



Okoiti v The Parliament of Kenya & 2 others; The County Government of Taita Taveta & 3 others (Interested Parties) (Petition 33 of 2021) [2022] KEELC 12822 (KLR) (3 October 2022) (Ruling)

Neutral citation: [2022] KEELC 12822 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

PETITION 33 OF 2021

LL NAIKUNI, J

OCTOBER 3, 2022

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

AND

IN THE MATTER OF THE ALLEGED VIOLATION OF ARTICLES 1, 2, 3(1) 4(20), 6 (1), 10, 19, 20, 21, 24, 93 (2), 94 (3), 129, 130, 131(1) (B) & 2 (A) & (B) 156, 188 AND 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 47 (1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF COMPELLING PARLIAMENT OF KENYA TO SET UP AN INDEPENDENT COMMISSION TO RESOLVE THE BOUNDARY DISPUTE BETWEEN TAITA TAVETA AND KWALE AND BETWEEN TAITA TAVETA AND MAKUENI AND COMPELLING THE NATIONAL GOVERNMENT TO SURVEY AND ERECT BEACONS TO CLEARLY DEMARCATHE THE BOUNDARIES IN ISSUE

AND

IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATIONS

BETWEEN

OKIYA OMTATA OKOITI PETITIONER

AND

THE PARLIAMENT OF KENYA 1ST RESPONDENT

THE NATIONAL EXECUTIVE OF KENYA 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 3RD RESPONDENT



AND

THE COUNTY GOVERNMENT OF TAITA TAVETA INTERESTED PARTY
THE COUNTY GOVERNMENT OF KWALE INTERESTED PARTY
THE COUNTY GOVERNMENT OF MAKUENI INTERESTED PARTY
MINISTRY OF LANDS AND PHYSICAL PLANNING INTERESTED PARTY

RULING

I. Background

1. This ruling pertains to the notice of motion applications dated October 11, 2021 and May 12, 2022 both filed under certificate of urgency filed by the 2nd interested party and 3rd interested party herein. The court shall be dealing with the said applications in more details below. But first of all, let It tackle the brief background of the matter. Through the Constitution petition dated July 19, 2021 and received in court on July 23, 2021 filed contemporaneously with notice of motion application dated the even day filed under certificate of urgency, the petitioner sought among other orders that pending inter - parties hearing and determination of the application and / or the petition herein, this honourable court be pleased to issue interim order of status quo ante:-
 - a. Appointing the county government of Taita Taveta to be the sole authority issuing permits and levying county taxes in Mackinon road town just as its predecessor did before the establishment of county governments in 2013, and to deposit all the revenues it so collects into an interest earning bank account opened jointly with Kwale county government.
 - b. Appointing the county government of Taita Taveta to be the sole authority issuing business permits and levying county taxes in Mtito Andei town just as its predecessor did before the establishment of county governments in 2013, and to deposit all the revenues it so collects into an interests earning bank account opened jointly with the Makueni county government.
1. That pending the inter-parties hearing and determination of the application and/ or the petition herein, this honourable court be pleased to issue interim order of prohibition:-
 - a. Prohibiting the county government of Kwale and its agents from collecting revenue in anyway whatsoever or howsoever in Mackinon town where its predecessor did not collect revenue before establishment of county governments.
 - b. Prohibiting the county government of Makueni and its agents from collecting revenues in anyway whatsoever or howsoever in Mtito Andei where its predecessor did not collect revenues before establishment of county governments.
2. On September 20, 2021, the matter came up before this honourable court for the hearing of the application in the presence of petitioner in person, Mr Nguyo Wachira for the 2nd and 3rd respondents,



ms muthiani for the 3rd interested party, Mr Muliro holding brief for Mr Bwire for the interested parties, no appearance by the 1st respondent.

3. Upon hearing the parties the court issued among orders that in the meantime until inter parties hearing on October 27, 2021, this honourable court hereby issues an interim order of status quo ante:-
 - a. Appointing the county government of Taita Taveta to be the sole authority issuing permits and levying county taxes in Mackinon road town just as its predecessor did before the establishment of county governments in 2013, and to deposit all the revenues it so collects into an interest earning bank account opened jointly with Kwale government.
 - b. Appointing the county government of Taita Taveta to be the sole authority issuing business permits and levying county taxes in Mtito Andei town just as its predecessor did before the establishment of county governments in 2013, and to deposit all the revenues it so collects into an interests earning bank account opened jointly with the Makueni county government.

