



**Ngei II Estate Residents’ Association (suing Through Mauleed Majeed Kipkoech Jasho as the Registered Official and Chairperson of the Association)) v Nairobi City County & 5 others; Broadlands Limited & 6 others (Interested Parties) (Environment & Land Petition E037 of 2021) [2022] KEELC 3205 (KLR) (2 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3205 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION E037 OF 2021**

**JO MBOYA, J**

**JUNE 2, 2022**

**BETWEEN**

**NGEI II ESTATE RESIDENTS’ ASSOCIATION ..... PETITIONER  
SUING THROUGH MAULEED MAJEED KIPKOECH JASHO AS THE  
REGISTERED OFFICIAL AND CHAIRPERSON OF THE ASSOCIATION)**

**AND**

**NAIROBI CITY COUNTY ..... 1<sup>ST</sup> RESPONDENT  
CHIEF REGISTRAR OF LANDS ..... 2<sup>ND</sup> RESPONDENT  
PRINCIPAL SECRETARY, MINISTRY OF LANDS AND PHYSICAL  
PLANNING ..... 3<sup>RD</sup> RESPONDENT  
NATIONAL HOUSING CORPORATION ..... 4<sup>TH</sup> RESPONDENT  
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 5<sup>TH</sup>  
RESPONDENT  
ATTORNEY GENERAL ..... 6<sup>TH</sup> RESPONDENT**

**AND**

**BROADLANDS LIMITED ..... INTERESTED PARTY  
ERIC MUREITHI ..... INTERESTED PARTY  
ABDULGAFOOR MOULANA ..... INTERESTED PARTY  
LEAH ATIENO OGWEL ..... INTERESTED PARTY  
MAURICE ODONGO AYUGI ..... INTERESTED PARTY  
DUNCAN WAITHAKA NDEGWA ..... INTERESTED PARTY**



**RULING**

**Introduction:**

1. The Ruling herein relates to two applications, namely, the notice of motion application dated the 12 October 2021, filed by the Petitioner, the Notice of Motion application dated the 8<sup>th</sup> November 2021 filed by the 1<sup>st</sup> interested party and notice of preliminary of objection dated the December 3, 2021, the latter which is filed by the 1<sup>st</sup> Respondent.
2. In respect of the notice of motion application dated the October 12, 2021, the petitioner has sought for the following orders;
  - (a) .....Spent
  - (b) That this Honourable Court be pleased to issue Conservatory orders in the interim restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Respondents from alienating and/or allotting, improving, permitting, and/or issuing licenses for development or construction of commercial structures within the suit property Nairobi Block 72 (Ngei II Estate) and the Interested Parties from occupying , taking possession, and/or further wasting the contested titles within the suit property Nairobi Block 72 (Ngei II Estate) pending further directions and/or orders on the application.
  - (c) That this Honourable Court be pleased to issue Conservatory orders in the interim restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Respondents from alienating and/or allotting, improving, permitting, and/or issuing licenses for development or construction of commercial structures within the suit property Nairobi Block 72 (Ngei II Estate) and the Interested Parties from occupying , taking possession, and/or further wasting the contested titles within the suit property Nairobi Block 72 (Ngei II Estate) pending the hearing and determination of this application Inter-partes.
  - (d) That this Honourable Court be pleased to issue Conservatory orders in the interim restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> respondents from alienating and/or allotting, improving, permitting, and/or issuing licenses for development or construction of commercial structures within the suit property Nairobi Block 72 (Ngei II Estate) and the Interested Parties from occupying , taking possession, and/or further wasting the contested titles within the suit property Nairobi Block 72 (Ngei II Estate) pending the hearing and determination of the Petition.
  - (e) That the Costs of the application be provided for.
3. The subject application is premised on the various grounds contained in the body thereof and same is further supported by the affidavit of one, Mauleed Majeed Kipkoech Jasho, sworn on the October 12, 2021 and to which the deponent has annexed three sets of documents.
4. Upon service of the subject application, the 1<sup>st</sup> respondent responded thereto by filing a notice of preliminary objection dated the December 3, 2021. For clarity, the details and contents of the notice of preliminary objection, shall shortly become apparent.
5. On the other hand, the 3<sup>rd</sup> interested party filed a Replying affidavit sworn on the March 14, 2022 and in respect of which same has contested and/or otherwise disputed the claims mounted on behalf of the Petitioner.



6. Other than the 1<sup>st</sup> respondent and the 3<sup>rd</sup> Interested party, neither of the Parties herein filed any response to the said application dated October 12, 2021.
7. Vide the notice of motion application dated the November 8, 2021, the 1<sup>st</sup> interested party has sought for the following orders;
  - a. That the orders made on October 15, 2021 be lifted, varied, set aside, vacated and or annulled in so far as the same touch on the property owned by the 1<sup>st</sup> interested party herein, pursuant to the judgement delivered on February 20, 2020.
  - b. That the 1<sup>st</sup> interested party be struck out from the suit for wrongful mis-joinder of parties to the suit.
  - c. That these proceedings and the correlated Petition dated October 6, 2021 be struck out in their entirety for being scandalous, frivolous, vexatious and a gross abuse of Due Process.
  - d. Costs of the suit.
8. Upon being served with the said application, by and/or on behalf of the 1<sup>st</sup> Interested Party, the petitioner filed a Replying affidavit sworn on the 19<sup>th</sup> November 2021, in respect of which same contested and/or otherwise controverted the allegations contained therein.
9. Suffice it to note that neither of the Respondents nor the rest of the Interested Parties filed any response to the said application, which was mounted by and/or on behalf of the First Interested Party.
10. Other than the aforesaid applications, the 1<sup>st</sup> respondent herein filed a Notice of Preliminary Objection and in respect of which same raised the following grounds:
  - a. That the court lacks Jurisdiction to entertain the present Petition in light of sections 61(3) and 61(4) of the *Physical and Land Use Planning Act* No. 13 of 2019, which vests the appellate jurisdiction of Executive Committee decisions in the County Physical and Land Use Planning Liaison Committee.
  - b. That by dint of section 61(4) of the Act, persons aggrieved by the decision of the County Physical and Land Use Planning Liaison Committee are then allowed to access the Environment and Land Court.
  - c. That the Petition is premature in its failure to Exhaust the dispute resolution mechanisms under the *Physical and Land Use Planning Act* No. 13 of 2019.

### **Depositions by the Parties:**

#### **Petitioner's Case:**

1. Vide supporting affidavit sworn on the November 12, 2021, one Mauleed Majeed Kipkoech Jasho, (herein after referred to as the deponent), has averred that the petitioner is a duly registered Association for and/or on behalf of the residents of Ngei II and whose purpose is to represent and protect the Interests of the said residents generally in matters pertaining to their welfare.
12. Further, the deponent has averred that same has been a resident of Ngei II Estate since the year 1990 and that on or about March 2021, same was duly elected as the chairman of the said association.
13. On the other hand, the deponent has averred that Ngei II Estate, which is situated within Langata Sub County, was developed and constructed by the National Housing Corporation between the years 1971 and 1973.



