



Gele t/a Buxton Filling Station v Chief Officer Land, Housing and Physical Planning, County Government of Mombasa & 7 others (Environment & Land Petition 44 of 2010) [2022] KEELC 3577 (KLR) (9 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3577 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND PETITION 44 OF 2010

LL NAIKUNI, J

MAY 9, 2022

IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS

AND

IN THE MATTER OF: THE PRINCIPLES OF NATURAL JUSTICE, OPENNESS AND JUST COMPENSATION

AND

IN THE MATTER OF: FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 22, 23, 40, 47, 48, 50, 159, 162 (2) (B), 258 AND 259 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: THE CONTRAVENTION AND THREATENED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 40 (2) AND (3) 47, 48, 50 (1), OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND



**IN THE MATTER OF: PROVISIONS OF THE LAND
ACQUISITION ACT
AND
L. NAIKUNI (JUDGE)
IN THE MATTER OF: THE LAND ACT AND LAND
REGISTRATION ACT IN THE MATTER OF
UNLAWFUL DEMOLITION OF BUXTON
FILLING STATION**

BETWEEN

ABDULLAHI AHMED GELE T/A BUXTON FILLING STATION .. PETITIONER

AND

**CHIEF OFFICER LAND, HOUSING AND PHYSICAL PLANNING, COUNTY
GOVERNMENT OF MOMBASA 1ST RESPONDENT**
**HASSAN ALI JOHO, GOVERNOR COUNTY GOVERNMENT OF
MOMBASA 2ND RESPONDENT**
COUNTY GOVERNMENT OF MOMBASA 3RD RESPONDENT
BUXTON APARTMENTS OF MOMBASA 4TH RESPONDENT
SULEIMAN SHAHBAL 5TH RESPONDENT
RONTON CONSTRUCTION CO. LTD 6TH RESPONDENT
CHIEF LAND REGISTRAR 7TH RESPONDENT
ATTORNEY GENERAL 8TH RESPONDENT

RULING

I. Introduction

1. What is before this honorable court for its determination is the notice of motion application dated October 5, 2021 by the petitioner. It is brought under the provisions of sections 1A, 1B and 3A of the [Civil Procedure Act](#) cap 21 order 51 rule 1 of the [Civil Procedure Rules, 2010](#).

II. The Petitioner/Applicants Case

2. The petitioner/applicant is seeking for the following orders:-
 - (a) Spend
 - (b) That pending the hearing and determination of this application “*inter partes*” the honorable court be pleased to grant a conservatory order restraining the 1st, 2nd, 3rd, 4th, 5th and 6th respondents from further demolishing, destroying, digging, constructing or in any way



interfering with the suit property known as Buxton Filling Station erected on the land reference No Mombasa/Bloc/XVII/1443.

- (c) That pending the hearing and determination of the petition the honorable court be pleased to grant a conservatory order restraining the 1st, 2nd, 3rd, 4th, 5th and 6th respondents from further demolishing, destroying, digging, constructing or in any way interfering with the suit property known as Buxton Filling Station erected on the land reference No Mombasa/Bloc/XVII/1443.
 - (d) That pending the hearing and determination of this application “*inter partes*” the honorable court be pleased to grant an order allowing the petitioner free access to the property for purposes of removing all the fuel, tank and pumps without interference from the 1st, 2nd, 3rd, 4th, 5th and 6th respondents their officers, servants and/or agents and workmen.
 - (e) That this honorable court be pleased to grant any other orders and directions as it may deem fit and just to issue under the circumstances.
 - (f) That the costs of this application to be borne by the 1st, 2nd, 3rd, 4th, 5th and 6th respondents.
3. The notice of motion application is premised on the grounds, testimonies facts and the averments of the 21 paragraphed supporting affidavit of Abdullahi Ahmed Gele, the petitioner/applicant herein sworn and dated on the even date, the six (6) annexures marked as “AAH-1to 6” annexed hereto. He deposed that he is a citizen of Kenya and law abiding and the legal and owner of business and property known as Buxton Filling Station registered under the [Registration of Business Names Act](#) under Number BN/2016/419007 (hereinafter referred to as “the business premises”).
 4. He deposed that he was the lawful occupant of the suit property – land reference No Mombasa/Bloc/XVII/1443 having leased it through a lease agreement dated 1st March, 2018 and ending on February 28, 2023 duly executed between Jiviben Lalji Shah and himself – Fiviben Lalji Shah being the legal owner of the property for 99 years from the year July 1, 1947 and as per the certificate of lease annexed thereto marked as “AAG -2”. He stated that he had dutifully and diligently paid for business permits fees and fire permit fees to the County Government of Mombasa since the Station’s inception and had a valid 2021 business permit.
 5. He deposed that on September 22, 2021 the officer format he fire department of the 3rd respondent while undertaking impromptu inspection brought notices for non-compliance for fire safety precaution and asked the petitioner to comply with six (6) steps within 24 hours. Despite the short notice, the petitioner fully complied and send a letter requesting for a compliance certificate on September 28, 2021 the petitioner through his advocates wrote to the 2nd, 3rd and 4th respondents demanding for cessation of the harassment and intimidation and adherence to due process.
 6. He stated that in the night of September 29, 2021 at 11.00 pm, the 1st to 6th respondents send their officers accompanied by goons allegedly from the offices of the 2nd respondent illegally without lawful authority and without color of right stormed and fences off the business property and put their guards to watch for them overnight. He informed court that in the morning of September 30, 2021 at about 8.00 am.the said officers started demolishing the business property to the detriment of the petitioner. He was not given sufficient time and notices to collect and remove his fuel worth Kshs four million (Kshs 4,000,000/=) comprising of petrol, diesel and kerosene and other valuables. He deposed that the said respondents decision to demolish the petitioners business property without giving him fair hearing and just and prompt compensation was actuated by high handedness, misuse of power arrogance and for the general public to feel that they could flex their muscles and were above the law to intimidated threaten and execute excessive powers on innocent persons.



