



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MILIMANI**

**ELC PETITION NO. E032 OF 2021**

**IN THE MATTER OF ARTICLES 22,23,47,48, 62, 68 AND 70 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS UNDER ARTICLE 42 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND  
FUNDAMENTAL FREEDOMS), PRACTICE AND PROCEDURE RULES 2013**

**BETWEEN**

**ANTHONY MWANGI NG'ANG'A & 35 OTHERS.....PETITIONERS**

**VERSUS**

**KENYA URBAN ROADS AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY MINISTRY OF INTERIOR AND.**

**COORDINATION OF THE NATIONAL GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**NAIROBI COUNTY GOVERNMENT.....3<sup>RD</sup> RESPONDENT**

**NAIROBI METROPOLITAN SERVICES.....4<sup>TH</sup> RESPONDENT**

**KENYA POWER & LIGHTING COMPANY LIMITED.....5<sup>TH</sup> RESPONDENT**

**WATER RESOURCES MANAGEMENT COMPANY.....6<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL.....7<sup>TH</sup> RESPONDENT**

**RULING**

**A. Background**

1. The Petitioners filed a Chamber Summons Application dated 13/08/2021 under section 10 of the Judicature Act, Cap 8 Laws of Kenya, Rule 3(1) and (2) of the High Court (Practice and Procedure Rules), Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental freedoms) Practice & Procedure Rules 2013. The Petitioners are seeking for the following: -

**1. Spent.**

**2. THAT Costs be in the cause.**

2. The Petitioners also filed a Notice of Motion dated 13/08/2021 filed under Order 51 Rule 1 and 3 of the Civil Procedure Rules 2010, Article 22 (2) (b), (c), & (d) and 165 of the Constitution of Kenya and Rule 25 of the Constitution of Kenya (Protection of Rights and Fundamental freedoms) Practice & Procedure Rules 2013 and the inherent powers of the court. The Petitioners are seeking for the following:

**1. Spent.**

**2. THAT pending hearing and determination of this application conservatory orders be issued against the Kenya Power Company Limited stopping its employees and agents from reconnecting electricity and power lines to any encroachment on the 10-meter road reserve property adjoining parcel of land number DAGORETTI/KANGEMI/712 after the lines were razed down on 3/08/2021.**

**3. THAT pending hearing and determination of this application**

**conservatory orders be issued to the Kenya Urban Roads Authority to**

**mark out, peg and put beacons identifying the 10-meter road and its**

**reserve as adjoining parcel of land number**

**DAGORETTI/KANGEMI/712.**

**4. THAT pending hearing and determination of this petition conservatory orders be issued to The Ministry of Interior and Coordination of The National Government, State Department of Transport and the Kenya Urban Roads Authority to provide, maintain the 10-meter road and stop any encroachments and ensure its usable and motor-able standards to and by everyone.**

**5. THAT pending hearing and determination of this petition conservatory orders be issued against the Kenya Power Company Limited stopping its employees and agents from reconnecting electricity and power lines to any encroachment on the 10-meter road reserve property adjoining parcel of land number DAGORETTI/KANGEMI/712 after the lines were razed down on 3/08/2021.**

3. The Application herein is opposed vide the 1<sup>st</sup> Respondent's Replying Affidavit sworn on 27/08/2021, the 3<sup>rd</sup> Respondent's Replying Affidavit sworn on 24/09/ 2021, the 6<sup>th</sup> Respondent's Replying Affidavit sworn on 19/10/2021, the 5<sup>th</sup> Respondent Grounds of Opposition dated 27/09/2021 as well as a Preliminary Objection dated 27/09/2021 challenging the jurisdiction of this court.

