice of Motion application dated 19th July 2019 or the main Petition. On the material day, the 2nd and 3rd Interested Parties were represented by their Counsels Ms. Muthiani and Ms Mwashiruti while there was no appearance by the Petitioner, 1st, 2nd and 3rd Respondents. I directed that notice be issued to appear on 12th October, 2022 by all the parties who had been absent.
53. On 11th October 2022 the Court erroneously and/ or inadvertently mentioned the matter instead of 12th October 2022. Only the Counsel for the 3rd Respondent was present I guess having spotted it on the Court's Daily Causelist. In view of the absence by the other parties, I directed that the matter be mentioned on 10th November 2022 whereby the 2nd and 3rd Respondents, the Petitioner and the 1st Interested party were present, based on the presentation by the Learned Counsels present, the Court proceeded to order;-
 - a. That the Notice of Motion application dated 19th July 2021 be and is hereby compromised on condition that the conservatory orders granted on 20th September 2021 be sustained and/ or maintained until the main petition is heard and determined in order to pave way and hence expedite the hearing and final determination of the petition.



- b. That it is confirmed following the orders of the court on 23rd March 2022, the National Land Commission has already taken up the matter and held virtual meeting on 7th November 2022 and resultant on 28th November 2022. All parties advised to fully participate in these processes and report to the Court.
 - c. That the matter be mentioned on 9th February 2023.
54. Pursuant to this background, it caused the 1st and 3rd Interested Parties herein to have filed the instant applications herein. Certainly, that is as far as the brief facts of the case is concerned and I believe that is adequate. The Honorable Court would now like to embark on the analysis of the farmed issues herein.

Issue No. a). Whether the Court has jurisdiction to hear and determine the instant applications?

55. Under this Sub heading, it is imperative that the Court deals on the issue of jurisdiction before proceeding further in tackling any other issue. The 1st Interested Party has termed this Court as being *functus officio* in respect of the orders sought. As it has been established in myriad of authorities, jurisdiction is everything, it is the heart and is what gives the Court power to hear and determine a case. In the “locus classicus” on jurisdiction is the celebrated case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1 where Justice Nyarangi of the Court of Appeal held as follows:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

56. For this very reason, the matter has to be dealt with from the very onset. Jurisdiction can be derived from *the constitution*, legislation or both. Under the provision of Rule 25 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides as follows:

“Setting Aside, Varying or Discharge – An Order issued under Rule 22 may be discharged, varied or set aside by the Court either on its own motion or an application by a party dissatisfied with the order”

57. It is my opinion that applying the above legal principles to the instant matter means that this court has discretionary powers to discharge, vary or set aside its own orders either on its own motion (“Suo Moto”) or on an application by a party. Therefore, I discern, In that case the 2nd and 3rd Interested Parties are within their rights to have moved court under the two instant applications seeking the orders above stated. Without belaboring the point any further, the Court holds that his Honorable Court has jurisdiction to determine the applications herein.

Issue No. b). Whether the order issued on 10th November 2022 should be set aside, varied and discharged?

58. This Court has already set out the proceedings of what transpired in Court to a great extent and in particular on 10th November 2022. Ideally, and based on the averments from their applications, it is clear that the 2nd and 3rd Interested Parties are aggrieved by the orders made on the said date and have moved the Court seeking review and or set aside of the said orders to be issued. In a nutshell, the 2nd



Interested Party case is that it is gravely prejudiced by the order as it was issued in the absence of its Counsel and the party. The 2nd Interested Party explains that the absence was a result of this Court's order issued on 12th October vacating the mention date of 10th November 2022. It has imputed that its right to heard has been violated. The 2nd Interested Party seeks that the proceedings of 10th November 2022 and all consequential orders be set aside in entirety and be granted leave to be heard on the Petitioner's notice of motion application dated 19th July 2022.