7. He deponed that the 1st to 6th respondents had:-
- (a) Failed to act within the law but act with impunity and infringed the property rights – under article 40 of the [Constitution of Kenya](#).
 - (b) Acts like they were above the law by giving verbal instructions
 - (c) Have continued to trespass interfere with the business property by digging demolishing and construction on it.
 - (d) Failed and/or neglected to provide the petitioner any information and was rendered without his livelihood.
 - (e) Clearly prejudiced the petitioner which amounted to an infringement of his right under [Constitution of Kenya](#).
8. He urged court that to have the 1st to 6th respondents:-
- (a) Be restrained pending the hearing and determination of the application as the livelihood of the petitioner was infringed.
 - (b) To hold that their actions as being in violation of the [Constitution of Kenya](#) and that the court had the power to enforce the proprietary rights of the petitioner as provided for under article 40(2) (b) of the [Constitution of Kenya](#) and the [Land Acquisition Act](#).

He prayed for the orders sought from the application be granted with costs.

III. The Grounds of Opposition

9. On October 27, 2021 the 1st, 2nd and 3rd respondents through Murfaza Tajbhai, the County Attorney of the County Government of Mombasa filed a seven (7) points grounds of opposition dated October 26, 2021 opposing the notice of motion application dated October 5, 2021 by the petitioner herein. The grounds were summarized as:-
- (a) The petitioner had not proved that he had “*prima facie*” case to warrant being granted interim conservatory orders.
 - (b) Matters raised in the application and the petition were private law issues and did not warrant a remedy under the constitutional contest conservatory orders bore a decided public law connotation – being of public interest unlike interlocutory injunction which linked to private party issues. This avenue by the petitioner was wrong.
 - (c) It was premature to grant conservatory orders at this stage before the determination of the factual evidence.
 - (d) The application as unfounded, frivolous and vexatious and should be dismissed with costs.

IV. Reply of the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents Grounds of Opposition by the Petitioner

10. On November 30, 2021, the learned counsels for the petitioners the law firm of Messrs Abdiaziz & Company Advocates filed a nine (9) paragraphed reply to the grounds of opposition filed by the 1st, 2nd, and 3rd respondents dated the same date. In summary they held that the grounds of opposition:-
- (a) The matter was not res-judicata as the same did not offend the provisions of section 7 of the [Civil Procedure Act](#) as the issues, facts and parties were not the same as those of Constitutional Petition No 28 of 2020.



- (b) The issue before court was violation of the petition constitution rights – article 40(2) (b) of *Constitution of Kenya* whereby his business property was illegally and unlawfully demolished and him being evicted from the suit property and which has never been dealt with substantially.
- (c) No complainant has ever been filed by the 4th, 5th and 6th respondents on allegations of illegal installations of a fueling stations by the petitioner to the Energy Regulatory Authority established under the *Energy Act* with the legal mandate to review modify, subject or revoke licenses and permits for all undertakings in the energy sector.
- (d) On the 1st to 3rd respondents that this was a private law issue they responded by holding that the property raided, trespassed and illegally reclaimed by the 1st to 6th respondents without lawful authority court order fair process and procedure.
- (e) The petitioner was a lawful occupation of the suit property based on a duly executed lease agreement.
- (f) The claim by the 4th to 6th respondents that they had exclusive use, occupation and sole proprietorship was misguided as the property was registered to Jiviben Lalji Shah and the so called amalgamation and consolidation of several parcels into one was un-procedural.

V. The Replying Affidavit of the 1st, 2nd and 3rd Respondents

11. On November 12, 2021, the 1st, 2nd and 3rd respondents filed a 37 paragraphed replying affidavit sworn by Rose Mbaika Munupe and dated November 11, 2021 and 14 annexures marked as “RMM-1 to 14 annexed hereto. She deposed that she was a director, Department of Lands, Housing and Physical Planning in the County Government of Mombasa the 3rd respondent herein and hence fully conversant with the facts in this petition. She was authorized by the 1st, 2nd and 3rd respondent to swear this affidavit on their behalf. She held that the 1st and 2nd respondent were not judicial bodies capable of being sued or petitioned in the manner sought herein. As officers of the 3rd respondents they had no legal liability in relation to acts or omission done by virtue of their offices by dint of section 133 of the *County Governments Act* and sections 22 of the *National Government Co-ordination Act, 2013* hence there was no reasonable cause of action against the 1st and 2nd respondent and their names should be struck out from these proceedings.
12. She held that the 3rd respondent was the registered proprietor and absolute owner to all that property/ parcel of land known as land reference No Mombasa/Block/XVII/1821 measuring about 4.905 Ha (approximately 12.2 acres) and she annexed a copy of the title issued on May 28, 2021 marked as “RMM-1” to the replies. She deposed that by a lease dated June 11, 2021 between the 3rd respondent and the 4th respondent, the 3rd respondent lased to the 4th respondent all that parcel of land known as land reference No Mombasa/Block/XVII/1821 for a term of 99 years with effect from the January 15, 2020 for consideration terms and condition contained in the said lease agreement and the terms of the joint venture agreement dated January 15, 2020 between the 2nd and 4th respondents for the urban renewal and the re-development of the old Buxton Estate.
13. She held that the lease between the 3rd and 4th respondents was made pursuant to a joint venture agreement dated January 15, 2020 under the Public Private Partnerships Act under the 3rd respondents urban renewal and regeneration programme which aimed at upgrading ten (10) of the 3rd respondents dilapidated estates to realize and actualize the right to adequate and affordable housing to the residents of the County of Mombasa as provided for under article 43 of *Constitution of Kenya* and the National Government of Kenya – Affordable Housing Programme Framework Guidelines, 2018.