II. The Applications by the 2nd & 3rd Interested Parties

4. Being aggrieved, the 3rd interested party and the 2nd interested party filed notice of motion applications dated October 11, 2021 and May 12, 2022 both filed under certificate of urgency which the two applications are subject of the instant ruling. The honourable court undertook to deal with both of them simultaneously.

3rd Interested party's application.

5. The 3rd interested party through the law firm of messrs Mutheu Muthiani & Company advocates filed a notice of motion application dated October 11, 2021 under certificate of urgency seeking among orders:-
 - a. That pending the hearing and determination of the application, this honourable court be pleased to set aside order 2 (b) of the petitioners notice of motion dated July 19, 2021 and granted on September 20, 2021.
6. The application is based on the grounds on the face of the testimonial facts and averments of the supporting affidavit sworn by Thomas Thuta the sub county administrator of Kibwezi East sub county, county of Makueni administering the Mtito Andei, Ivinzoni/Nzambani, Thange and Masongaleni wards respectively dated on the even date.
7. The deponent pleaded that the petitioner misled the honourable court into believing that the predecessor of the county of Taita Taveta government, the 1st interested party herein was issuing business permits and collecting revenues from the residents of Mtito Andei town before establishment of county governments. He held that, on the contrary, the actual and the true position was that Mtito Andei town council was in charge of issuing business permits and levying revenues collection in Mtito Andei town before the establishment of county governments in the year 2013.
8. The deponent admitted that there existed a protracted boundary dispute between the county government of Makueni and county government of Taita Taveta over the Mtito Andei ward. Further, in his replying affidavit opposing the notice of motion application dated July 19, 2021, Thomas Thuita stated that it was not disputed that there is an existing boundary



dispute between the county government of Makueni, the 3rd interested party and the county government of Taita Taveta, the 1st interested party.

9. The deponent has annexed among other documents a letter dated May 31, 2021 seeking resolution of the county assembly of Makueni onto the boundary dispute between the counties of Makueni and Taita Taveta at Mtito Andei and a report by the county assembly of Makueni by the sectoral committee on lands and urban planning titled “a report on the statement regarding the boundary dispute between Makueni and Taita Taveta counties at Mtito Andei” request for statements which members of the county assembly sought to know whether the department was aware of the plans by the county government of Taita Taveta to start collecting revenue from Mtito Andei and the concerns raised to safeguard business in Mtito Andei from exploitation.

2nd Interested party’s application

10. Through the firm of Messrs V A Nyamodi, the 2nd interested party filed notice of motion application dated May 12, 2022 under certificate of urgency seeking among orders:-
 - a. That pending the inter parties hearing and determination of the application, this honourable be pleased to issue an interim order of stay of execution of its order issued on issued on March 23, 2022 directing that the 1st interested party be appointed the sole authority issuing permits and levying county taxes in Mackinon Road town and that the revenue collected be deposited in an interest earning bank account opened jointly by the 1st and 2nd interested party for a period of 6 months from the date of the ruling.
 - b. That pending the hearing and determination of the petitioner’s notice of motion application dated July 19, 2021, this court be pleased to issue an interim order of stay of execution of its order issued on March 23, 2022 directing that the 1st interested party be appointed the sole authority issuing permits and levying county taxes in Mackinon Road Town and that the revenue collected be deposited in an interest earning bank account opened jointly by the 1st and 2nd interested party for a period of 6 months from the date from the date of ruling.
11. The application is based on grounds on the face of it and supported by an affidavit sworn by Kevin Dzumo the county attorney for the 2nd interested party sworn on May 12, 2022. There is a notice of appointment of advocates dated February 23, 2022 filed by the firm of V A Nyamodi & co advocates to act for the 2nd interested party.
12. First off, the 2nd interested party opposes the petitioners notice of motion application dated July 19, 2021 through the replying affidavit sworn by Onduko Alex Thomas on March 31, 2022 and submissions dated the even date who depones that he is not aware of any complaints submitted to the 2nd interested party by the residents of the town about alleged double taxation and harassment from a boundary dispute between the 1st and the 2nd interested party as alleged by the petitioner. That the petitioner has failed to adduce evidence of alleged double harassment of the residents of Mackinon Town as alleged by the petitioner.