**B. The Petitioners' Case**

4. The Chamber Summons Application is premised on the grounds on its face and further by the Supporting Affidavit sworn by Okello H.O (the Petitioner's Advocates herein) on 13/08/2021. They aver as follows: -

**i. That the Petitioners therein residents at parcel of land number DAGORETTI/KANGEMI/712 (together the neighboring parcels of land) are served with a public road which is of a length of about two kilometers but the road has been fully encroached leading to this petition.**

**ii. That on the night of 3/08/2021 at about 2200 hours a huge fire ball engulfed the skies and destroyed all the developments on the road reserve adjoining the parcel of land number DAGORETTI/KANGEMI/712.**

**iii. That the fire incident was widely publicized and aired in the Kenyan media and recorded (see <https://www.youtube.com/watch>).**

**iv. That there had been several other fire incidences on the same area that have led to the loss of lives and property in the estate, the recent one occurring on the night of 3/08/2021.**

**v. That the Petitioners seek the court assistance to stop future encroachment and erecting of illegal structures that will/may be erected on the above stated road.**

**vi. That there being erected on the said road despite orders from the Assistant County Commissioner.**

**vii. That unless the Honourable court grants the orders sought, the petition would be nugatory and the orders sought academic, and the petitioners/applicants will suffer substantial injury and may never recover from.**

**viii. It is in the interest of justice char the application be allowed.**

5. The Notice of Motion Application is premised on the grounds on its face and further by the Supporting Affidavit sworn by Anthony Mwangi Ng'ang'a (one of the Petitioners herein) on 13/08/2021. In addition to the grounds set out in the Chamber Summons Application, the Applicant avers that: -

i. He is a resident at the parcel of land DAGORETTI/KANGEMI/712 along Waiyaki Way and appointed to represent the other respondents in this petition and therefore competent and authorized to swear this affidavit on behalf of all the respondents.

ii. All the petitioners are residents of the parcel of land

DAGORETTI/KANGEMI/712 holding leases and/or Certificates of Leases.

iii. The residents occupying the parcel of land DAGORETTI/KANGEMI/712 have been denied the right to use, access and gain of all the qualities that a land parcel owner should have as they reside therein.

iv. At their parcel of land number DAGORETTI/KANGEMI/712 (together with the neighboring parcels of land) is served with a public road which of a length of about two kilometers but the road has been fully encroached leading to this petition.

v. On their parcel of land number DAGORETTI/KANGEMI/712 there has been developed various dwelling/residential apartments with multi users whereby they have collectively been denied the equal use of the public road and the rear part of their suit parcel of land by the negligence of the respondents' failure to ensure equality and non-discrimination in land use which they pray that the respondents be compelled to halt anybody constructing on the road pending the hearing of this suit.

vi. As residents and purchasers of the apartments on the parcel of land number DAGORETTI/KANGEMI/712 they have been denied the rights provided for under Article 42 of the Constitution of Kenya 2010 that provides for Clean and Healthy environment, economic rights, reasonable standards sanitation hygiene, physical accessibility to our houses have all been denied due to the ongoing encroachment to the road and road reserve.

vii. The current use of the road adjoining their parcel of land number DAGORETTI/KANGEMI/712 has disregarded the principles of accessible, sustainable use of our land and road disregarded the existence of a road and encouraging the encroachments of the road adjoining DAGORETTI/KANGEMI/712 and the same needs to be curbed and further developments therein stopped.

viii. Article 62 elaborates that all public land includes roads, and it is therefore necessary to ensure that public roads are respected, protected and used for posterity for the purpose that is supposed and not for individual gain of a few to the exclusion of others.

ix. Article 42 of the Constitution of Kenya 2010 provides for Clean and Healthy environmental land use and by allowing the encroachment of the road adjoining land parcel no. DAGORETTI/KANGEMI/712 has led to the degradation of the adjoining water stream and Kangemi Dam water to the detriment of the users downstream and the neighbors.

x. Some illegal structures have been constructed in a style that leads to reclamation of the land from the dam threatening the existence of the Kangemi dam.

xi. There is a stream that leads/feeds the Kangemi Dam with water and the same has been misused by erecting structures on it illegally and by diverting its water illegally and used in an unsustainable manner threatening its existence of the spring and dirtying dam water.