59. Likewise, the case of the 3rd Interested Party is that the Court inadvertently, and in ignorance (sic) of its orders of 10th November 2022 proceeded to conduct proceedings in the absence of the Counsel for the 3rd Interested Party. Indeed on 12th October 2022, this Court directed that in the meantime the earlier date of 10th November 2022 be and is hereby vacated. Erroneously, on 10th November 2022 the matter was listed before the Court where only the Counsel for the 2nd and 3rd Respondents, the 1st Interested Party and the Petitioner appeared. There was no appearance for the 2nd and 3rd Interested Parties. As a result, the Court issued orders as already set out hereinabove.
60. The 3rd Interested Party states that by the said orders, the ex parte interim conservatory orders issued by the Court on 20th September 2021 were confirmed without the benefit of considering the Replying Affidavit of Thomas Thuita sworn on behalf of the 3rd Interested Party. The 3rd interested party is vehemently opposed to the confirmation of the said ex parte orders and wishes to be heard on the Petitioner's application dated 19th July 2021. In so doing it would a clear affirmation to the principles of natural Justice where parties should not be condemned unheard. In its submissions, the 3rd Interested Party while strongly objecting the jurisdiction and the legal mandate of the national Land Commission to hear and entertain this matter whatsoever, have in the alternative prayed that it would be in public interest of all parties for the main Petition be determined expeditiously so as to remove it from the Courts jurisdiction.
61. Be that as it may, the Honourable Court has critically assessed all the salient issues raised from the filed applications. Undoubtedly, the Court admits there was a glaring mix up of the dates caused solely by the Registry and hence agrees with the 2nd and 3rd Interested Parties that their absence in court on 10th November 2022 was not their fault. Ironically, and based on the assertion by the reknown author Mr. Robert A. Greene in his masterpiece book titled, "The Laws of Human Nature" holds that:-

"We are a social animal. Our very lives depend on our relationships with people. Knowing why people do what they do is the most important tool we can possess, without our other talents can only take us so far...."

I say this based on the rather perplexing and perhaps irrational position taken by the 3rd Interested Party. In as much as I agree that the orders made on 10th November 2022 were made in the absence of the 2nd and 3rd Interested Parties without giving them an opportunity to be heard, the 3rd Interested Party again proceeds in the alternative prayer to be seeking for expeditious disposal of the Petition is converse of its case seeking expeditious disposal of the main Petition. Wasn't that the same position taken by consensus by all the parties on 10th November, 2022? To jog the memory of the 3rd Interested Party, vide a ruling dated 3rd October 2022, the Court directed that for expediency sake, either parties to agree by consensus on:-

- i. Hearing of the Notice of Motion application dated 19th July 2021 by the Petitioner herein by way of written submissions as per directions of this Court; or
- ii. In alternatively to fix the main Petition to proceed on for main hearing.



62. Thus, it is instructive to note from records that the Notice of Motion application dated 19th July 2021 by the Petitioner has never been heard and determined. Ideally, this Court would have expected the parties to have made replies to it and hence cause it for disposal but instead they opted to file the two impugned applications. Clearly, we all need to point out that the suit also involves numerous other parties only that the Petitioner, the 1st, 2nd and 3rd Interested Parties seem to be the most active ones for the time being in force at this interlocutory stage of the filed Petition. Thus, it is not correct for the 3rd Interested Party to claim that interim conservatory orders issued by the Court on 20th September 2021 have been confirmed. The Court made that order to ensure that the matter was heard and determined expeditiously. I feel the Court is being pushed to digress from the main gist and substance of the applications. I decline to take that route.
63. Without belabouring on this issue, the provision of Articles 25, 47, 50 of *the Constitution* of Kenya, 2010 enshrines the right to a fair hearing. I am persuaded that the 2nd and 3rd Interested Parties have made their case only to set aside order (1) issued on 10th November 2022 however I am not inclined to agree that the 2nd Interested Party can direct the Court on whether the submissions will be highlighted or not.
64. I have already stated, the application dated 19th July 2021 by the Petitioner has not been heard and determined. I have also set aside order 1 of the orders issued on 10th November 2022, consequently the issue sought by the 2nd Interested Party to be granted leave to be heard on the Petitioner's Notice of Motion application dated 19th July 2021 has been effectively dealt with I need not say much. Setting aside of order (1) means that the application dated 19th July 2021 is now open to proceed for hearing and determination unless parties otherwise agrees.
65. The 3rd Interested Party states that whereas the Petitioner was directed by the Court to lodge a complaint with the National Land Commission, to date, the 3rd Interested Party has not been served with and accordingly, no formal proceedings may be or have been commenced by NLC. On record there is a letter dated 8th February 2023 by the Law firm of Messrs. E. K Mutua & Co. Advocates addressed to the secretary of the National Land Commission. It reads inter alia:-
- “We have seen an email thread to the effect that proceedings arising out of the above matter were conducted before a panel of National Land Commission on 28th December 2022.
66. On 10th November 2022, the Petitioner apprised the Court that the National Land Commission had virtual meeting with some of the Parties being Makueni and Kwale on 7th November 2022. The Court was informed that the next meeting would be on 28th November 2022, a clear indication that some activities were already taking place. Certainly, I am not persuaded that there is no proceedings at the National Land Commission. This Court is not in the business of micro managing other Quasi Judicial bodies. I feel we are splitting hairs here and once again I decline to be pushed onto that path. I am compelled to state that it is just safer to let the National Land Commission execute its Constitutional legal mandate as enshrined under the provision of Article 67 (e) of *the Constitution* of Kenya, 2010 unless otherwise stated. For these reasons, therefore, I decline any invitation by the 2nd and 3rd Interested Parties to discharge, review, set aside and / or vary order 2 issued on 10th November 2022 to that effect.