She averred that pursuant to the lease between the 3rd and 4th respondents, the respondents was issued by the Registrar of Lands Mombasa with certificate of lease for all that portion of Land known as Mombasa/Block/XVII/1821 for a term of 99 years with effect from January 15, 2020 which was the date of the Joint Venture agreement.

14. She held that from the records from her department the petitioners alleged lease for land reference No Mombasa/Block/XVII/1443 was amongst several plots which the then defunct Municipal Council of Mombasa irregularly hived off and excised from public parking and recreation land lawfully set aside at Buxton Housing Estate in Mombasa Island. She averred that by a letters dated November 4, 2019 and February 5, 2020 respectively the then County Land, Planning and Housing Committee Executive member write to the National Land Commission (NLC) and the Ethics and Anti-Corruption Commission (EACC) requesting for the revocation of those irregularities on the leases and bring to book the culprits and perpetrators of the said land grabbing of public land utilities like parking areas and playgrounds at Buxton Housing Estate but never received any responses not obtained any assistance from these agencies which compelled the 1st defendant to request the Land Registrar to proceed to cancel these title deeds.
15. She deponed that upon examination of the Register of land held at the Land Registry Mombasa it revealed and showed the following particulars:-
 - (a) The lease entry was first opened on July 17, 1996 with the lessor as defunct Municipal Council of Mombasa and one Mohamed Buhore as the lessee for a term of 99 years with effect from July 1, 1947 at an annual rent of Kshs 4,924/=.
 - (b) Restriction – that no disposition by the proprietor to be registered without written consent of the lessor. But without any written consent of defunct Municipal Council of Mombasa the following happened:-
 - (i) On November 11, 1997 the lessee – Mohamed Buhero sold the Leasehold interest to Jiviben Lalji Shah at a sum of Kshs 1.5 million.
 - (ii) On January 19, 2001, Mohamed Buhero transferred leasehold to Rashid Mohamed and Abdiullahi Ahmed Gele of a monthly rent of Kshs 23,000/= for a term of six (6) years with effect from March 1, 2001. This meant the lease expired on March 2, 2007 and had never been renewed todate.

She held that there was no minutes of the Land allocation Committee of the defunct Municipal Council of Mombasa, approving the said allocations, applications for the plot allocation from Mohamed Buhero the 1st lessee, the part development plan (PDP) prepared before the said allocation could be undertaken under the provision of the Physical Planning Act, nor a survey and cadastral plans that were prepared before the said lease were issued.

16. She deposed that the lease of plot No Mombasa/Block/ XVII/1443 to the petitioner expired on March 3, 2010 as it had been for six (6) years. She held hat from the 1st lessee to the petitioner no lease ever paid the 3rd respondent any reserved annual rent for the irregular created leases. Arising from the above irregularities, the 3rd Respondent convened a meeting on January 19, 2021 to deliberate on all the irregularly created leases whereby the committee recommended the cancellation of the said leases.

Pursuant to the said minutes, the County Executive Committee member for Land, Planning, Housing and Urban Renewal on April 21, 2021 wrote to the Lands Registrar, Mombasa directing the said office to cancel all those leases which had been irregularly and illegally created, and the said offices obliged accordingly through a Gazette Notice Vol /CXXIII No 104 dated May 13, 2021 Notice No



4671 the 3rd respondent notified the general Public of the cancellation of the said irregular leases. Therefore currently there was no register for the alleged petitioners lease for plot No Mombasa/Block/XVII/1443 but instead what was in existence was plot No Mombasa/Block/XVII/1819 belonging to the 3rd respondents absolutely and free from any leasehold interest in favour of any third party.

17. She informed court that the 4th respondent had a lease to develop a joint venture with the 3rd respondent into plot No Mombasa/block/XVII/1821 and not Mombasa/Block/XVII/1819 on which the lease of the petitioner had been cancelled and determined. That is after the cancellation of the irregular leases, the 3rd respondent took possession of now consolidated plot No Land reference No Mombasa/Block/XVII/1819 by evicting all the illegal occupants and fencing the entire property and is not lawfully in possession of the 4th respondent.
18. She held that the leases were set aside for residential purposes and not commercial user. Purposes of a petrol station and the petitioner having admitted that the user of the lease was a commercial in nature automatically by law under the provision of section 12(8) and (9) of the Land Act lost any proprietary interest on it and therefore had no justifiable cause of action against the 3rd respondent
19. She held that the lease of the petitioner having been unlawfully and irregularly created had not protection of the law or otherwise under article 40(6) of the Constitution of Kenya together with sections 2(a) and (b) of the Land Registration Act No 3 of 2012. She further indicated being aware of the provisions of sections 152A and 152B of the Land Act No 6 of 2012, the petitioner all along was an unlawful occupant of plot No Mombasa/Block/XVII/1443 as he had no valid lease and therefore his lease was lawfully terminated and thereafter evicted by the 3rd respondent.
20. She held that the petitioner purported to seek for restraining orders against the 4th and 6th respondent on property Mombasa/Block/XVII/1821 which did not form part of the 4th respondent's leasehold property having been cancelled and consolidated with others to form lease No Mombasa/Block/XVII/1819 and as such there was no cause of action against the 4th and 6th respondent's activities – indeed the 4th and 6th respondents had commenced huge developments on plot No Mombasa/Block/XVII/1821 and hence any injunction orders issued against them would result to irreparable loss and injury that could not be compensated by an award of damages due to the strict timelines for the joint venture agreement between the 3rd and 4th respondents. Besides, the petitioner had admitted having been evicted from the alleged plot No Mombasa/Block/XVII/1443 and damages would be adequate remedy should the petitioner succeed in his petition.
21. Finally, she averred that this suit offended the doctrine of “*res judicata*” contrary to the provisions of section 7 of Civil Procedure Act in that there was another suit – ELC Constitution Petition No 28 of 2020 Justus Chai Mbaru & 12 others v The County Government of Mombasa & 20 others was heard and petition got dismissed with costs to the respondents.