The main ground for the 2nd interested party’s application is that the order was issued ex parte and was not granted an opportunity to respond to the petitioners application dated July 19, 2021



thus infringing on its constitutional right and it is unable to comply with the order due to its unconstitutional nature

III. The Replying Affidavit by the Petitioner.

13. On September 28, 2022 the petitioner herein filed its 12 paragraphed replying affidavit sworn by the Mr Okiya Omtatah Okoiti, the petitioner himself. The honourable court has taken cognisance to the fact that the said replies were filed rather way out of the stipulated time. Nonetheless, this being a land matter and with its sensitivities, the principles of natural justice and provisions of article 159 (1) and (2) of the Constitution of Kenya, 2010, the court has accepted and admitted it out of time.
14. The petitioner in response to the issues raised by the 2nd interested on the contents of paragraph 4 of the supporting affidavit avers that the orders of March 23, 2022 were not issued “*ex - parte*’ as indeed the advocate for the 2nd interested party participated in the proceedings leading to the orders issued then. Thus for these reasons there was no way the 2nd interested party would claim that their constitutional rights to fair and public hearing would be infringed.
15. He further held that the said letter issued by the 1st interested party on September 22, 2021 upon the 2nd interested party was in compliance with this court’s order. The petitioner averred that it would a high degree of impunity for the 2nd interested party to state that it would not comply with the court order of March 23, 2022 merely because it did not agree with it.
16. He held that as a rule of thumb, a party like the 2nd interested party herein, should not be heard until it purged the contempt of this court’s orders issued by this court herein.
17. In the long run he urged the honourable court to dismiss the notice of motion application by the 2nd interested party dated May 12, 2022 and set the petition for full hearing on its merit to avoid delay occasioned by the unnecessary applications.

IV. Submissions.

18. On June 8, 2022 while all the parties were present in court, it was agreed and thus directed that these applications be disposed off by way of both oral and written submissions. Specifically, the court directed thus:-
 - a. That taking that all the parties had filed their submissions which were comprehensive a ruling date for a notice of motion application dated October 11, 2021 by the 3rd interested party be delivered on September 26, 2022. In that case, I direct/ order that no party will be allowed to file any further submissions on that notice of motion application whatsoever.
 - b. That the 2nd interested party do effect service of the notice of motion application dated May 12, 2022 upon all the parties within the next 7 days from the date thereof.
 - c. That upon service of the notice of motion application dated May 12, 2022 all the parties be and are hereby granted 21 days to file and exchange replies and written submissions on the said application and the court will render a ruling simultaneously/ concurrently with the 3rd interested party’s notice of motion application of October 11, 2021 on September 26, 2022 taking that the issues and the prayers sought therein were almost identical and similar in nature.
 - d. That in the ruling of September 26, 2022, this honourable court would provide guidelines in so far as the hearing and determination of the notice of motion application dated July 19, 2021 by the petitioner and the main petition was concerned.



- e. That any party herein was at liberty to move the court on any issue in the meantime should they desire.

Thereafter, upon all parties fully complying, the honourable court retired to deliver its ruling accordingly.

19. To demonstrate service, the 2nd interested party filed affidavits of service both sworn of June 15, 2022 by Mesalimu Mwashuruti and Geoffrey Injila.

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

20. The 2nd interested party in support of the application filed submissions dated August 1, 2022. The 2nd interested party in its submissions has identified two issues for determination; whether the 2nd interested party's right to be heard has been infringed and whether the court should set aside order (g) in its ruling dated March 23, 2022.
21. The 2nd interested party submits that the Constitution safeguards the right to a fair hearing and equal treatment for all under the law in the delivery of justice and the Constitution under article 159 (2) (a) of the Constitution directs courts to be guided by the principle of justice to all irrespective of status in exercising judicial authority.
22. The 2nd interested party cites the case of Thomas Edison Limited v Batbock 1912 15 CLR which was cited in the case of St Patricks Hill School Limited v Bank of Africa Limited [2018] eKLR which held that:-

There is a primary precept governing administration of justice that no man is to be condemned unheard and therefore, as a general rule, no order should be made to the prejudice of a party unless he has the opportunity being heard in defence but instance occur where justice could not be done unless the subject matter of the suit is preserved and, if that is in danger of destruction by one party or irremediable by one party interim orders may issue to give room for the court to determine the dispute on merits.