14. On the other hand, the deponent has averred that during the construction and/or development of the said estate, a portion of the property on which the estate is located, posed difficulties and/or challenges to the National Housing Corporation arising from the topography thereof. In this regard, the deponent has averred that the said portions which posed challenges owing to topography were thus not developed and were left as open grounds.
15. Besides, the deponent has averred that the portions which were left as open grounds were however surveyed during the time of the construction of the estate and same were duly given parcel Numbers . Nevertheless, the deponent has averred that given the nature of the parcel of lands same remained undeveloped and have been used by the members/residents of the petitioner estate for various purposes.
16. Be that as it may, the deponent has further averred that subsequently the parcels of land, which though surveyed, but were left as open grounds have since been alienated and allocated to and in favor of various private developers, who have been issued with title Documents.
17. Owing to the alienation and/or allocation of what were hitherto open grounds, the deponent avers that such alienation and/or allocation of the hitherto open grounds was illegal and unlawful.
18. In any event, the deponent has further averred that following the allocation and alienation of what was hitherto open ground by the 1<sup>st</sup> respondent herein the original lay out and capacity of the estate to accommodate Public utilities, namely, water lines, electricity lines and Natural buffer zones has now been compromised.
19. On the other hand, the deponent has further averred that despite evident and noticeable natural challenges, the 1<sup>st</sup> and 5<sup>th</sup> respondent herein have continued to issue licenses, approvals and permits for construction of structures, for commercial use, albeit without due and proper regard to the obtaining conditions in relation to the subject parcels of land.
20. It has further been averred that the alienation and allocation of what was hitherto open, but surveyed grounds and areas, is destined and/or bound to deprive the residents of the petitioner estate of the recreational areas as well as playing field for children attending Langata Junior School.
21. Other than the foregoing, the deponent has averred that the said surveyed areas, but which were left open have been used by the National Housing Corporation to service the estate as passage of underground drainage channel and sewer lines.
22. Besides, the deponent has averred that owing to the underground passages and coupled with imminent and noticeable natural challenges, it is impossible for the 1<sup>st</sup> and the 5<sup>th</sup> Respondents herein to issue or permit construction of buildings on top of the said open areas, as by doing so, such licensed buildings shall severely prejudice the residents of the petitioner estate and thereby occasion serious Environmental Injustice in the area.
23. Other than the foregoing, the deponent has further averred that since the year 1974 when most residents moved into and commenced occupation of the estate, the estate has enjoyed relative calm and the residents have been using the open grounds for various activities, without interference and such usage continued up to including the year 2010.
24. However, the deponent has further averred that from the year 2010 onwards various portions of what were hitherto surveyed but open grounds, have been alienated and allocated to private developers, who have since laid claim of ownership to and in respect of the alienation portions.



25. Owing to the foregoing, the deponent has averred that the residents of the petitioner estate and particularly, Members of the Association have been embroiled in various Court cases and/or disputes with the Private developers, with a view to protecting the grabbed areas.
26. On the other hand, the deponent has averred that on or about the year 2010, the Residents of the petitioner estate engaged a licensed surveyor to carry out and/or conduct an extensive review and survey of the suit property and in particular, to mark out its topography, natural features, rivers and a surface water as well as underground passages and thereafter to make recommendations relating to the suitability of the allotment of the open spaces.
27. Be that as it may, the deponent reiterates that the allocation, alienation transfer and issuance of titles of the open common ground areas, remains unlawful, illegal and void.
28. Further, the deponent has averred that the allocation, alienation and issuance of Title Documents to private developers, including the Interested Parties herein, have threatened the peaceful enjoyment of the hitherto common open areas by the residents of the petitioner Estate.
29. On the other hand, the deponent has averred that the allocation and/or alienation of what was hitherto the common areas by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, was carried out and/or undertaken without notice to and involvement of the resident of the petitioners Estate.
30. Based on the foregoing, the deponent herein has thus contended that the manner in which the surveyed, but open common ground were allocated and alienated in favor of the Interested Parties has violated and infringed on the petitioners rights and/or interests and essentially, the Rights pursuant to articles 40 of *the Constitution* of Kenya 2010.
31. Other than the foregoing, the deponent has averred that owing to the alienation and allocation of the hitherto open common grounds, the residents of the petitioner Estate have written various correspondence and invited relevant Government institutions to inspect and determine the veracity of their claims, but their requests have not been fruitful.
32. In the premises, the deponent has thus contended that the alienation, allocation and registration of various portions of the hitherto surveyed but, open grounds have thus exposed the residents of the petitioner Estate to continuous dispute with the Private owners of the contested parcels of land.
33. In any event, the deponent has averred that the alienation and allocation of various portions of the hitherto surveyed, but open grounds, which is the subject of the Petition herein reeks of fraud, illegality and corrupt practice.
34. In the premises, the deponent herein on behalf of the petitioner Estate has therefore challenged alienation, allocation and transfer of various portions of the hitherto common areas to the private developers and in particular, the Interested Parties herein.
35. On the other hand, the deponent has similarly, challenged the issuance of permits, approvals and licenses for the developments of the alienated parcels of land by the 1<sup>st</sup> and 5<sup>th</sup> respondents. In this regard, the deponent has contended that such approvals, permit and licences have been issued without due regard to the interest of the residents petitioner Estate.

**Response by the 3<sup>rd</sup> Interested Party:**

36. Vide replying affidavit sworn on the March 14, 2022, the 3<sup>rd</sup> interested party herein has averred that same is the lawful proprietor of L.R No. Nairobi Block 71/2934, which was lawfully allocated,



alienated and registered in his name, upon compliance with the terms contained in the letter of allotment.

37. On the other hand, the 3<sup>rd</sup> interested party has averred that though same has been joined in the subject proceedings, the entire Petition does not allude to and/or relate to his parcel of land or at all.
38. Further, the 3<sup>rd</sup> interested party has also averred that to the extent that the Petition herein does not touch and/or concern his parcel of land, the petitioner therefore has no cause of action as against himself.
39. Based on the foregoing, the 3<sup>rd</sup> interested party has thus contended that Petition, as well as the application therefore ought to be struck out and/or be dismissed against himself.

#### **Response by the 1<sup>st</sup> Respondent:**

40. As was pointed out herein before, the 1<sup>st</sup> respondent responded to both the application and the subject petition, by filing a notice of preliminary objection dated the December 3, 2021. For completeness, the details of the preliminary objection have been articulated elsewhere herein before.