She urged court not to grant the conservatory orders as pleaded in the petition with costs.

VI. Submissions

22. On October 27, 2021, in the presence of all the parties herein, court directed that the notice of motion application dated October 5, 2021 be dispensed off by way of written submissions.

Pursuant to that, all the parties obliged and indeed, court provided a date for ruling accordingly.

A. The Petitioner's Written Submissions

23. On December 1, 2021 the learned counsel for the petitioners/applicants the law firm of Messrs. Abdiaziz and Company Advocates filed their written submissions dated November 30, 2021 Mr



Abdiaziz Advocate submitted the supporting affidavit of applicant dated October 5, 2021 and further affidavit dated November 30, 2021.

He held that the notice of motion application dated October 5, 2021

24. It was leased from the property owner on a six (6) year revolving term which commenced from 2001 and the last lease was signed between him and the owner in the year 2018 paying a monthly rent of Kshs 40,000/= breaching the provisions of article 40 (1) and (3) and without granting him a fair hearing. While subjecting him to humiliation and leaving him destitute for property he legally occupied for that long period of 20 years. He held that though the 1st to 6th respondent allege to have cancelled the leases based on recommendation by the CEC Committee of the 3rd respondent for allegedly as public land being illegally acquired and the Petition being illegal tenants whose lease had expired and which were issued illegally but wondered why were the cancellation of the title leases not conducted pursuant to the proper procedure provided for in law under article 40 of Constitution of Kenya and an order or judgment of this honorable court.

25. The learned counsel submitted that the petitioner had legitimate expectation in fair operation and performance of the 1st to 6th respondents which had been clearly violated as the same was prejudicial unfair and unjust to the petitioner on this point. He relied on the case of *Diana Kethi Kilonza & another v the Independent Electoral and Boundaries Commission (IEBC) and 2 others* where the issue of legitimate expectation was elaborately address

“...the doctrine of legitimate expectation is said to arise out of a promise made by a public body of official which the person relying on anticipates will be fulfilled Essentially, once made, the promise or practice creates an estoppel against the public body or official so that the person benefitting from the promise or practice would continue to so benefit and that the promise or practice would not be withdrawn without due process or consultation.”

26. The learned counsel further submitted that the petitioner ought to have been given a right to a fair hearing and fair administrative action as envisaged in the *Constitution of Kenya*, rather than cancelling his lease in an opaque and dubious manner unknown to law. Contrary to the provisions of article 50(1) of the *Constitution of Kenya*. They failed to notify the petitioner of their intended action to reclaim the property. For these reason the petitioner deserves the protection of court by being granted conservatory orders sought pending the hearing and determination of the petition.

To buttress its arguments he relied on several decisions being:-

Hon Mr Joseph Mbalu Mutara v The Attorney General & another Petitioner No 337 of 2013,

CA 152 of 1986 *Onyango Oloo v Attorney General* [1986-1998] EA 456,

Petition No 5 of 2014 *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* Supreme Court Application No 5 of 2014 [2014] eKLR,

Nubian Rights Forum & 2 others v Attorney-General & 6 others; Child Welfare Society & 8 others(Interested Parties); Centre For Intellectual Property & Information Technology(Proposed Amicus Curiae) Petition No 56, 58 & 59 of 2019 [2019] eKLR.

27. He argued that the petitioner was entitled to be granted conservatory orders pending the hearing and determination of the main petition. He held that the court only needed to determine whether a prima facie had been established by the petitioner. He argued that the issues that had been canvassed by the



respondents did not concern the honorable court at this stage but at later time during the hearing of the main petition. In the long run he urged court to grant the orders as prayed in the notice of motion application dated October 5, 2021 with costs.

B. The 1st, 2nd and 3rd Respondents Written Submissions

28. On November 30, 2021, the learned counsel for the 1st, 2nd and 3rd respondents the law firm of Messrs. Kilonzo & Aziz Company Advocates filed their written submissions dated November 29, 2021. M/s Thuku Advocates submitted that she would be relying on the filed replying affidavit together with annexures annexed thereto sworn November 11, 2021 by Rose Mbaika Munupe the Director of Land Administration in the 2nd respondents Department of Lands, Planning and Housing in her submissions, she queried whether the 1st and 2nd respondents could be sued by the petition in their personal capacities.

She held that the 1st respondent was the Chief Officer, Land Housing and Physical Planning County Government of Mombasa whereas the 2nd respondent was the Governor of the County Government of Mombasa. They have been in their personal capacities because of the position they hold in the County Government of Mombasa. She held they were not juridical bodies capable of being sued or petitioners like in the circumstances herein as officers of the 3rd respondents. She argued that the 1st and 2nd respondents had no legal liability in relation to acts of omissions done by virtue of their offices that they served in by dint of section 133 of the County Governments and section 22 of the National Government Co-ordination Act, 2013 .

29. To buttress on this point she relied on the case of *Joram Mwenda Guantai v Chief Magistrate*, Nbi [2007] eKLR and held that the 1st and 2nd respondents could not be held personally liable as their acts done if any were done in the administration of duty and in good faith. Indeed, the petitioner had no reasonable cause of action against them and hence their names should be struck out from these proceedings..