23. The 2nd interested party submits that interim orders are granted *ex - parte* to preserve the status quo pending the ascertainment by the court of the rights of the parties. Consequently, the law demand of justice that in allowing *ex - parte* proceedings, the court balances the rights of the individuals in a suit by immediately following the *ex - parte* hearing with a full hearing inter partes . The 2nd interested party further relies in the case of "Abraham Lenauia Lenkeu v Charles Katekeyo Nkaru 2016 eKLR where the court noted:-

"The other parameter to this is the question whether granting an *ex - parte* application has the effect of extinguishing substantive rights without the due process of the law. Noteworthy that an *ex - parte* proceedings resulting in an *ex - parte* order are exceptions to the basic court procedure which requires both parties be present to canvass their respective positions before a judge. As a general rule *ex - parte* matters usually involve urgent requests and often result in temporary orders pending an inter partes hearing at a near future date.

The law demands of justice that in allowing *ex - parte* proceedings courts balance the right of individuals to receive fair notice against the need for the interest of justice for the court to step in to prevent imminent and irreparable harm. That is the basis upon which to maintain the integrity of the justice system, where a court order resulting from *ex - parte* hearing should be quickly followed with a full hearing inter - partes.



The law enjoins an applicant appearing before the court without notice to other party to exhibit a high quality and degree of sincerity and honesty. He or she must be guileless. He or she must be frank. He or she must be open. Each must keep nothing that touches on the matter away from the court”.

24. To the 2nd interested party this being a constitutional petition then it is guided by the Constitution on the right to a fair hearing and the principles in exercising judicial authority as well as the Constitution of Kenya (protection of Rights and Fundamental Freedoms) Practice and Procedure Rules commonly referred to as Mutunga rules and has cited rule 25 of the said rules.
25. The 2nd interested party submits that the court has power to set aside, vary or discharge its orders. The 2nd interested party acknowledges that this power is discretionary and is dependent on the circumstances of the case and the injury which will be occasioned to a party seeking such order. It relies in the case of “James Juma Muchemi & Partners Ltd v Barclays Bank of Kenya & another (NairobiHCCC No 339 of 2011 [2012] eKLR which Mabeya J expressed the view that jurisdiction to set aside, vary or discharge an order was discretionary and like in all other discretions, the same must be exercised judiciously although there are no firm rules of law or practice that have been set down . It further relies in the case of “Ragui v Barclays Bank of Kenya 2002 IKLR 647 where Ringera J stated:-

“It is settled law that if an interlocutory injunction has been obtained by means of representation or concealment of material facts, the same will on the application of the party aggrieved be discharged”
26. The 2nd interested party submits that the petitioner misrepresented facts and failed to disclose the factual position on the correct position on the collection of revenue at Mackinon Road Town, it asserts that the petitioner misled the court by stating that the 1st interested party’s predecessor collected revenue at Mackinon Road town and the residents are subjected to double taxation. It submits that the 2nd interested party is constitutionally mandated to collect revenue and administer Mackinon Road Town just as it predecessor did and in strict adherence to part 2 of the second schedule of the District and Provinces Act No 5 of 1992.
27. That the implementation of the order directing another county to collect revenue and hold the revenue in a joint account will therefore impede with the 2nd interested party’s constitutional mandate under article 174 of the Constitution and the fourth schedule of the Constitution. That the principles and procedures of revenue collection enshrined in the Constitution and the Public Finance Management Act No 18 of 2012 do not envisage collection of taxes by an authority other than one constitutionally mandated to do so or the collection of the revenue in a joint account held by counties.
28. The 2nd interested party has placed reliance on articles 201 and 207 (1) of the Constitution and sections 109 (2) of the Public Finance Management Act No 18 of 2012. In conclusion the 2nd interested party has placed reliance in “Andria (vasso) case 1984 1 QB 477 page 491 cited in “Owners of Motor Vessel “Lilian “S” v Caltex Oil Kenya Limited and Bahadurali Ebrahim Shamji v Al Noor Jamal & 2 others civil appeal No 210 of 1997 to buttress that a party should make full and frank disclosure in a case and that the said orders granted by the court cannot be enforced due to their unconstitutionality and illegality.