#### **Application Dated 8<sup>th</sup> November 2021:**

##### **1<sup>st</sup> Interested Party's Case:**

41. Vide supporting affidavit sworn by one, Peter Ndegwa, the 1<sup>st</sup> interested party has averred that same is the lawful and registered proprietor over and in respect of L.R No. Nairobi Block 72/2918, Ngei Estate, which was allocated and/or alienated to and/or in her favor in the year 1992.
42. On the other hand, the deponent has averred that on or about the year 2008, same commenced developmental activities over and in respect of her parcel of land and that in the course of doing so Members, residents and/or otherwise Officials of the residents of the petitioner Estate interfered with her activities thereon and as a result of the said interreference, same filed and/or lodged Civil proceedings vide Nairobi Elc Cause No. 450 of 2008.
43. Further, the deponent has averred that upon the lodgment of the said proceedings, namely, Nairobi ELC Cause No. 450 of 2008, the same was heard and determined culminating into a Judgment which was rendered on the 20<sup>th</sup> February 2020. For clarity, it has been averred that the Judgment of the court vindicated the 1<sup>st</sup> Interested Party's ownership rights to and in respect of the said Parcel of land.
44. Further, the deponent has averred that even though the petitioner herein or her Officials were Parties to the said suit, the petitioner herein has failed to disclose to the court that the said suit was heard and determined and a decree was thereafter issued in favor of the 1<sup>st</sup> Interested Party.
45. In the premises, the deponent on behalf of the 1<sup>st</sup> interested party has thus averred that the Interim Conservatory orders which were granted to and in favor of the petitioner were therefore procured and/or obtained by concealment of material facts.

#### **Response by the Petitioner:**

46. Vide Replying Affidavit sworn on the November 19, 2021, one Mauleed Majeed Kipkoech Jasho, has averred and reiterated that same is the current Chairperson of the petitioner Association and thus same has the requisite capacity and authority to depone/ Swear the subject affidavit on behalf of the Petitioner.



47. Further, the deponent has also averred that the petitioner was aware of the proceedings vide Nairobi ELC Cause No. 450 of 2008 and the outcome thereof.
48. However, the deponent has averred that the said proceedings proceeded and were concluded vide judgment rendered in favor of the 1<sup>st</sup> Interested Party, but when the petitioner herein applied to be joined in respect of the said suit, the petitioner's application was dismissed.
49. Nevertheless, the deponent has further averred that while filing the subject Petition, as well as the application seeking conservatory orders, same disclosed the existence of various suits touching on and/or concerning the suit property, including Nairobi Elc Cause No. 450 of 2008, which concerned the 1<sup>st</sup> Interested Party.
50. In the premises, the deponent herein has stated and/or averred that at the time when the court granted the Interim Conservatory orders, all the material facts, were disclosed to and placed before the court. In this regard, it has been stated that there was therefore no concealment of any material facts whatsoever.
51. Other than the foregoing, the deponent has further averred that the subject application and that of the Conservatory orders have been made in good faith and same is not meant vex and/or to harass the 1<sup>st</sup> interested party.
52. Finally the deponent has averred that the subject petition is well ground and discloses a reasonable cause of action against the respondents and all the interested parties, including the 1<sup>st</sup> interested party and hence same ought not to be struck out, in the manner sought by the 1<sup>st</sup> interested party.

#### **Submissions by the Parties:**

53. The subject matter came up for hearing on the November 9, 2021, when it transpired that there were two applications and a notice of preliminary objection, which were pending hearing and determination.
54. Premised on the foregoing, directions were given to the effect that the two pending applications, namely, the application the October 12, 2021 and the November 8, 2021, as well as the preliminary objection dated the December 3, 2021 be canvassed and disposed of simultaneously.
55. On the other hand, it was further directed that the said applications and the notice of preliminary objections be canvassed by way of written submissions to filed and exchanged within stipulated time lines.
56. Pursuant to the foregoing, the petitioner herein filed her maiden submissions on the December 20, 2021 and thereafter filed a Rejoinder submissions on the March 23, 2022.
57. On her part, the 1<sup>st</sup> respondent filed her written submissions, pertaining to and concerning the notice of preliminary objection on the March 4, 2022.
58. On her part, the 1<sup>st</sup> interested party filed her submissions on the February 3, 2022 and the submissions have addressed the two applications, namely, the application dated the October 12, 2021 and November 8, 2021, respectively.
59. The other set of submissions that was filed is the one by and/or on behalf of the 3<sup>rd</sup> interested party and same is dated the March 16, 2022.
60. Briefly, the petitioner herein has submitted that the suit property, namely Nairobi block/72, comprising of Ngei Estate was developed and/or constructed by National Housing Corporation. However, in the course of development and construction of the said Estate a portion of the suit



property was left as open ground, owing to the topography thereof, which made it difficult to develop and/or construct on the subject portions.

61. It has further been submitted that though the subject portions were surveyed and issued with parcel numbers, same were left open and have thus been used and/or utilized by the residents of the petitioner Estate for recreational purposes and other related activities.
62. On the other hand, it has also been submitted that part of the open areas, which were not developed by National housing Corporation has also been used as playing field by pupils of the neighboring school, namely, Langata Junior School.
63. Based on the foregoing, the petitioner has thus submitted that the surveyed, but open areas, which were left undeveloped were held by the 1<sup>st</sup> respondent, albeit on trust for the residents and members of the petitioner and thus same could not be alienated in favor of Third Party Private developers.
64. Further, the petitioner has submitted that the alienation and/or allocation of what was hitherto surveyed, but open areas by the 1<sup>st</sup> and 2<sup>nd</sup> respondent has been carried out and/or undertaken in a fraudulent and illegal manner, without the involvement of the members and Residents of the Petitioners.
65. At any rate, the petitioner has also submitted that the alienation and/or allocation of the portions of the hitherto surveyed, but open ground has culminated into conflict between the Residents/Members of the petitioner Estate and the Third Party private developers.
66. Be that as it may, the petitioner has also submitted that despite the illegality in the alienation and/or allocation of portions of what was hitherto surveyed, but open areas to the third party developers, the 1<sup>st</sup> and 5<sup>th</sup> Respondents have since proceeded to and issued permits, approvals and licenses for purposes of developments over and in respect of the resultant sub-divisions
67. On the other hand, it has also been submitted that owing to the issuance of the license, permits, the private developers, inclusive of the Interested Parties herein, are now keen to commence constructions and/or developments thereon, which will affect the rights and interests of the Members/Residents of the petitioner Estate.
68. In the premises, the petitioner has thus submitted that same has disclosed a Prima facie case with overwhelming chances of success and same is therefore entitled to the issuance of conservatory orders.
69. In support of the foregoing submissions, the petitioner has relied on various decisions including, *Center For Rights education & Awareness (CREAW) & Another v The Speaker of National Assembly & 2 Others* (2017) eKLR, *Laws Society of Kenya v Office of The Attorney General & Another; Judicial Service Commission (Interested Parties)* (2020) eKLR.
70. As concerns the 1<sup>st</sup> Interested Party's application dated the 8<sup>th</sup> November 2020, the petitioner has submitted that the joinder of the interested party herein was necessary to enable the court to fully adjudicate on the issues pertaining to the suit property.
71. Secondly, the petitioner has also submitted that same disclosed to the court all the material and relevant information, including the existence of the judgment issued vide Nairobi ELC Cause No. 450 of 2008, in favor of the 1<sup>st</sup> Interested Party.
72. In the circumstances, the petitioner has submitted that the allegation of concealment and non-disclosure of Material facts which have been alluded to by the interested party are therefore misleading and therefore legally untenable.