IssueNo. c). Whether the orders issued on 20th September 2021 and extended on 23rd March 2022 should be set aside, varied and discharged pending hearing and determination of the Application?

67. It is worth noting that the Petitioner, the 1st Interested Party and the Respondents did not file Replying affidavits opposing the matters of fact contained in the affidavits in support of the application and the further affidavit. However, this cannot be construed as an admission by the Petitioner, 1st Interested Party and the Respondents of those facts. The question is whether the 2nd and 3rd Interested Parties have cogently proved their case, has the application met the threshold for the Court to exercise its judicial discretion and set aside, vary and/ or discharge orders issued on 20th September 2021 and extended on 23rd March 2022? Perusal of the application by the 2nd Interested Party reveals that it dwells on seeking to set aside the orders issued on 10th November 2022 and proceed to the hearing of the Petitioner's application dated 19th July, 2022.
68. To the 3rd Interested Party, in order to determine the application dated 5th January 2022 it is important to appreciate the contest in the Petition especially the reliefs sought. The substantive prayers sought are:-
- a. Parliament of Kenya to set up an independent commission pursuant to Article 94 (3) and 188 of *the constitution* for purpose of resolving the simmering boundary dispute between Taita Taveta county against Makueni and Kwale Counties; enact legislation to implement Article 94 (3) and 188 of *the Constitution*.
 - b. The national executive to 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 one hand.
69. To the 3rd Interested Party, the Petition neither seeks a mandatory injunction or prohibitory injunction nor a declaration in relation to collection of revenue by Taita Taveta, Makueni or Kwale Counties. In the premises the Petition is misplaced and cannot issue in isolation. On 23rd March 2023, the Court delivered its ruling on notices of preliminary objections by the 2nd, 3rd Respondents, the Senate, the 3rd and 4th Interested Parties. To summarize the said ruling is that the Court ordered "inter alia":-
- a. That the court has jurisdiction to and determine the issues raised in the petition.
 - b. The petitioner is directed to serve the orders upon the National Land Commission and lodge a formal complaint to enable the Commission initiate investigations into the historical injustices and the instant county boundary dispute involving the three counties and prepare a report.
 - c. In the meanwhile, there be interim orders appointing and/ or authorizing the County Government of Taita Taveta to be the sole authority issuing business 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 interests earning bank account opened jointly with the county government of Kwale for a period of six (6) months from the date of this ruling.
 - d. That interim order appointing the county government of Taita Taveta to be the sole authority issuing business permits and levying county taxes in Mito



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 county government of Makueni.