She further argued that although the petitioner alleged to be the legal tenant in plot No Mombasa/Block/XVII/1443 where he erected the business premises pursuant to a lease dated March 1, 2018 with one Jiviben Lalji Shah who was the registered owner of a lease firm the defunct Mombasa Municipal Council for 99 years from 1974 had failed to show the process of acquiring the subject title. She heavily relied on the case of *Munyu Maina v Hiram Gathibi Maina*, Civil Appeal No 233 of 2009 she emphasized that the title deed held by the petitioner was acquired unlawfully and un-procedurally as his predecessor in title had failed to follow due process which they demonstrated and as such no good title was passed to the petitioner.

30. She held that it was discovered that from the records held by the 3rd respondent several documents were missing. These included – minutes of the Land Allocation Committee of the defunct Municipal Council of Mombasa approving the said allocation, application for plot allocation from Mohamed Buhero the first lessee, part development plan as required by the *Physical Planning Act* and no survey and cadastral plans prepared before the said lease.

The learned counsel argued that due to these irregularities in allocations of the lease by the defunct Municipal Council by the Registrar of Lands several leases including plot No Mombasa/Block XVII/1443 consolidated into a single plot No Mombasa/Block XVII/1819 which was without any encumbrances in favour of any third party and was owned by the Municipal Council of Mombasa absolutely. Hence upon the cancellation of the leases, the petitioner was evicted from the suit land under the provisions of sections 152A and 152B of the *Land Act, 2012* and thereafter the 3rd and 4th respondents took possession and fenced it. The learned counsel submitted that upon the examination



of the green and white card. It was evidence that Mohamed Buhero transferred his leasehold interest on January 19, 2001 to Rashid Mohamed and Abdullahi Ahmed Gele at a monthly rent of Kenya shillings twenty three thousand (Kshs 23,000/=) for a term of 6 years with effect from March 1, 2001 meaning according to the learned counsel the lease expired on March 2, 2007 and had never been renewed.

31. Thence, the petitioner stopped being the lawful lessee from the year 2007 and hence no lease to be protected as such. She argued as Equity never acted in vain no injunction was capable of being issued. She cited the case of *Kalya Soi Farmers Cooperative Society v Paul Kirui & another* [2013] eKLR to support its position.

The learned counsel further submitted that the doctrine of *res judicata* and *estoppel per judicatam* were applicable in the circumstances herein as the matter had already been heard in the case of Constitution Pet No 28 of 2010 *Justus Chai Mbaru* (supra) and Mombasa Court of Appeal Civil Appeal No E20 of 2021 filed by the petitioner and which were dismissed by the Court of Appeal on November 5, 2021 therefore this doctrine of *res judicata* applied thereof to buttress her argument she cited the case of *Pop - In Kenya Limited & 3 others v Habib Bank AG Zurich* Civil Appeal No 80 of 1988, and *Rajwani v Rodem* [1990] eKLR

32. Finally, the Learned counsel argued that the petitioner was not entitled to be granted the conservatory orders sought for the reason the petitioner had failed to establish whether he had a prima face case with a likelihood of success in that the leased had expired and hence extinguished by operation of law, the petitioner was seeking orders to restrain the respondents from plot No Mombasa/Block/XVII/1443 whereas the 4th and 6th respondent activities were confirmed to plot No Mombasa/Block XVII/1821 and the lease was for residential and not commercial purposes. She emphasized that the petition did not bear a good title for all the reason adduced above.

There was no violation of any constitutional freedom and rights to warrant any protection and no danger or prejudice would be occasioned by the petitioner as he already admitted having been evicted from the alleged suit.

33. In any case the contractor on site already carrying out development works with serious time frame and which if interrupted would attract hearing penalty on the contractor.

She urged court to dismiss the notice of motion application with costs.

C. The 4th, 5th and 6th Respondent's Written Submissions

34. On November 30, 2021 the Learned Counsel for the 4th, 5th and 6th Respondents the Law firm of Fadhili & Kilonzo Advocates filed their written submissions dated November 29, 2021. M/s Thuku holding brief for Mr Sultan submitted that in summary that the 4th respondent was the freehold and absolute proprietor of all that parcel of Land known as Mombasa/Block XVII/1821 since May 28, 2021 and through an agreement of lease dated June 11, 2021 the 3rd respondent let to the 4th respondent for a term of 99 years the parcel of land known as Mombasa/Block XVII/1821 upon the terms and conditions stipulated in the joint venture agreement dated January 15, 2020 pursuant to the lease agreement, the 4th respondent was issued with a certificate of lease for Mombasa/Block XVII/1821 for 99 years by that time the land was vacant and unoccupied flats which the 3rd respondent commenced the demolishing process upon completion and started fencing it.

35. She insisted that the development by the 4th respondent was confined on plot No Mombasa Block/XVII/1821 and not plot No Mombasa/Block XVII/1443 as alleged by the petitioner.

To her plot Mombasa/Block XVII/1443 did not exist and the petitioner failed to show it acquired that plot. The 4th, 5th and 6th respondents held that the petitioner did not have a good title having acquired it



irregularly and un-procedurally, a fact confirmed by the 3rd respondent with regard to irregularities in the allocation procedure of plot No Mombasa/Block XVII/1443 the learned counsel submitted that the lease had been created in favour of Mohamed Bohero for a term of 99 years from July 1, 1947 on the July 17, 1996 by then defunct Municipal Council of Mombasa for an annual rent of Kenya shillings four thousand nine hundred and twenty (Kshs 4,920/=). Mr Bohero transferred his leasehold interest to Jiviben Lalji Shah for consideration of one million five hundred thousand (Kshs 1,500,000.00). Mr Lalji let the property to Abdulkadir Rashid Mohamed and Abdullahi Ahmed Gele on 19th January 2001 for 6 years from March 1, 2001 at a monthly rent of Kenya shillings twenty three thousand (Kshs 23,000/=). According to them there had been no renewal of the lease upon expiry of the 6 years period on March 2, 2007.