B. The Written Submissions by the 3rd Interested parties

29. The 3rd interested party in support of the application filed their written submissions dated 31st March and received in court on March 1, 2022. M/s Muthuani Advocate while submitting framed three (3) issues for determination. These were:-

Firstly, whether order 2 (b) of the application by the petitioner dated July 19, 2021 granted on 20th September should be set aside. The 3rd interested party submits that rule 25 of *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules* provides for setting aside, varying or discharging of an order of the court, it contends that the application dated July 19, 2021 is full of misrepresentation and non-disclosures and urges the court to set aside the orders granted on September 20, 2021 on the aforesaid grounds. To buttress the case the 3rd interested party cited the case of “*Uhuru Highway Development Limited v Central Bank of Kenya & others* 1995] eKLR.

30. Secondly, whether the residents in Mtito Andei town had been subjected to double taxation. To the 3rd interested party, the petitioner has misrepresented and misled the court into believing that the 1st interested party’s predecessor was collecting revenue from the people of Mtito Andei town and the said people have been subjected to double taxation. The 3rd interested party submits that Mtito Andei town council was the 3rd interested party’s predecessor and not the 1st interested party’s predecessor as alleged by the petitioner. Mtito Andei town council held meetings at Mtito Andei town, issued permits to residents of Mtito Andei, issued allotment letters, developed strategic plans to improve service delivery, prepared monetary reports on income and expenditure and prepared audit annual financial statements.

31. To the 3rd interested party, the petitioner misled the court into believing that the predecessor of the 1st interested party was collecting revenue from the residents of Mtito Andei and misled the court into believing that the residents of Mtito Andei town have been subjected to double taxation. To buttress its case it place reliance in the case of “*Leonard Otieno v Airtel Kenya Limited* [2018] eKLR where Justice Mativo held:-

“It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the constitution and inevitably result in ill considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses”

32. The 3rd respondent further placed reliance in the case of “*Keninda Assurance Company Limited v John Brown Shilenje* [2020] eKLR . To the 3rd interested party, the petitioner has not furnished the court with receipts to substantiate his claim of double taxation.

33. Thirdly, whether the court has power to oversee revenue collection of local government authorities. The 3rd interested party submits that the court has no power to oversee revenue collection of local government authorities and place reliance on articles 175, 207, section 103, 104, 109 of the *Public Finance Management Act* . To the 3rd interested party the interim order in question directing the 1st interested party to deposit all the revenue it so collects into an interest earning bank account opened jointly with the 3rd interested party . such kind of account is neither provided for under the *Constitution* nor the *Public Finance Management Act* and interferes with the autonomy of the two county governments management of affairs in relation to collection of funds and revenues but also



quality of service rendered to residents of Mtito Andei and it will be impossible for the 3rd interested party to govern and deliver services effectively without funds. In conclusion it cites the case of “[Matatu Owner’s Association v National Council on Administration of Justice & another; Invesco assurance Company Limited & 4 others.](#)”

V. Analysis and Determination

34. Having keenly assessed all the filed pleadings herein, affidavits, the written submissions, the cited authorities and the relevant provision of the [Constitution](#) of Kenya, 2010 and statutes, this honourable court finds that essentially the two (2) above applications seek to set aside the orders of the honourable court issued on September 20, 2021. Further, they wish to uphold a ruling dated and delivered on March 23, 2022 which dismissed preliminary objections filed thereof.

In order to arrive at a plausible, reasonable, just, fair and an informed decision, the court has only framed the following single issue for determination:-

Issue - Whether this honourable court should set aside/ vary the orders issued September 20, 2021 and extended *vide* a ruling dated March 23, 2022.

3rd Interested Party’s Application.

35. I will begin with the 3rd interested party’s application which was filed first, the 3rd interested party’s application is based on grounds; that the petitioner misled the honourable court into believing that the predecessor of Taita Taveta county government, the 1st interested party herein was issuing business permits and collecting revenues from the residents of Mtito Andei town before establishment of county governments yet the true position is that Mtito Andei town Council was in charge of issuing business permits and levying revenues collection in Mtito Andei town before the establishment of county governments in 2013; that the court has no power to oversee revenue collection of local government authorities.