70. The Court proceeded to fix the matter for “inter parte hearing on 10th October 2022 for purposes of compliance by the National Land Commission and further directions with regard to the disposal of the main Petition. The 2nd and 3rd Interested Parties then filed Notice of Motion applications dated 11th October 2022 and 12th May 2022 respectively seeking to set aside / vary the orders issued on 20th September 2021 and extended vide ruling dated 23rd March 2023. In its ruling dated 3rd October 2022, the Court declined to grant the orders sought in the Applications and dismissed with no orders as to costs.
71. In the instant applications, the 2nd and 3rd Interested Parties are beseeching the court to set aside, vary and / or discharge its orders issued on 20th September 2021 and extended on 23rd March 2022 that there be interim orders appointing and/ or authorizing the County Government of Taita Taveta to be the sole authority issuing business permits and levying county taxes in Mackinon road 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 county government of Kwale for a period of six (6) months from the date of this ruling; and That interim order 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 county government of Makueni.
72. The 2nd Interested Party is concerned that the 1st Interested Party has commenced execution proceedings and also threatened the 2nd Respondent’s CECM for finance with contempt proceedings through letter dated 24th November 2022. The said letter reads
- “.....we have noted with concerns that your department of Finance and Economic Planning is levying taxes at Macknon contrary to Court order issued on 22nd September 2021.
- The letter puts you on notice regarding premises you have been using as your office in Mackinon; the same belongs to County Government of Taita Taveta and by a copy of this letter we are giving you 7 days notice to vacate the same to enable our revenue officers effectively carry out their duties and/ or comply with the Court order.
73. The Supreme Court in the case of “Gitaru Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR expressed itself on the matter as follows:

“conservatory orders’ bear a more decided public Law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold 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 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 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.... That it is in the public interest that the order of stay be granted. This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through *the Constitution*.

74. Additionally, this Court is guided by decision in the case of “the Centre for Rights Education and Awareness (CREAW) & Another v Speaker of the National Assembly & 2 others [2017] eKLR, where the Court was emphatic that:-

“A party who moves the court seeking conservatory orders must show to the satisfaction of the Court his or her rights are under threat of violation; are being violated or will be violated and that such violation or threatened violation is likely to continue unless a conservatory order is granted. This is because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending case or Petition.”

75. From the above, it is clearly discernible that the purpose of granting conservatory order is to prevent violation of rights and fundamental freedoms freedom and preserve the subject matter pending the hearing and determination of a pending case or Petition. It is not meant to confer any benefit to a party. The 1st interested party has used the order to compromise the case as though the county boundary dispute has been determined. The conservatory order issued does not resolve the issues raised in the Petition, it does not resolve the boundary dispute. It was only meant to ensure that in the meantime, the three counties do not double tax the residents of Mackinon town and Mtitito Andei. The 2nd Interested Party has proffered that the status quo should in fact mean that it is the 2nd Interested Party has been the one issuing business permits, levying county taxes and collecting cess at Mackinon Road town and produced a copy of the Kenya gazette Notice No. 1397 of 1st January 2013 which the Court has examined in full effect. The 2nd Respondent pleads that the Petitioner has no “prima facie” case, will suffer no damage. This Court disagrees with the 2nd Interested Party that the Petitioner will not suffer the any damage. The substratum of the Petition is that the existence the county boundary disputes is being used to compete for resources and the result is double taxation.

76. In respect of the orders of this Court issued on 20th September 2021 and extended on 23rd March 2022, there is no evidence that joint bank account between the 1st Respondent and the 2nd Respondent has ever been opened to deposit revenue collected from Mackinon Road Town as directed. Further, it appears that no revenue has been collected as directed by the Court, it is evident that residents of Mackinon Road Town may have not have been paying county taxes, certainly this cannot be a way of doing things. The order is not a blanche carte to exempt residents of Mtito Andei and Mackinon Road Town from paying taxes.

77. The 3rd Interested Party pleads that in guise of seeking to restore an alleged status quo ante, the Petitioner misrepresented facts to the Court and in effect the Petitioner obtained conservatory/interim orders restraining the 3rd Interested Party from performing its constitutional mandate and altering the boundary of Makueni a jurisdiction it does not have. Before making a further step, this Court delivered itself on 23rd March 2023 that it has jurisdiction to hear and determine the issues raised in the Petition, that position still stands.