xii. Numerous fire incidents recently on 3<sup>rd</sup> August 2021 and 10<sup>th</sup> September, 2020 was a threat to the lives and property of the occupants of land parcel no. DAGORETTI/KANGEMI/712, the presence of illegal structures on the adjoining road curtailed the movement of emergency personnel and their equipment as firefighters and medics used the compound of the land parcel no DAGORETTI/KANGEMI/712 to put off the fire to save the lives of the encroachers but unfortunately numerous people got injured and lives were lost.

xiii. It is therefore necessary to have the access road marked, beacons and/or pegged then cleared to facilitate its use in order to avoid further incidence of loss of lives during calamities.

xiv. It is a principle of environmental law that all are entitled to use their parcels of land to the best of their abilities, use that accords them maximum benefits, use of access of adjoining roads, unfettered access of the resources attached to their parcels of land and a clean environment in relation to all the road adjoining land parcel DAGORETTI/KANGEMI/712.

xv. The respondents have neglected their statutory mandate as per the Kenya Roads Act 2007 to manage and maintain urban trunk roads. The respondents jointly have facilitated continued encroachment of a public road calculated to deny the occupants of land parcel no DAGORETTI/KANGEMI/712.

xvi. The Respondents should be ordered to coordinate their efforts to remove all the encroachment on the said urban trunk road. This will restore public use and access of the urban trunk road.

xvii. The failure, neglect and abdication of statutory duty to manage the use of the public road by the respondents (in relation to the public road adjoining land parcel no DAGORETTI/KANGEMI/712) has led to the encroachment of the same. The said actions to rehabilitate the public road has led to erection of illegal structures therein.

xviii. Kenya Urban Roads Authority have deliberately abdicated their roles in relation to this suit road denying the petitioners a quiet enjoyment of their parcel of land number DAGORETTI/KANGEMI/712.

xix. The reliefs and remedies sought are purely for public benefit to restore order, save lives, ensure clean and healthy environment and facilitate the use of a public road.

xx. The Petitioners' reliefs sought include;

- a. Declaration that there exists a public road adjoining the land parcel no DAGORETTI/KANGEMI/712.
- b. A declaration that occupants of land parcel no DAGORETTI/KANGEMI/712 have been denied the use of the public road adjoining it.
- c. An Order permanent injunction stopping Kenya Power and Lighting Company limited from connecting and/or reconnecting any power on the road adjoining DAGORETTI/KANGEMI/712.
- d. An Order of permanent injunction for the removal of any structure on the road and road reserve and the whole road adjoining DAGORETTI/KANGEMI/712.
- e. An Order of permanent injunction for the removal of any structure on the riparian lands adjacent the dam.

xxi. These orders and declarations will restore the dignity of the water resources that is Kangemi Dam, its feeder stream and the road adjoining the parcel of land number DAGORETTI/KANGEMI/712.

xxii. The Petitioner has made and acted with all fairness and all necessary disclosure and there is no intention to punish the respondents.

### **C. The Respondents case**

#### **Preliminary Objection**

6. The 5<sup>th</sup> Respondent has opposed this Application seeking that the petition be struck out with costs on the grounds that this Honourable Court lacks jurisdiction to hear and determine this dispute and petition as against the 5<sup>th</sup> respondent and together with all consequential orders as the same offends the provisions of sections 3(1), 10; 11(e), C. (), (k) & (1); 23; 24; 36; 40; 42 and 224(2)(e) of the Energy Act, 2019 together with Regulations 2, 4, 7 and 9 of the Energy (Complaints and Disputes Resolution) Regulations, 2012 as read together with Article 159(2)(c) and 169(1) (d) and (2) of the Constitution of Kenya, 2010 and sections 9(2) and (3) of the Fair Administrative Action Act, 2015.