36. Rule 23 of [Constitution of Kenya \(protection of rights and fundamental freedoms\) practice and procedure rules \(the Mutunga\) Rules](#) provide as follows:-

Conservatory or interim orders

- 1) 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 or interim orders.

37. Under rule 25 of the [Constitution of Kenya \(Protection Of Rights And Fundamental Freedoms\) Practice and Procedure Rules, 2013](#) which is the basis of the application provides for setting aside, varying or discharge of conservatory or interim orders. The said provision states that:-

“An order issued may be discharged, varied or set aside by the court either on its own motion or on application by a party dissatisfied with the order”.

38. The Supreme Court emphasized the probative value of public law nature of conservatory orders in the case of ‘[Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others](#) [2014] eKLR when the court stated as follows:-

“(86) conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions,



linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

39. The court in *Republic v Kensington Income Tax Commissioner & Princess Edmond De Polignac* [1917] 1KB 485 laid the principle that:-

“a person who makes an ex-parte application to the court that is to say in the absence of the person who will be affected by that which the court is asked to do, - is under an obligation to the court to make the fullest possible disclosure of all material facts within his own knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained.”

40. In *Uhuru Highway Development Limited v Central Bank of Kenya & others* [1995] eKLR the Court of Appeal of Kenya held that the foregoing principles of full disclosure of all material facts in *ex - parte* applications apply in Kenya. The court proceeded to adopt the foregoing principles. The court then proceeded to uphold the decision of the High Court whereby *ex - parte* injunction was declined due to non- disclosure of material facts.

41. The 3rd interested party avers that the petitioner misled the honourable court into believing that the predecessor of the county government of Taita Taveta, the 1st interested party herein was issuing business permits and collecting revenues from the residents of Mtito Andei town before establishment of county governments yet the true position is that Mtito Andei town council was in charge of issuing business permits and levying revenues collection in Mtito Andei town before the establishment of county governments in 2013.

42. In his replying affidavit as stated herein, Mr Thomas Thuta admits that there exists a boundary dispute between the county government of Makueni and county government of Taita Taveta over Mtito Andei. Further, in his replying affidavit opposing the notice of motion application dated July 19, 2021. Thomas Thuita states that it is not disputed that there is an existing boundary dispute between Makueni county, the 3rd interested party and Taita Taveta the 1st interested party.

43. The petitioner on the hand avers there is boundary disputes which have been simmering for a long time since pre-independence days between what are today’s county governments of Taita Taveta, Kwale and Makueni and that the residents of the two towns and its environs are complaining of harassment by officials from the said counties competing for control of the towns. In particular, the residents are forced to pay taxes twice to two different counties and due to the confusion they do not know which county they should demand services and accountability for the taxes they pay.

44. Mr Thomas Thuta who is the sub county administrator of Kibwezi East sub county, Makueni county administering Mtindo Andei, Ivinzoni/Nzambani, Thange and Masongaleni wards respectively in an affidavit sworn on 11th October on behalf of the 3rd interested party has among other documents annexed; a letter dated May 31, 2021 seeking resolution of the county assembly of Makueni on the boundary dispute between the county governments of Makueni and Taita Taveta at Mtito Andei and a report by the county assembly of Makueni by the Sectoral committee on lands and urban planning titled report on the statement regarding the boundary dispute between the county governments of Makueni and Taita Taveta at Mtito Andei, request for statements which members of the county



assembly sought to know whether department was aware of the plans by county of Taita Taveta to start collecting revenue from Mtito Andei and the concerns raised to safeguard business in Mtito Andei from exploitation.