78. Whereas the 3rd Interested Party has rightly directed its mind that the Petitioner does neither seek a prayer that the 1st Interested party, the County of Taita Taveta be allowed to collect revenue within Mtito Andei Town nor an order that the 3rd Interested Party, the County of Makueni be restrained



from collecting such revenue, truly that is a narrow view. This Court holds a broad reasoning. The instant petition is about resolving a boundary dispute between the Counties of Taita Taveta and Kwale and between the Counties of Taita Taveta and Makueni. As already stated, this boundary disputes is being used to compete resources and in effect the residents in the disputed areas are subjected to double taxation. On one hand the 3rd Interested Party prays that the Petition be determined expeditiously and on the other hand filing applications.

79. Concern to the court is the 3rd Interested Party's averment that as a consequence of the interim/ conservatory order, the 3rd interested party which was responsible for service delivery within Mtito Andei town has been unable to offer such services because it no longer collects revenue within the said town. At the same time the 1st Interested Party does not offer any services within the town. Further to this is that the failure to offer services has led to security and health risks for the residents of Mtito Andei town. This position has not been controverted by the 1st Respondent. The other issue is that it is not possible to ascertain the amount of levy or revenue collected by the 1st Interested Party and what is deposited in the intended joint account. To the Court's mind intended joint account implies that no account has been opened while at the same time the residents on Mtito Andei are not receiving any services. This is a recipe for chaos. I am aware that this Court should not and cannot draw any conclusions at this stage in respect of the boundary disputes. However, if the allegations that the 1st Interested Party is not providing services is anything to go by, then there is cause for alarm. It is not the objective that a party whose conservatory/ interim order have been issued in its favour engages in a conduct to defeat its purpose. From the very onset, I must caution the 1st Interested Party to refrain from misusing orders of the Court and allow the judicial course to flow.
80. In a further affidavit sworn on 30th January 2023, the 3rd Interested Party annexes a letter dated 23rd January 2023 by the County Government of Taita Taveta seeking police assistance to effect order issued on 20th September 2021. In the said letter, the 1st Interested Party notified the County Commissioner Makueni County that it will deploy revenue team with effect from 30th January 2023. In effect, the order issued on 20th September 2021 has not been complied and enforced. There is no evidence that joint bank account was opened. Be that as it may be, this Honourable Court is not persuaded that the Petitioner will not suffer any irreparable damage, I am completely unable to agree with the 3rd Interested Party's application.
81. The 3rd Interested Party pleads that NLC may not competently resolve the dispute in the context of the reliefs sought. The 3rd Interested Party admits that whereas NLC has jurisdiction to deal with historical land injustices, the said issue is intertwined without county boundary dispute and without involvement of parliament and an independent commission the NLC cannot determine the dispute herein. The 3rd Interested Party compares the current dispute to be similar to one before the court in the case of "County Government of Isiolo & 10 others - Versus - Cabinet Secretary, Ministry of Interior and Coordination of National Government & 3 others [2017] eKLR placing reliance in paragraphs 89 and the order issued thereof that An order do issue that the boundary disputes between Isiolo and Meru Counties shall be resolved by an Independent Commission to be set up by Parliament under Article 188 of *the Constitution*. Paragraph 89 of the said judgement reads:-
89. It is therefore on the basis that principally the issue before this Court is about boundaries between two Counties and occupation of land by residents of the said Counties that this matter ought to be addressed. This is the basis upon which this matter should be determined.
82. The provision of Article 188 of *the Constitution* of Kenya, 2010 on the boundaries of Counties thus:



188. Boundaries of counties

- (1) The boundaries of a county may be altered only by a resolution—
 - (a) recommended by an independent commission set up for that purpose by Parliament; and
 - (b) 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;
 - (b) 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

83. In the above cited case, the Court noted, to draw the distinction, the 1st Interested Party relied on Black's Law Dictionary 4th edition definition of the words 'Alter' and 'delimit' thus:

“Alter: to make a change in, to modify; vary in some degree; to change some of the elements or ingredients or details without substituting an entirely new thing or destroying the identity of the thing affected.

That 'demarcate' is a synonym to 'delimit' and 'delimit' means:-

To mark or lay out the limits or boundary line of a territory or country; to fix or to mark the limits of; to demarcate; bound.