73. In support of the submissions that the joinder of the First interested party was necessary and/or expedient, the petitioner has relied in the Decisions in the case of *Meme v Republic* (2004) 1E.A, page 124 and *John Harun Mwau v Simone Haysom & 2 Others; Attorney General & Others (interested parties)* (2021) eKLR.
74. In respect of the Preliminary objection, the petitioner has submitted that the issues in dispute, which have been captured and articulated vide the Petition are multi-faceted in nature and therefore it is not possible to segregate same into pieces and ventilate same before various administrative bodies.
75. It is the petitioner's further submissions that based in the nature of Dispute, it is this court that is seized and/or possessed of the requisite jurisdiction to entertain and/or adjudicate upon same.
76. In any event, the petitioner has further submitted that this Honourable court is conferred with both Original and Appellate jurisdiction and in this regard, the petitioner has invited the court to take cognizance of the provisions of section 13(3) of the *Environment and Land Court Act*, 2011.
77. In a nutshell, the petitioner has contended that this Court has the requisite jurisdiction to entertain and adjudicate upon this subject dispute.
78. Other than the foregoing, the petitioner also filed Rejoinder submissions, in respect of which same has addressed two pertinent issues. Firstly, the petitioner has submitted that the petitioner association is a duly registered association and by virtue of being such an association, same is authorized to file and/or maintain the subject proceedings.
79. In any event, the petitioner has further submitted that being a duly registered association, the petitioner can sue through her registered officials, including, Mauleed Majeed Kipkoech Jasho.
80. Be that as it may, the petitioner has invited the court to take note that the extent and scope of a Party's capacity to sue has since been expanded and the court therefore ought not to apply and/or adopt a restrictive approach, in addressing the issue of locus standi.
81. In support of the foregoing submissions, the petitioner has invited the court to apply the ratio in *Mumo Matemu versus Tructed Society of Human Rights Alliance & 5 others* (2013) eKLR and *Michael Osundwa Sakwa versus The Chief Justice & President of The Supreme Court of Kenya & another* (2016) eKLR.
82. Finally, on the issue of Res-judicata, the petitioner has argued that Nairobi ELC Cause No. 450 of 2008, touched on and/or concerned ownership of L.R No. Nairobi Block/2918, which is just a segment of the suit property, namely Nairobi/Block 72.
83. In any event, the petitioner has further submitted that the petitioner herein was not a Party to the said suit and same only became aware of the suit after the delivery of judgment and when same applied to be joined as an interested party thereto, the application for joinder was dismissed.
84. On the other hand, the petitioner has also submitted that the causes of action between Nairobi Elc Cause No. 450 of 2008 and the subject Petition are separate and distinct, insofar as the previous suit by the 1<sup>st</sup> interested party only related to trespass by the various defendants thereto, whereas the subject Petition seeks to invalidate all titles that have been issued in respect of the suit property as well as to challenge the licenses, permit and approvals granted for such developments.
85. In the premises, the petitioner has thus contended that the subject Petition is not barred by the Doctrine of Res-judicata and by extension, the Provisions of section 7 of the *Civil Procedure Act*, chapter 21, Laws of Kenya.



86. In support of the foregoing submissions, the petitioner has invited the court to take cognizance of the case of *Omondi v National Bank Kenya Ltd & another* (2001) EA 177 and *John Florence Maritime Services Ltd v Cabinet Secretary, Transport and Infrastructure & 3 Others* (2021) eKLR.
87. On her part, the 1<sup>st</sup> respondent has submitted that the permits, licenses and approval granted in respect of the development of commercial premises over L.R. No. Nairobi/Block72/2944, being the suit property, were lawfully issued by the 1<sup>st</sup> Respondent.
88. Secondly, it has been submitted that any Applicant and/or interested party aggrieved by the issuance of approvals, licenses and/or permits issued for purposes of developments, including developments on the suit property, is obliged to file an appeal before the County Physical and Land Use Planning liaison Committee in line with sections 61(3) and 61(4) of the *Physical Planning and Land Use Act*, 2019.
89. In this regard, the 1<sup>st</sup> respondent has submitted that the petitioner's complaints therefore ought to have been filed before the County Physical and Land Use Planning liaison Committee and not otherwise.
90. Thirdly, the 1<sup>st</sup> respondent has submitted that where there exists duly established Statutory bodies conferred with mandate to deal with and/or address specific issues, it behooves the claimant to first access and exhaust the established Statutory mechanism, before approaching a court of law for adjudication. In this regard, the 1<sup>st</sup> respondent has impleaded the Doctrine of exhaustion.
91. Based on the foregoing, the 1<sup>st</sup> respondent has therefore submitted that the Court herein is not seized of the requisite jurisdiction to entertain and/or adjudicate upon the subject matter.
92. In support of the foregoing submissions, the 1<sup>st</sup> respondent has relied in the case of *Samuel Kamau Macharia v Kenya Commercial Bank Ltd & 2 Others* (2012) eKLR, to underscore the import and tenor of jurisdiction.
93. On the other hand, the 1<sup>st</sup> respondent has invited the court to take cognizance of the Doctrine of Exhaustion to give deference to the established Statutory bodies to appropriate their mandate, before the Honourable court can intervene.
94. In support of the foregoing submissions, the 1<sup>st</sup> respondent has invited the court to take note of the case of *Speaker of the National Assembly versus Hon James Njenga Karume* (2008) 1KLR 425 and *Albert Chaurembo Mumba & 7 Others versus Maurice Munyao & 148 Others*, (2019) eKLR.
95. On her part, the 1<sup>st</sup> interested party has submitted that the petitioner herein being a registered society, same is not a legal person with the capacity to sue or be sued in own name. For clarity, the 1<sup>st</sup> interested party has submitted that a society can only sue and/or be sued in the names of her officials.
96. In this regard, the 1<sup>st</sup> interested party has therefore submitted that the Petition, which has been filed in the name of the Association, is thus Bad in law and legally untenable.
97. In support of the foregoing submissions, the 1<sup>st</sup> interested party has relied in the case of *Geoffrey Ndirangu & 5 Others versus Chairman of Mariakni Jua Kali Association & 2 Others* (2005) eKLR.
98. Secondly, the 1<sup>st</sup> interested party has also submitted that when same commenced development activities over and in respect of her property, namely, L.R. No. Nairobi Block 72/2918, Ngei II Estate, Members/Residents of the Petitioner, as well as the Officials thereof, interfered with her activities and/or trespassed onto her land and in this regard, same filed civil proceedings vide ELC No. 450 of 2008.
99. It was further submitted that the various defendants who were sued in the said suit, namely the 4<sup>th</sup> to the 7<sup>th</sup> defendants therein were and are still the officials of the petitioner herein and hence the Judgment and decree which was issued in the said suit by binds the current Petitioner.