45. The heculian query to pose is this - can any mind property directing itself conclude that there is no boundary dispute? I do not think so. Clearly, there is no material non disclosure committed by the petitioner. Perusing the record it is apparent that there is a boundary dispute which is being used by the mentioned counties to compete for resources whereupon is the gist in the instant petition. Each of the three counties are claiming that each of its predecessor was issuing business permits and collecting revenues from the residents of Mtito Andei and/ or Mackinon road town before establishment of county governments this clearly implicates double if not triple taxation of the residents of Mtito Andei.
46. Relying on the provision of articles 175 & 207 of the Constitution of Kenya, 2010 and sections 103 , 104 , 109 of the Public Finance Management Act the 3rd interested party posits that the court has no power to oversee revenue collection of local government authorities. With respect the 3rd interested party has misunderstood the issue in question.
47. In order to have a holistic perspective of the issue in question, the petitioner avers that there exists boundary disputes which have been simmering for a long time since pre-independence days between what are today's county governments of TaitaTaveta, Kwale and Makueni counties which boundary disputes have caused the residents of the two towns and its environs complaints . The residents are complaining of harassment by officials from the said counties competing for control of the towns forcing residents to pay taxes twice to two different counties.
48. Under the provision of the article 259 of the Constitution provides that the Constitution shall be interpreted in a manner that:-
- a) promotes its purposes, values and principles;
 - b) advances the rule of law, and the human rights and fundamental freedoms in the bill of rights;
 - c) permits the development of the law; and
 - d) contributes to good governance
49. In "re the matter of the Interim Independent Electoral and Boundaries Commission, application No 2 of 2011, the Supreme Court addressed itself on article 259(1) as follows:-
- “In article 259(1) the Constitution lays down the rule of interpretation as follows: “This Constitution shall be interpreted in a manner that- (a) promotes its purposes, values and principles; (b) advances the rule of law, and the human rights and fundamental freedoms in the bill of rights; and (c) contributes to good governance.”
50. This was reiterated in the case of Institute of Social Accountability & another v National Assembly & 4 others, petition No 71 of 2014 [2015] eKLR where the court (E. Mwita J) stated;
- “The court is enjoined under article 259 of the constitution to interpret the Constitution in a manner that promotes its purposes values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and that contributes to good governance. In exercising its judicial authority, this court is obliged under article 259(2) (e) of the Constitution to protect and promote the purpose and principles of the Constitution”



51. The residents through the petitioner have filed the instant petition in order to get a solution to the long standing boundary disputes which result of the boundary dispute from the said counties is competition for control of the towns forcing residents to pay taxes twice to two different counties. This court is obliged under article 259(2) (e) of the Constitution to protect and promote the purpose and principles of the Constitution.
52. To my mind this court cannot fold its hands, doing so would amount to abrogation of its duty to interpret the Constitution in a manner that promotes its purposes values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and that contributes to good governance.

The application by the 2nd interested party

53. The 2nd interested party on the other hand posits that order issued by the was issued *ex - parte* and was not granted an opportunity to respond to the petitioners application dated July 19, 2021 thus infringing on its constitutional right to be heard and it is unable to comply with the order due to unconstitutional nature and prays the court to set aside order (g) in its ruling dated March 23, 2022. Before I take a step, this country is governed by the rule of law which includes obeying court orders. There are recourse of a party to explore if dissatisfied and that recourse does not include disobeying a court order.
54. To the 2nd interested party it has not been granted an opportunity to present its case regarding the petitioners application for interim orders and that the *ex parte* orders in place greatly prejudices the residents of Mackinon Road Town and are contrary to taxation tenets guiding the collection and administration of taxation as enshrined in the Constitution.
55. The Constitution of Kenya is the supreme law of the land and the pillar of all affairs in the country , the Constitution entrenches right to be heard, fair hearing, treatment and mandates courts to uphold individual rights and equal treatment of all under the law in delivery of justice. Under article 159(2) (a) of the Constitution, the courts in exercising judicial authority are guided by principle of doing justice to all, irrespective of their status.
56. The 2nd interested party is not sincere to claim that it has not been given an opportunity to present its case and ventilate its claim. It is important to note that on record there is a supporting affidavit sworn by Kevin Nzumo who is the 2nd interested party's county attorney sworn on February 21, 2022 who depones that he was aware the petitioner herein served summons to enter appearance, petition and notice of motion application all dated July 19, 2021 on August 2, 2021 and pleadings received by legal services department.
57. Further, that the pleadings were misplaced in the county attorney's office thus leading to the inadvertent oversight to engage services of a law firm to enter appearance and / or file a replying affidavit and preliminary objection within the prescribed time and he failure to enter appearance and / or file pleadings within the prescribed time was not intentional but was occasioned by in advertent oversight and upon discovery of the oversight engaged the services of V.A Nyamodi & co advocates who attempted to come on record but were informed by the clerk at the registry that the file was in judge's chambers.
58. The 2nd interested party acknowledges service of summons to enter appearance, petition and notice of motion application all dated July 19, 2021 on August 2, 2021 and pleadings received by legal services department. Having been served with the summons the 2nd interested party failed to enter appearance and file responses to the petition. It would be a legal absurdity for a party who has been served with