84. On this aspect, the Honourable fails to agree with the 3rd Interested Party. It is my view that territorial boundaries of the 47 counties in Kenya are fixed and can only be altered through the procedure provided under the provision of Article 188 of *the constitution*. In the instant case, the issue is to demarcate the existing boundary disputes between the mentioned counties. In the above decision, the court noted-

”96. Who then is to demarcate County boundaries? It is worth noting that while the Petitioners, were emphatic that the 1st Respondent does not have the legal mandate to demarcate County boundaries, they alluded to that power being vested in the IEBC. I have however explained above that IEBC as a constitutional commission with a specific constitutional mandate has no power to demarcate or delimit County boundaries. The Respondents and the 1st Interested Party on their part submitted that such a 'small issue' like demarcation of boundaries is well within the power of the 1st Respondent but I have already alluded to how emotive the land question is in our Country and how it led to the drafting of Chapter 5 of *the Constitution* and so the matter is not small. It was submitted that the issue of the boundary between the two Counties also has not reached the level of an 'historical injustice' against the



Petitioners. While, as I have stated above under Article 188, it is the prerogative of Parliament to set up an independent commission whenever there is need to alter County boundaries, it is my understanding of the law that in the meantime, issues to do with demarcation of boundaries and claims of historical injustices should be well channelled and resolved through the National Land Commission (NLC).

85. Judges do not live in a cocoon nor utopia!. They are in this world and society. Undoubtedly, there are several disputes facing counties over their boundaries. This Court takes judicial notice that Hon Moses Otieno Kajwang', Senator for Homa Bay County has sponsored the County Boundaries Bill 2023 which is an Act of Parliament to provide for county boundaries; to provide for a mechanism for the resolution of county boundary disputes; to give effect to Article 188 of *the Constitution* by providing for the procedure for alteration of county boundaries; to provide for the establishment of an independent county boundaries commission; and for connected purposes.
86. The Bill aims to craft an acceptable and lasting solution to boundary fights by clearly providing in legislation demarcated boundaries of all the 47 Counties whose effect will resolve all the existing county boundary disputes. To harmonize the law in accordance with *the Constitution*, the Bill if passed will repeal “the District and Provinces Act Cap 105A” of the Laws of Kenya. The Bill intends to provide a framework for resolution of county boundary disputes away from the Court process. What comes out clearly is that the Bill clearly deals with resolution of boundary disputes and also the alteration of county boundaries. At this stage I am aware that County Boundaries Bill 2023 is still in the process of being enacted into law and at this stage this Court is not being called to interpret. This is a timely Bill and I call upon all the 47 Counties to give their views on the Bill.
87. In *County Government of Kiambu & another v Senate & others* [2017] eKLR, Mativo J(as the he was) called upon our Courts to be innovative and take into account the contemporary situation of each age but innovations must be supported by the roots. However, to the extent that judges make laws, they should do so with wisdom and understanding. Judges should be informed on the factual data necessary to good policy making. This includes not only the facts peculiar to the controversy between the litigants before them, but also enough of an understanding of how our society works so that they can gauge the effect of the various alternative legal solutions available in deciding a case.
88. This is a case in which the 1st, 2nd and 3rd interested parties do not agree on what the status quo entails. It would appear that each of the three interested parties claims that the status quo which existed was that each of the interested parties was issuing permits and levying county taxes. The 1st and 3rd Interested parties are fighting for Mtito Andei while the Mackinon road is being tussled for control by the 1st and the 2nd interested parties. It would also appear that some portions of the Mackinon Road Town and Mtito Andei fall into two Counties. This Court is unable to deliver its mind on this.
89. Suffice it to say, in the interest of Justice, Equity and Conscience, I hold the view that some of the prayers from the filed two applications by the 2nd and 3rd Interested Parties need to be allowed as will be stated herein below.

Issue No. e). Who will bear the costs of these applications.

90. It is now well established that and from Rule 26 (1) and (2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules 2013, the award of costs is at the discretion of the Cost. Costs is the award that a party is granted at the conclusion of any legal action or proceedings in any litigation.
91. In exercising its discretion to award costs, the court shall take appropriate measures to ensure that every person has access to court to determine their rights and fundamental freedoms.