100. Owing to the fact that the subject suit touches on and/or seeks to invalidate, inter-alia, the 1<sup>st</sup> interested party's title, it is contended that the suit herein is thus barred by the Doctrine of Res-judicata.
101. In support of the foregoing submissions, the 1<sup>st</sup> interested party has relied on and placed emphasis in the case of the *Independent Electoral and Boundaries Commission versus Maina Kiae & 5 others* (2017) eKLR, where the Court of Appeal underscored the essential features of Res-Judicata.
102. Thirdly, the 1<sup>st</sup> interested party has also submitted that the petitioner herein is guilty of contempt of the Judgment and Decree of the Court issued vide ELC No. 450 of 2008. Consequently, the 1<sup>st</sup> interested party has invited the court to find and hold as much.
103. In support of the foregoing invitation, the 1<sup>st</sup> interested party has relied in the Decision of *Sbimmers Plaza Ltd v National Bank Of Kenya Ltd* (2015) eKLR.
104. Other than the foregoing, the 1<sup>st</sup> interested party has also submitted that the interim conservatory orders which were procured and obtained by the petitioner herein were obtained on the basis of Concealment and non-disclosure of Material facts.
105. In this regard, the 1<sup>st</sup> interested party has contended that one, Mauleed Majeed Kipkoech Jasho, who has sworn the various affidavits herein, is not a Registered Official of the petitioner and that on that account, there has been concealment of material facts.
106. Besides, the 1<sup>st</sup> interested party has also submitted that the petitioner herein also failed to disclose to the court that this Honourable court had issued a Judgment and decree vide ELC 450 of 2008, which effectively determined the rights of the 1<sup>st</sup> interested party as pertains to L.R No. Nairobi/Block 72/2918 and hence no further proceedings can be taken to impeach the said title.
107. Be that as it may, it has been submitted that even though the petitioner herein was aware of the judgment and decree herein, same did not disclose the existence thereof to the court. Consequently, the 1<sup>st</sup> interested party contends that there was concealment.
108. Finally, the 1<sup>st</sup> interested party has submitted that same is the lawful and duly registered proprietor over and in respect of L.R No. Nairobi/Block 72/2918 and to the extent that same is the registered owner thereof, her rights thereto are vindicated vide section 24 and 25 of the *Land Registration Act*, 2012.
109. Based on the foregoing, the 1<sup>st</sup> interested party has therefore submitted that no conservatory orders can therefore issue to bar and/or prohibit her from utilizing and/or developing own Property.
110. In the premises, the 1<sup>st</sup> interested party has therefore contended that the conservatory orders sought by and at the instance of the petitioner ought to be declined.
111. On his part, the 3<sup>rd</sup> interested party has submitted that same is the lawful and registered owner of L.R No. Nairobi/Block 72/2935 and by virtue of being the owner of the parcel of land same is conferred with lawful rights to develop the said Property.
112. Secondly, the 3<sup>rd</sup> interested party has further submitted that the petitioner herein has not led and/or adduce any evidence to impeach and or impugn his title to and in respect of L.R No. Nairobi/Block 72/2935.
113. Based on the foregoing, the 3<sup>rd</sup> interested party has submitted that no credible basis has been established and/ or proven to warrant the grant of the conservatory orders sought.



114. In a nutshell, the 3<sup>rd</sup> interested party has therefore maintained that the petitioner has not established and/or proven a basis for the grant and/or issuance of the conservatory orders, either in the manner sought or at all.

#### **Issues for Determination:**

115. Having reviewed the notice of motion application dated the October 12, 2021, November 8, 2021 and the preliminary objection dated the December 3, 2021 and having considered the written submissions filed on behalf of the Parties, the following issues do arise and are thus germane for determination;

1. Whether the petitioner herein is a lawful entity or duly registered Association and thus seized of Locus standi to commence and maintain the subject petition.
2. Whether the Honourable court has Jurisdiction to entertain the subject Petition on the face of section 61(3) and 61(4) of the *Physical Planning and Land Use Act*, 2019.
3. Whether the Petition is Res-Judicata and thus barred by the Provisions of section 7 of the *Civil Procedure Act*, chapter 21, Laws of Kenya.
4. Whether the petitioner has established and/ or met the requisite threshold for the grant of Conservatory orders.

#### **Analysis and Determination:**

##### **Issue Number 1: Whether the petitioner herein is a lawful Entity or duly Registered Association and thus seized of Locus standi to commence and maintain the subject Petition.**

116. It is common ground that the petitioner herein is stated to be an Association and/or a Society registered pursuant to and or under the provisions of the *Society Act*, chapter 108 Laws of Kenya and same is said to comprise a community of over three hundred households.

117. By virtue of being an association registered under the society Act, it is therefore imperative to note and/ or observe that under private law the petitioner herein is therefore not a body Corporate and hence same is not vested with Legal capacity to be sue or be sued in own name.

118. In this regard, if the matter before hand was an Ordinary a civil suit, then the Association herein could not file and/or mount the suit in its own name. For clarity, the suit could only be filed in the names of the Registered Officials and/or Committee Members, albeit on behalf of the Society.

119. In respect of the foregoing observation, case law abound. However, without belaboring the point, it suffices to take cognizance of the holding in the case of *Geoffrey Ndirangu versus Chairman Mariakani Jua Kali Association & 2 others* (2005) eKLR, where the court held as hereunder;

‘The law on suits by or against societies is well settled. A society not being a legal person cannot sue or be sued in its name. It has to sue or be sued through its officials – Voi Jua Kali Association –vs- Sange and others (2002) 2 KLR 474. And the officials have to be named. Titles like Chairman, Secretary and or treasurer cannot be used as those are not legal persons either.’

120. Despite the foregoing, it must be recalled that what is before the court is however not an Ordinary suit commenced vide Plaintiff, originating summons and/or such other mechanism provided for commencement of Civil proceedings, as prescribed pursuant to the Provisions of the *Civil Procedure Act* and the Rules made thereunder.