summons to enter appearance to fail to take the necessary action to appear before a court of law and claim that it has not been given an opportunity to be heard and ventilate its case.

59. Makau J delivered himself in "*Ochola Kamili Holdings Limited v Guardian Bank Limited* [2018] eKLR, thus: -

“The court is alive to the fact that interlocutory injunction, being an equitable remedy, would be discharged upon being shown the person’s conduct with respect to the matter pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter and especially where a party upon getting injunction orders sits on the matter and uses the orders to the prejudice of the opponent. The orders of injunction are meant to preserve the subject matter Not to oppress another party nor should an injunction be used to economically oppress the other party or to deny justified repayment of outstanding loan. That once such a post-injunction behavior is exposed it would in my view be a ground to discharge an injunction because the order obtained would be an abuse of the purpose for which the injunction was obtained. No court would allow its orders to be used to defeat the ends of justice”.

60. In the case of "*St Patricks Hill School Limited v Bank of Africa Kenya Limited* [2018] eKLR:-

“Similarly, this court has unfettered discretion to discharge or vary or even set aside an injunction order if the ends of justice so demand, or if the injunction does not serve the ends of justice it was intended to serve when it was issued. Questions such as whether it is unjust to maintain the injunction in force or it is otherwise unjust and inequitable to let the order remain will be asked when considering an application to discharge an injunction.”

61. The material and relevant question before this court is whether it is unjust to maintain the injunction in force or it is otherwise unjust and inequitable to let the order remain in force? This court takes note that the probative value of conservatory orders is to preserve the status quo pending determination of an issue in question, it is not meant to benefit or confer any advantage to any party.

VI. Conclusion and Disposition

62. Ultimately, this honorable court takes note that the issue in the instant petition is a boundary dispute which is being used by the mentioned counties to compete for resources and consequently subjecting residents of the two towns to double taxation.

It is my view that allowing the notice of motion applications herein filed by the 3rd interested party and the 2nd interested party would have the effect of rendering the petitioner herein mere sojourners and explorers in their pursuit of resolving the boundary dispute and in effect render the petition herein an academic exercise and nugatory.

63. In view of the above, I am not satisfied that the 3rd and 2nd interested parties have met the threshold to warrant setting aside *ex - parte* ruling and/or orders delivered on March 23, 2022. I find that it does not serve administration of justice to allow the notice of motion applications dated October 11, 2021 and May 12, 2022 for setting aside the conservatory orders.
64. Consequently, upon conducting an elaborate analysis to the only singled out framed issue herein, this honorable court proceeds to make the following determination:-



- a. That an order be and is hereby made that both notice of motion applications by the 2nd & 3rd interested parties herein dated May 12, 2022 and October 11, 2011 respectively be dismissed for lack of merit.
- b. That for expediency sake, either the parties to agree by consensus on:-
 - i. hearing of the notice of motion application dated July 19, 2021 by the petitioner herein by way of written submissions as per the directions of this court; or
 - ii. in the alternative to fix the main petition to proceed on for main hearing through affidavits, *viva voce* evidence, if need be and written submissions as scheduled. For the attaining direction on these two purposes, the matter to be mentioned on October 12, 2022
- c. That there shall be no order as to costs.

It ordered accordingly.

RULING DELIVERED, SIGNED AT MOMBASA AND DATED THIS 3RD DAY OF OCTOBER 2022.

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

In the presence of:

- a. **M/s. Yumnah & Mr. Omar, the Court Assistants.**
- b. **No appearance for the Petitioner.**
- c. **No appearance for the 1st Respondent.**
- d. **M/s. Mwashuruti Advocate for the 2nd Interested Party.**
- e. **M/s. Muthiani Advocate for the 3rd Interested Party.**