92. The Proviso of the Provisions of Section 27(1) of the *Civil Procedure Act* Cap 21 holds that costs follow the event. By event it means the results of the legal action or process in any litigation (see the Supreme Court Case of Jasbir Rai Singh Rai – Versus- Tarhochan Singh (2014) eKLR and Mary Wambui Munene –Versus- Ihururu Dairy Co - operative Societies eKLR (2014)
93. In the instant proceeding, although the 2nd and 3rd Interested Parties have partially succeeded in prosecuting their applications and taking that the Petition is still on Course, it is just, fair, reasonable and equitable that each party bears their own costs.

IX. Conclusion and Disposition.

94. Ultimately, upon conducting an elaborate analysis to the framed issues herein, the Honourable Court now proceed to make the following specific orders. These are:-
- a. That both the Notice of Motion applications dated 4th and 5th January, 2023 by the 2nd and 3rd Interested Parties respectively be and are hereby partially allowed to the extent in terms of Prayers number (d), (e), & (f) of the application dated 4th January, 2023 and Prayers (c) of the application dated 5th January, 2023 as stated herein below.
 - b. That the order issued on 10th November 2022 that the Notice of Motion application dated 19th July 2021 be and is hereby compromised on condition that the conservatory orders granted on 20th September 2021 be sustained and/ or maintained until the main Petition is heard and determined in order to pave way and hence expedite the hearing and final determination of the Petition be and is hereby set aside.
 - c. That the Notice of Motion application dated 19th July, 2022 to be canvassed by way of written submissions through stringent time frame as follows:-
 - i. The 1st, 2nd & 3rd Respondents and the 1st, 2nd & 3rd Interested Parties be granted 14 days leave to file and serve replies and written submissions after having been served by the Petitioner’s submissions.
 - ii. The Petitioner/Applicant granted 14 days leave to file and serve further affidavit to the new issues raised from the responses and written submissions.
 - iii. There be “Inter Parties’ hearing on 19th July, 2023 (highlighting of submissions) and taking a ruling date.
 - d. That pending hearing and determination of the Petitioner’s application dated 19th July 2021,
 - i. a conservatory/ interim order already in force is and hereby extended appointing and/ or authorizing the County Government of Taita Taveta to be the sole authority issuing business permits and levying county taxes in Mackinon road and to deposit all the revenues it so collects into an interests earning bank account opened jointly with the county government of Kwale for a period.
 - ii. a conservatory/ interim order already in force is and hereby extended appointing the County Government of Taita Taveta to be the sole authority issuing business permits and levying county taxes in Mrito 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 county government of Makueni.



- e. That the County Executive Committee members finance for Taita Taveta and Kwale Counties do jointly open a bank account within 14 days of this ruling and come up with a framework to collect taxes as above.
- f. That the County Executive Committee Members finance for Taita Taveta and Makueni Counties do jointly open a bank account within 14 days of this ruling and come up with a framework to collect taxes as above.
- g. That the order of this Court issued on 23rd March, 2022 directing the National Land Commission to hear and determine all the issues of historical injustices pursuant to the provision of Article 67 (1) (e) of *the Constitution* of Kenya, 2010 pertaining to the County boundaries involving the County of Makueni, Kwale and Taita Tavetta to continue but within a given time frame unless otherwise stated not beyond 31st December, 2023.
- h. That the Deputy Registrar of the Court do serve a copy of this ruling upon the Speaker through the Clerk to the Senate to consider fast tracking the enactment of the County Boundaries Bill into a legislation and the Chairman through the Secretary/Chief Executive Officer, the National Land Commission for effecting the herein.
- i. That each party to bear their own Costs.

It is so Ordered Accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DELIVERED AT MOMBASA THIS 6TH DAY OF JUNE 2023

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**HON. JUSTICE MR. L.L NAIKUNI (JUDGE)
OF THE ENVIRONMENT AND LAND COURT AT
MOMBASA**

Ruling delivered in the presence of:-

- a. M/s. Yumnah, the Court Assistant.
- b. No appearance for the Petitioner.
- c. No appearance for the 1st Respondent.
- d. No appearance for the 2nd Respondent.
- e. Mr. Penda Advocate for the 3rd Respondent.
- f. No appearance for the 1st Interested Party.
- g. M/s. Mwashuruti Advocate for the 2nd Interested Party.
- h. No appearance for the 3rd Interested Party.