121. To the contrary, what is before the court is a Constitutional Petition commenced and/or mounted pursuant to the provision of *the constitution* 2010. Consequently, the determination as to whether or not the petitioner Association can commence and originate a Petition, in own Name, must be judged on the basis on *the constitution* and not otherwise.
122. In the premises and before venturing to address whether or not the petitioner has the requisite Locus standi, it is therefore imperative to reproduce the provisions of articles 22 (1) & (2) of *the Constitution*, 2010.
123. For convenience the provisions of articles 22 (1) and (2), provides as hereunder;
22. Enforcement of Bill of Rights
- (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
- (a) a person acting on behalf of another person who cannot act in their own name;
- (b) a person acting as a member of, or in the interest of, a group or class of persons;
- (c) a person acting in the public interest; or
- (d) an association acting in the interest of one or more of its members.
124. Based on the foregoing, it is therefore settled beyond peradventure that a registered association or society, is competent to file and/or commence a Constitutional Petition in its own name or through a registered official, acting for and/or on her behalf.
125. Having found and held that a Registered Society or an Association, can file and/or commence a Constitutional Petition, the contention by and/or on behalf of the 1<sup>st</sup> interested party that the suit by the petitioner herein is barred by the provisions of the Society Act, Chapter 108 Laws of Kenya, is therefore misconceived and legally untenable.
126. Notwithstanding the foregoing, there remains an outstanding issue which requires to be addressed and/or determined, before a pronouncement can be made on the issue of Locus standi.
127. It is worthy to note that the petitioner herein, which is described to be a duly registered Resident Association is known as Ngei II Estate Residents Association. In this regard, one would have expected the petitioner and/or the petitioner's advocates to place before the court and/or avail a copy of the Certificate of registration of the said Association and/or Society, in proof of its existence and registration.
128. However, what has been placed before the Court is a Certificate registration number 20262 in respect of a Society/Association known as Ngei Phase Two Langata Residents Association, which was issued on the February 6, 2001.
129. From a cursory glance of Certificate of registration, which has been supplied to the court by the petitioner, it is evident and/or apparent that the certificate does not relate to and concern the petitioner before the court.



130. Put differently, the Certificate of registration that has been availed relate to a separate and distinct Association and hence same cannot be relied upon and/or used to anchor a petition on behalf of the petitioner, which ipso facto does not appear to be registered.
131. On the other hand, to the extent that no Certificate of registration has been availed by and/or on behalf of the Petitioner, it then means that the petitioner is non-existent, either in the eyes of the law or at all.
132. Further, without any evidence of registration, it then means that the petitioner herein cannot purport to sue through one Mauleed Majeed Kipkoech Jasho, who described himself as the registered chairperson of the registered Association.
133. For clarity, the said Mauleed Majeed Kipkoech Jasho, cannot purport to be the registered official and the chairperson of the Association whereby the Association itself is not Registered.
134. Nevertheless, even assuming that Mauleed Majeed Kipkoech Jasho was indeed a registered official, in the manner alluded to, (which unfortunately is not the case), it was incumbent upon him to place before the court evidence of his election, including minutes and certificate of such registration.
135. On the other hand, it is also worthy to note that the said Mauleed Majeed Kipkoech Jasho has placed before the court a Certificate of election, but yet again the organization that is said to have carried out the election leading to the issuance of that certificate is known as Ngei Phase Two- Langata, which again is separate and distinct from the Petitioner.
136. Based on the foregoing, the question that begs the answer is whether the petitioner herein is a duly registered Society or Association and thus capable of mounting and/or originating the Petition or otherwise.
137. The other incidental question that also arises is whether an unregistered Society or Association, which is thus non-existent, can have a registered official, in the manner alluded to.
138. In my considered view, though the provisions of article 22 (supra) envisages a situation where an Association or Group of persons can sue and/ or commence a Constitutional Petition, however, such an Association must by law be in existence.
139. In respect of the subject matter, I have anxiously looked at the documents which have been placed before the court, with a view to ascertaining the existence of the petitioner Association, but unfortunately, no evidence of its existence has been placed before the court either as required by the law or at all.
140. Suffice it to note, that it is the petitioners who contended that same is a duly registered Society pursuant to the *Society Act*, Chapter 108 Laws of Kenya and in this regard same was obliged to place before the court the document to meet the threshold question of Locus standi.
141. In the absence of any proof of the existence of the petitioner Association, it is my considered finding that the petitioner herein is non-existent and thus devoid of the requisite Locus standi to commence and or originate and maintain the subject Petition.
142. Consequently and based on the foregoing, I would return a finding that the petitioner is devoid and/ or bereft of the requisite locus standi in this matter.



143. In arriving at the foregoing conclusion, I am guided by the decision in *Law Society of Kenya ... Vs... Commissioner of Lands & Others*, Nakuru High Court Civil Case No.464 of 2000, the court held that:-

“Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”.

144. Other than the foregoing decision, which endeavored to define the meaning and scope of locus standi, the court in the case of *Alfred Njau and others ..Vs.. City Council of Nairobi* ( 1982) KAR 229, also underscored the meaning of locus standi. For clarity the court held as hereunder.

“the term Locus Standi means a right to appear in court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.

145. In the premises, it is therefore imperative to note that locus standi connotes the capacity and/or right of a Party to appear before and to be heard by a court. In this regard, locus standi is therefore a threshold question that must be ascertained, authenticated and/or proven at the onset.

146. At any rate, it behooves the claimant at all material times to satisfy the court that same has legitimate and/or identifiable stake in the subject matter, to warrant the intervention by the court.

**Issue Number 2: Whether the Honourable court has Jurisdiction to entertain the subject Petition on the Face of Section 61(3) and 61(4) of the Physical Planning and Land Use Act, 2019.**

147. In respect of the second issue herein, the 1<sup>st</sup> respondent has submitted that this Honourable court is devoid and/or bereft of jurisdiction, to entertain and/or adjudicate upon the subject dispute, on the basis that the Complaint touches on and/or concerns the issuance of permit, approval and/or license to develop the suit properties, which were issued in line with the provisions of the *physical Planning and Land Use Act*, 2019.

148. In ventilating the foregoing submissions, the 1<sup>st</sup> respondent has invited the court to take cognizance of the decision in the case of *Samuel Kamau Macharia & another versus Kenya Commercial Bank Limited & 2 others* [2012] eKLR, where the supreme court held as hereunder;

(68) A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.



149. Even though the 1<sup>st</sup> respondent contend that this court is not seized of the requisite jurisdiction to entertain and/or adjudicate upon issues pertaining to Physical Planning and Land use and by extension issuance of permit, approvals and license for purposes of development, it is my humble view that this court is seized with the requisite jurisdiction to entertain and/or adjudicate upon such dispute.
150. For coherence, it is imperative to take note of the provision of section 13 (1) and (2) of the *Environment and Land Court Act*, which provides as hereunder;
- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
  - 2) In exercise of its jurisdiction under article 162(2)(b) of *the Constitution*, the Court (shall have power to hear and determine disputes—
    - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
    - (b) relating to compulsory acquisition of land;
    - (c) relating to land administration and management;
    - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
    - (e) any other dispute relating to environment and land.
151. Flowing from the foregoing provisions of the law, what becomes evident and apparent is that this Honourable court is possessed of both original and appellate jurisdictions in matters including inter-alia land planning and issuance of approvals, permits and/or licenses for developments.
152. In the premises, the correct position is not that this court is devoid of jurisdiction, but whether this court should assume jurisdiction in the first instance, whereas there exists a Statutory body and/or avenue, established under the law to address a particular complaint and/or grievance in the 1<sup>st</sup> instance.
153. Intertwined with the foregoing is the doctrine of exhaustion, that is whether a litigant ought to access and partake of the jurisdiction of the court before exhausting all the statutory avenue and/or mechanisms, established under the law.
154. In my considered view, where there exists statutory bodies and avenues, established under the law and competent to attend to and/or deal with the grievance in the first instance, then it behooves the litigant to first access and exhaust such mechanisms before approaching the court. Such, is the importance and significance of the Doctrine of Exhaustion.
155. Towards and in vindication of the foregoing observation, it is worthy to take cognizance of the decision in the case of *Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 others* [2017] eKLR, where the court held as hereunder;

‘The Appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High court by way of constitutional petitions. See International Centre for Policy and Conflict



& 4 others vs The Hon. Uhuru Kenyatta and others, Petition No. 552 of 2012, and Speaker of National Assembly vs Njenga Karume [2008] 1KLR 425.