36. The learned counsel held that there was no written consent of the lessor who was the defunct Mombasa Municipal Council authorizing the transfer to the petitioner's predecessor in title contrary to the requirements of section 67 of the [Land Act, 2012](#) and section 55 of the [Land Registration Act, 2012](#). They emphasized that the lease was specifically for residential purposes contrary to the petitioner's user which was commercial in nature conducting the business of a filling station causing the alleged lease to be invalid and illegal contrary to the provision of section 12 (8) (9) and 66(b) of the [Land Act, 2012](#).

Besides, the learned counsel held that the petitioner never had any license to run the alleged filling station from the Energy and Petroleum Regulatory Authority under section 9 of the [Energy Act](#).

37. They summarized by holding that the petition suit property land reference No Mombasa/Block XVII/1443 was not capable of any protection by this honorable court as the lease already expired on March 2, 2007 and it had never been renewed and it had been acquired illegally and un-procedurally. To buttress their point they cited the authority of [Kenya Chemicals and Allied Workers Union v Milly Glass Works Limited](#) [2020] eKLR.

The learned counsel submitted that this suit had offended the doctrine of *res judicata* and the provision of section 7 of [Civil Procedure Act](#), cap 21. They reiterated the same arguments as those by the 1st, 2nd and 3rd respondents. They further argued that the petitioner was not entitled to be granted conservatory orders as they failed to establish a *prima facie* case with a likelihood of succeeding and on this they cited the case of [Progress Welfare Association of Malindi and 3 others v County Government of Kilifi & 4 others](#) [2020] eKLR.

38. They reiterated the same arguments as those of the 1st, 2nd and 3rd respondents to the effect the petitioner was not likely to be prejudiced and it was the 4th respondent who was to suffer arising from the term and condition of the joint venture agreement between the 3rd and 4th respondents with very stringent timelines which could not be breached.

They prayed for the notice of motion application to be dismissed with costs

VII. Analysis And Determination

39. I have fully considered all the fundamental issues raised herein from the filed pleadings by the parties in relation to the notice of motion application dated October 5, 2012 being the supporting affidavit by the appellant/applicant, the grounds of opposition and the replying affidavits by the 1st to 6th respondents, articulate and well-presented written submissions, the cited authorities, the relevant provisions of law and the [Constitution of Kenya](#).



In order to arrive at an informed, fair and just decision I have framed the following issues for determination these are:-

- a. Whether the fundamental rights for the petitioner/applicant have been violated, threatened and/or infringed by the actions of 1st to 2nd respondents.
- b. Whether the notice of motion application dated October 5, 2021 by the petitioner/applicant fulfills the fundamental threshold established for granting conservation orders.
- c. Whether the parties herein are entitled to the orders sought from the filed pleadings.
- d. Who will bear the costs of this suit.

Issue No (a) Whether The Fundamental Rights For The Petitioner/applicant Have Been Violated, Threatened And/Or Infringed By The Actions Of 1st to 2nd Respondents

Brief Facts

40. Prior to proceeding further with the analysis of the above issues, it is imperative that the honourable court expounds on the brief facts of this case. From the pleadings, it is stated that the petitioner is the legal and owner of the business premises. He was the lawful occupant of the suit property – land reference No Mombasa/Bloc/XVII/1443 having leased it through a lease agreement dated March 1, 2018 and ending on February 28, 2023 duly executed between Jiviben Lalji Shah and himself. Mr Shah was the legal owner of the property for 99 years from the year July 1, 1947. He had dutifully and diligently paid for business permits fees and fire permit fees to the County Government of Mombasa since the station’s inception and had a valid 2021 business permit. On September 22, 2021 some officers from the fire department of the 3rd respondent while undertaking impromptu inspection brought notices for non-compliance for fire safety precaution and asked the petitioner to comply with six (6) steps within 24 hours. Despite the short notice, the petitioner fully complied and send a letter requesting for a compliance certificate on September 28, 2021 the petitioner through his Advocates wrote to the 2nd, 3rd and 4th respondents demanding for cessation of the harassment and intimidation and adherence to due process.
41. In the night of September 29, 2021 at 11.00 pm the 1st to 6th respondents send their officers accompanied by goons allegedly from the offices of the 2nd respondent illegally without lawful authority and without color of right stormed and fences off the business property and put their guards to watch for them overnight and in the morning of September 30, 2021 at about 8.00 am the said officers started demolishing the business property to the detriment of the petitioner. He claims he was not given sufficient time and notices to collect and remove his fuel worth Kenya shillings four million (Kshs 4,000,000/=) comprising of petrol, diesel and kerosene and other valuables. He said that the respondents decision to demolish the petitioners business property without giving him fair hearing and just and prompt compensation was actuated by high handedness, misuse of power arrogance and for the general public to feel that they could flex their muscles and were above the law to intimidated threaten and execute excessive powers on innocent persons. He prayed for the orders sought from the application be granted with costs.
42. Juxtapose, on the other hand, the 1st, 2nd, 3rd, 4th, 5th and 6th respondents stated that the 3rd respondent was the absolute and legal proprietor and registered of all that property known as land reference Numbers Mombasa/Block/XVII/1821. It leased it to the 4th Respondent by a lease dated June 11,



2021 for a term of 99 years for terms and conditions contained in the lease agreement and the Joint Venture agreement dated January 15, 2021 for Urban Renewal and Redevelopment Project.

43. They stated that pursuant to the lease agreement, the 4th respondent was issued with a certificate of title for plot No Mombasa/Block/XVII/1821 with effect from January 15, 2020 and the development work had commenced. They emphasized that the petitioner did not have a good title as the same was acquired illegally and un procedurally by the defunct Municipal Council of Mombasa. They urged court to dismiss the case which they insisted offended the doctrine of *res judicata*. That is should adequate on the facts.
44. Now turning to the issue under this sub heading. It is trite law that in an application for conservatory orders, under article 23 of the [Constitution](#) the court is not invited to make any definite or conclusive findings of fact or laws on the dispute before it because that duty falls within the jurisdiction of court which will ultimately hear and determine the substantive dispute in the main petition. The jurisdiction of the court at this point is limited to examining and evaluating the material placed before it to determine whether the applicant has made out a *prima facie* case to warrant grant of a conservatory order.
45. Secondly the court has the duty to determine if the conservatory order is not granted, the applicant will suffer prejudice and thirdly, it is to be borne in mind that conservatory orders in public law litigation are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the court in the public interest. In the case of [Platinum Distillers Limited v Kenya Revenue Authority](#) [2019] eKLR it held :-

“The guiding principles upon which Kenya courts make findings on interlocutory applications for conservatory orders within the framework of article 23 of the [Constitution](#) are settled. The law, as I understand it, is that in considering an application for conservatory orders, the court is not called upon and is indeed not required to make any definitive finding either of fact or law as that is the province of the court that will ultimately hear the petition. The jurisdiction of the court at this point is limited to examining and evaluating the material placed before it, to determine whether the applicant has made out a *prima facie* case to warrant grant of conservatory orders. The court is also required to evaluate the pleadings and determine whether denial of the conservatory orders will prejudice the applicant” .

46. The law on conservatory orders is now well settled in this jurisdiction and is backed up by myriad of authorities. For instance in the case of [Centre for Rights Education and Awareness \(CREAW\) & another v Speaker of the National Assembly and 2 others](#) [2017] eKLR the court was emphatic that:-

“ A party who moves the court seeking conservatory orders must show to the satisfaction of the court that his or her rights are under threat of violation, are being violated or will be violated and that such violation is likely to continue unless a conservatory order is granted. This is so 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”

The instant notice of motion application and the petition by the petitioner is brought under sections 1A, 1B and 3A of the [Civil Procedure Act](#), order 51 rule 1 of the [Civil Procedure Rules, 2010](#), articles 22, 23, 40, 47, 48, 50, 159, 162 (2), 258 and 259 of the [Constitution of Kenya](#) and rules 13, 19, 23 (1) & (2) & 24 of the [Constitution of Kenya \(Protection of Fundamental Rights and Freedoms Practice and](#)



Procedure Rules 2013). This court holds that the provisions of article 23 (3) of the laws of Kenya are explicit in that they clearly indicate that:-

“In any proceedings brought under article 22 “a court may grant appropriate relief; including (c) a conservatory order. And that article 22(1) of laws of Kenya equally explicit provides that:-

“Every person has a right to institutes Court proceedings claiming that a right or fundamental freedom in the Bill has been denied, violated or infringed or is threatened”

Further to the above, I have cited the matter of Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others [2018] eKLR where Hon Justice Odunga held:-

“Article 23 of the Constitution does not expressly bar the court from granting conservatory orders where a challenge is taken on the constitutionality of legislation. The only rider is that the case must be one of which falls under article 22 of laws of Kenya. This however does not mean that court ought to readily suspend legislation simply because a challenge has been made to a statute. I agree that power ought to be exercised very sparingly where the court is satisfied that it ought to be exercised. However, it can be exercised. Therefore whereas I agree that there is presumption of constitutionality of statute that is a rebuttable principle. This was clearly appreciated in Ndanabo v The Attorney General [2001] 2 EA 485 where it was held inter alia that in interpreting the Constitution, the court would be guided by the general principles that there is a rebuttable presumption that legislation is constitutional hence the onus of rebutting the presumption rests on those who challenge that legislation status save that, where those who support a restriction on a fundamental right rely on a claw back or exclusion clause, the onus is on them to justify the restrictionhaving passed the first hurdle, the second issue is whether the petition has satisfied the provisions of article 23 (3) (c) of laws of Kenya article 23 (3) (c) – provides that in any proceedings brought under articles 22, a court may grant appropriate relief including a conservatory order”

47. The proceedings under article 22 of laws of kenya deal with the enforcement of the bill of rights. Therefore a strict interpretation of article 23 (3) (c) shows that the reliefs specified thereunder are only available where a party is alleging that a right or fundamental freedom in the bill of right has been denied, violated or infringed or is threatened. Therefore an applicant for conservatory orders ought to bring himself or herself within the provisions of article 22 of the Constitution of Kenya by pleading and establishing on a “*prima facie*” basis that his or her right or fundamental freedom in the bill of rights or those of other persons have been denied, infringed or is threatened.
48. Under the provision of article 165 and rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental freedom) Practice and procedure Rules 2013, (otherwise referred to “the Mutunga Rules”) clearly grants this honorable court powers to hear and determine application for conservatory orders or interim orders. In order to preserve and/or secure the subject matter rule 23 of “the Mutunga Rules” provide:-

“Despite any provision to the contrary, a judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory order or interim order”

While still on this point, I fully concur with the submissions by the advocates for the 1st respondent to the effect that, the principles in regard to granting of interim orders or conservatory orders were clearly outlined by the Supreme Court in the case of Gatirau Peter Munya v Dickson Mwenda Kithinji



§ 2 others Supreme Court Appeal No 5 of 2014 [2014] eKLR, Nubian Rights Forum & 2 others v Attorney General & 6 others Nos 56 of 2019 [eKLR] and Board of Management of Uhuru Secondary School v City County Director of Education & 2 others [2015] eKLR.