156. Other than the foregoing decision, the significance of the Doctrine of Exhaustion was re-visited and underscored by the Supreme Court Of Kenya in the decision in the case of *Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* [2019] eKLR, where the court held at paragraph 116 as hereunder;

(116) The foregoing verdict also finds support in an adage principle in administrative law of “Exhaustion of Administrative Remedies” and from the jurisprudence emanating from this court and the lower Courts, which has been restated with notoriety to the effect that, where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by *the constitution* and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance. see Alphonse Mwangemi Munga & 10 Others v African Safari Club Ltd [2008] eKLR Narok County Council case v Trans Mara County Council [2000] 1 EA 161 Kones vs Republic & Another ex parte Kimani wa Nyoike & 4 Others (2008)3 KLR (EP); Speaker of the National Assembly vs Njenga Karume (2008)1 KLR (EP) 425, Francis Mutuku vs Wiper Democratic Movement - Kenya & others [2015] eKLR David Ochieng Babu v Lorna Achieng Ochieng & 2 others [2017] eKLR among other cases not referred to. The Court of Appeal in Geoffrey Muthinja & Another Vs Emanuel Muguna Henry & 1756 others [2015] eKLR held that:

“We see this as the crux of the matter in this and similar cases. It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanism in place for resolution outside of courts. This accords with Article 159 of *the constitution* which commands Courts to encourage alternative means of dispute resolution.”

157. In view of the foregoing, whereas I have stated before and I restate here and now that this court is seized of jurisdiction to entertain the nature and/or kind of dispute arising out of *Physical Planning and Land Use Act*, 2019, it behooves the petitioner herein to first comply with and exhaust the dispute resolution mechanism underlined under section 61(3) of the Act, ( supra).

158. In the premises, and given the nature of the issues raised in the Petition, I would decline jurisdiction. Consequently, and taking into account the jurisprudence flowing from the various decisions from the Supreme Court Of Kenya, being the Apex Court and the Court of Appeal alluded to herein before, I would be constrained to strike out the petition.

159. It is not lost to this court that the claims raised vide the Petition are multi-faceted, some of which belong to established Statutory bodies and others belong to this court, but it is worthy to note that the central Complaints, raised by the petitioner belong elsewhere and thus this court should not have been made the port of first call.



160. To buttress the preceding observation, I am alive to the holding and/or decision of the Court of Appeal in the case of *Kibos Distillers Limited & 4 Others v Benson Ambuti & 3 others* (2020) eKLR, where the honourable court held as hereunder;

“Further, I observe that the jurisdiction of the ELC is appellate under Section 130 of EMCA. The ELC also has appellate jurisdiction under Sections 15, 19 and 38 of the Physical Planning Act. An original jurisdiction is not an appellate jurisdiction. A court with original jurisdiction in some matters and appellate jurisdiction in others cannot by virtue of its appellate jurisdiction usurp original jurisdiction of other competent organs. I note that original jurisdiction is not the same thing as unlimited jurisdiction.

A court cannot arrogate itself an original jurisdiction simply because claims and prayers in a petition are multifaceted. The concept of multifaceted claim is not a legally recognized mode for conferment of jurisdiction to any court or statutory body.

**Issue Number 3: Whether the Petition is Res-Judicata and thus barred by the provisions of Section 7 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.**

161. The 1<sup>st</sup> interested party herein contended that upon being allocated the property, namely, L.R No. Nairobi/Block 72/2918, Ngei Estate, same entered upon and commenced development thereof. However, in the course of her development of the said parcel of land residents/members of Ngei Estate and officials of the residents Association of the said Estate trespassed upon the suit property and prevented same from carrying out development thereof.
162. As a result of the action and/or activities of the residents/members and officials of the residents Associations, the 1<sup>st</sup> interested party was constrained to lodged civil proceedings vide ELC No. 450 of 2008.
163. Further, the 1<sup>st</sup> interested party also submitted that upon the lodgment of the said suit, which was essentially against the 1<sup>st</sup> respondent herein, as well as Officials of the Ngei II Residents Association, the suit was heard and determined vide judgment rendered on the 20<sup>th</sup> February 2020.
164. It has further been submitted that the said judgment found and held that the 1<sup>st</sup> interested party is the lawful owner of L.R No. Nairobi/Block 72/2918, and thereafter the court decreed an order of Permanent Injunction against the officials of Ngei II Residents Associations.
165. It is important to note that after the rendition and/or delivery of the judgment vide ELC No. 450 of 2008, an Organization known as Trustees of Ngei II Residents Association filed an application dated 3<sup>rd</sup> May 2021 and which application was supported by an affidavit of Mauleed Majeed Kipkoech Jasho.
166. For clarity, the application dated 3<sup>rd</sup> May 2021, sought to have the applicant joined as an interested party and to be heard in respect of the said matter and it was contended that though the 2<sup>nd</sup> to 7<sup>th</sup> defendant in the said suit were Members of the Executive Committee of the said interested party / applicant, some of them have migrated from Ngei II Estate and hence same did not protect the interest of the residents of Ngei II Estate in the suit.
167. Notwithstanding the contention by and/or on behalf of the interested party in that suit, what comes out clear is that the 2<sup>nd</sup> to 7<sup>th</sup> defendants in ELC No. 450 of 2008, were indeed Officials/Members of the Executive Committee of Ngei II Resident Association and hence same were Representatives of the current Petitioner.