Where in summary the principles were laid down as:-

“That the applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the court should decide whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific rights or freedom in the bill of rights and whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the court should consider the public interest and relevant material facts in exercise its discretion whether to grant or to deny a conservatory order”

49. In the instant application and applying the above principles, I find that the petitioner herein has fully satisfied the aforesaid standards in regard to granting the conservatory orders. They have demonstrated an arguable prima facie case with a likelihood of success and shown in the absence of the conservatory orders they are likely to suffer prejudice by the commencement and/or continued of the construction and development of the 1st respondent’s project if the conservatory orders sought are denied and/or not granted hereof.

The petitioner/applicant has further met the second principles that granting or denial of the conservatory orders would enhance the constitutional values and objectives of a specific right or freedom, in the bill of rights.

Thirdly the petitioner/applicant has demonstrated, if the interim orders or conservatory orders are not granted the petition or its substratum will be rendered nugatory and finally have demonstrated that public interest will be prejudiced by a decision not to grant the conservatory orders sought.

Issue No b). Whether The 1st, 2nd And 3rd Petitioners/applicants Were Entitled To The Reliefs Sought From The Application

50. The petitioner ought to be granted the conservatory orders as sought from the application as already elaborately stated herein

The orders are granted to allow the notice of motion application dated October 5, 2021 which is meritorious.

On the other hand, this honourable court fully concurs on the submission by the learned counsel for the 1st and 2nd respondents to the effect that the 1st and 2nd respondents being the Chief Officer, land, Housing & Physical Planning and the Governor of the County Government of Mombasa have been wrongly sued in their personal capacities. They are not juridical bodies capable of being sued or petitioned. They have no legal liability in relation to acts or omissions done by virtue of their offices that they served by dint of the provisions of sections 133 of the County Governments Act and sections 22 of the National Government Co-ordination Act, 2013.

Section 133 of the County Government Act, provided *inter alia*:-

Protection against personal liability – No act, matter or thing done or omitted to be done by:-

- a. Any member of the County government or its administration board or committee;



- b. Any member of the County Assembly;
- c. Any member of staff or other person in the service of the County governments;
or
- d. Any person acting under the direction of the County Government;

Shall, if that act, matter or thing was done or omitted in good faith in the execution of a duty or under direction, render that member or person personally liable to any civil liability.

Section 22 of the [National Co – ordination Act, 2013](#) holds that:

Nothing done by a public officer appointed under this Act shall, if done in good faith for the purposes of executing the functions of the office, render such officer personally liable for any action, claim or demand”

51. In view of the foregoing legal prepositions, this honourable court is satisfied that indeed the 1st and 2nd respondents cannot be held personally liable. Their acts was done while in the administration of duty and in good faith. For these reasons, the petitioner has no reasonable cause of action against them and as such their names should be struck out and/or removed from these proceedings going forward.

Issue No c). Who will bear the costs of this suit.

52. It is trite law that Costs is a discretionary issue. The provision of section 27 of the [Civil Procedure Act](#), cap 21 and numerous decisions hold that Costs follow the events. In this case, the events mean the circumstances and the results of each case.

In the instant case, the petitioner has succeeded in obtaining the conservatory orders sought from the notice of motion application dated October 5, 2021. Therefore, they should be entitled to costs accordingly.

VIII. Conclusion and Disposition

53. In the long run, after the detailed analysis of the framed issues herein and conclusion of this application, this honorable court makes the following orders:-
- a. That the notice of motion application dated October 5, 2021 be and is hereby found to be meritorious and hence allowed with costs.
 - b. That the petitioner be and is hereby granted conservatory orders restraining the 1st, 2nd, 3rd, 4th, 5th and 6th respondents from further demolishing, destroying, digging, constructing or in way interfering with the suit property known as Buxton Filling Station erected on the parcel of land known as land reference No Mombasa/Block XVII/1443 pending the hearing and determination of this petition.
 - c. That an order be and is hereby granted allowing the petitioner free access to the suit property for removing all the fuel tank and pumps without interference from the 1st, 2nd, 3rd, 4th, 5th and 6th respondents, their offers, servants and/or agents pending the hearing and determination of the petition.
 - d. That an order of this honourable court be and is hereby made to the effect that the 1st and 2nd respondents herein cannot be sued in their personal capacity as they are not Juridical bodies being the officers of the 3rd respondents by dint of the provisions of section 133 of the



County Governments Act, of 2012 and section 22 of the National Co - ordination Act, of 2013 and therefore their names should be struck out and/or expunged from the records of these proceedings forthwith.

- e. That for the sake of expediency, the petitioner to be heard by way of both *viva voce* evidence and affidavits on July 29, 2022.
- f. That the costs of the notice of motion dated October 5, 2021 to be borne by the 1st, 2nd, 3rd, 4th, 5th and 6th respondents herein.

It is so ordered accordingly.

DATED, DELIVERED, SIGNED AND READ IN OPEN COURT AT MOMBASA THIS 9TH DAY OF MAY, 2022.

HON JUSTICE LL NAIKUNI (JUDGE)

ENVIRONMENT & LAND COURT

AT MOMBASA

In presence of:-

Mr Wilson Rabongo, Court Assistant.

Mr Mohammed holding brief for Mr AbdiAzziz Advocate for the Petitioner.

Non Appearance for the 1st, 2nd, 3rd, 4th, 5th & 6th Respondents.

M/s Waswa Advocate for the 7th & 8th Respondent.