168. It is also apparent that in the course of the hearing of ELC No. 450 of 2008, the issue for determination centered around the legality or otherwise of the 1<sup>st</sup> Interested Party's Title, which is now being challenged vide the subject petition.
169. Other than ELC No. 450 of 2008, it is also imperative to note that the 4<sup>th</sup> to 7<sup>th</sup> Interested Parties herein had also filed a suit, namely ELC No. 363 of 2008 as against Ngei Phase Two Langata Residents Association & Others and the said suit was heard and determined vide Judgment rendered on the 29<sup>th</sup> June 2017.
170. Suffice it to note that even ELC No. 363 of 2008 touched on and concerned the propriety and/or legality of the Titles that were issued to the 4<sup>th</sup> to the 7<sup>th</sup> Interested Parties herein and which arose from L.R No. Nairobi/Block 72/2918, which is substantially the suit property upon which the Petition is premised.
171. It is imperative to note and/or point out, that even though Ngei Phase Two Langata Residents Association and her officials were sued vide ELC No. 363 of 2008, culminating into a judgment rendered on the June 29, 2017, the said defendants, did not file a Counter-claim to challenge seek for revocation and/or cancellation of the titles issued in favor of the 4<sup>th</sup> to the 7<sup>th</sup> interested parties herein.
172. What comes out of the foregoing proceedings, namely ELC NO. 450 of 2008 and 363 of 2008, is that the dispute surrounding the alienation, allocation and registration of the impugned titles in favor of the Interested Parties herein, with the exception of the 3<sup>rd</sup> interested party has been deliberated upon and determined by courts of competent jurisdiction.
173. Given that the issues about the legality or otherwise of the titles of the Interested Parties herein with the exception of the 3<sup>rd</sup> Interested Party, has hitherto been determined, the petitioner herein, cannot now file and/or mount a Petition, whose import and tenor is to revisit the issues that have hitherto been determined.
174. In any event, the fact that the petitioner has added additional Parties, which are essentially statutory bodies, most whom are responsible for the alienation and allocation of the suit properties in the names of the Interested parties, does not change the character and/or texture of the suit.
175. Simply put, the end result of the subject Petition is to invalidate the titles that were issued in favor of the Interested Parties, which have hitherto been adjudicated upon.
176. To my mind, the issues and more particularly the legality of the titles belonging to the interested parties, save for the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties herein, have previously been dealt with and cannot be revisited.
177. In the premises, the limb of the Petition relating to the cancelation of the titles belonging to and issued in favor of the interested parties, save for the 2<sup>nd</sup> and 3<sup>rd</sup> Interested parties, is Res-judicata. Consequently, the said limb of the petition is barred by section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.
178. To buttress the foregoing observation, it is imperative to adopt and restate the holding of the Court of Appeal *John Florence Maritime Services Limited & another versus Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR, where the court observed as hereunder;

‘Res judicata is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any



new wheel. We can however do no better than reproduce the re-indentation of the doctrine many centuries ago as captured in the case of *Henderson v Henderson* [1843] 67 ER 313:-

“.....where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.....”

179. Further, the court proceeded to and observed as hereunder;

It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process under Rule 3(8) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of res judicata.

180. Suffice it to note that the doctrine of Res-Judicata does apply even to Constitutional Petition and therefore one cannot evade the strictures of the Doctrine by filing a petition, in respect of matters that have hitherto been ventilated vide Ordinary suits.

**Issue Number 4 : Whether the petitioner has established the requisite threshold for the grant of Conservatory orders.**

181. The petitioners herein have sought for issuance of conservatory orders over and in respect of the property known as Nairobi/Block 72/ 2944 and other titles that have arisen and/or emanated therefrom.

182. Though the petitioners have sought for conservatory orders to bar inter-alia issuance of approval, licenses and permits granted in respect of development projects over the suit property as well as to bar further development by the Interested Parties, it is imperative to note that the petitioners herein have not placed before the court any evidence of title, to show ownership over and in respect of the suit property.

183. On the other hand, the Petitioners have averred that during the construction and/or development of Ngei II Estate in the year 1970 to 1973, the 4<sup>th</sup> respondent herein surveyed and created various titles, but left the said areas open without carrying out any developments thereon.

184. Besides, the petitioner have averred that the failure to carry out and/or undertake any development on the surveyed parcels of land, but which were left open by the 4<sup>th</sup> respondent, was because of difficulties posed the Topography in respect of the said surveyed parcels of land, including the suit property.



185. Nevertheless, the petitioner herein have not averred that the surveyed parcels of land, which were left open by the 4<sup>th</sup> respondent, including the suit property, were actually being held on trust for the petitioner or better still, that same were meant for recreational Purposes.
186. My understanding of the averments and deposition contained in the body of Petition and the supporting affidavit is that the 4<sup>th</sup> respondent surveyed and registered the parcels of land in question, but could not undertake development thereon because of the difficulties posed by the existing topography.
187. However, the 4<sup>th</sup> respondent did not bequeath the petitioner and/or the Residents thereon any rights over the surveyed, registered but open areas.
188. Granted, the members and residents of Ngei II Estate may have used the surveyed and registered, but open areas for various purposes including recreation, parking and meetings, but such usage would not confer upon the residents and members of Ngei II Estate interests and/or rights, to defeat the title of the 1<sup>st</sup> and 4<sup>th</sup> Respondents or to deter the 1<sup>st</sup> respondent from alienating or otherwise dealing with own land.
189. In my considered view, the petitioner herein, has not laid out and/or established any Legal or Equitable rights over and in respect of the suit property to warrant the issuance of a conservatory order either in the manner sought or at all.
190. To vindicate the foregoing observation, I wish to only refer to the decision in the case of Platinum Distillers Limited v Kenya Revenue Authority [2019] eKLR, which amplified the parameters for conservatory orders as follows:

“The guiding principles upon which Kenyan 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 conservatory orders will prejudice the applicant.”

191. Simply put, the petitioner herein, who has not shown any legal and/or equitable interest over and in respect of the suit property, has failed to established a prima facie case, which is central and paramount before a court can venture to grant a conservatory order.

**Final Disposition:**

192. Having reviewed all the issues for determination, it is now appropriate to render a determination and or a dispositive order.
193. Consequently and in the premises, I make the following orders;
- i. The preliminary objection dated the December 3, 2021be and is hereby allowed.
  - ii. The notice of motion application dated the 8<sup>th</sup> november 2021 be and is hereby allowed.
  - iii. The notice of motionapplication dated October 12, 2021be and is hereby Dismissed.



194. In a nutshell, the Petition dated the October 6, 2021 be and is hereby struck out. Similarly, the Interim Conservatory Orders that were granted herein be and are hereby vacated.
195. Nevertheless, taking into account the nature of issues that were being ventilated vide the petition, which border on Public Interest litigation, I order that Each Party shall bear own Costs.
196. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF JUNE 2022.**

**HON. JUSTICE OGUTTU MBOYA**

**JUDGE**

**In the Presence of;**

Kevin Court Assistant

Mr. Sichangi Nyongesa for the Petitioner.

Mr. Lesagor for the 1<sup>st</sup> Respondent.

Ms. Lianza for the 5<sup>th</sup> Respondent.

Mr. Alex Thangei for the 1<sup>st</sup> Interested party

Mr. Gachuba for the 2<sup>nd</sup> Interested party

No appearance for the 3<sup>rd</sup> and 4<sup>th</sup> Respondent

No appearance for the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> Interested Parties.