#### **Replying Affidavits**

7. The deponent to the 1<sup>st</sup> Respondent's Replying Affidavit has averred as follows: -

- a. That the Constitution of Kenya, 2010 at the Fourth Schedule classifies roads in Kenya into two categories, namely, National Trunk Roads and County Roads and vests their jurisdictions accordingly to the respective levels of government.
- b. That the 1st Respondent Authority is the State Corporation under the National Government with the mandate to develop, manage, control, rehabilitate and construct national trunk roads as they traverse urban areas in Kenya.
- c. That character and functionality determine the classification of roads. The cause of action concerns a public road which abuts the Petitioners property, situate at Dagoreti Sub County, Kangemi Location within the Nairobi County, and is as such a residential access road categorized as a County Road.
- d. That the said access road being a County Road, its superintendence, management and control vests in the County Government of Nairobi.
- e. That in view of the above the 1<sup>st</sup>, 2<sup>nd</sup> and 7<sup>th</sup> Respondents herein lack jurisdiction over this public road and are thus nonsuited, and therefore cannot, as a matter of law, implement any of the orders prayed for herein.
- f. That by reason further of the foregoing, the Petition and Motion filed herein, are in so far as they relate to the 1<sup>st</sup>, 2<sup>nd</sup> and 7<sup>th</sup> Respondents, incompetent and misconceived, and are therefore for striking out, or for dismissal with costs.

8. The deponent to the 3<sup>rd</sup> Respondent's Replying Affidavit has averred as follows:

- a. That the enduring principle of the Constitution is the democratic character of the Constitution and all state officers, state organs, individuals and other stakeholders have an obligation to defend and protect the Constitution, the 3rd Respondent has not breached any of the Applicant's rights.
- b. The Constitution is the supreme law of the Land, it is not possible that the drafters of the Constitution could have contemplated every scenario of life and that is why they separated the roles of different organs from other organs like the National Government

and the 3rd Respondents.

c. Article 4 of the Constitution declares Kenya as a Republic which is a democracy founded on principles and values of Governance in Article 10 of the Constitution.

d. The Application is frivolous and vexatious and we shall endeavor to have it struck out.

e. The orders sought are unavailable in the circumstances of the case and that to allow the application would amount to converting a constitutional petition to a civil suit for compensation, the petition as drawn does not meet the requirements of a constitutional reference, it offends the Civil Procedure Rules, and ought to be struck out.

f. The 3rd Respondents are wrongly sued as they are not mentioned anywhere in the Petition or in the Application, the Petitioners/Applicants have also not established how the 3<sup>rd</sup> Respondents have violated, denied, infringed and/or threatened the Petitioners' rights.

g. The court has not been told how the 3<sup>rd</sup> Respondents have violated the rights of the Applicants, the nature and extent of blame, and the particulars of breach of the constitutional provisions. The orders sought, much as they may have a constitutional underpinning, warrant that the 3<sup>rd</sup> Respondent be named and the case against it be disclosed.

h. A court of law cannot issue orders against undisclosed Respondents.

i. A declaration do issue stating that the rights and the fundamental freedoms of the Petitioners have not been violated, infringed, threatened and/or denied by the 3<sup>rd</sup> Respondents.

j. A declaration do issue that the Principle of legitimate expectation has not been breached and the Applicant's rights to protection and full benefit of the Law have not been violated, denied, infringed and/or threatened by the 3<sup>rd</sup> Respondents.

k. Article 186 of the Constitution makes clarifications on functions and powers of county governments. It shows where county functions are situated (Fourth Schedule) and explains about concurrent functions. It also designates any other function not assigned to the counties by the Constitution, or any other written law, as a national government function, the purported violations of human rights is not in the province of the 3<sup>rd</sup> Respondents.

l. Exclusive functions are functions that fall under either the national government or the county governments respectively. Each level of government is assigned its own functions which it should perform without interfering with the functions of the other arms of government, hence the exclusivity.

m. The 3<sup>rd</sup> Respondent prays that the Honourable Court dismisses the application.

**9.** The deponent to the 6<sup>th</sup> Respondent's Replying Affidavit has averred as follows:-

a. Following the Petitioners' assertions that there had been encroachment of a road reserve which led to the degradation of an adjoining water stream and Kangemi Dam, a technical team from the 6<sup>th</sup> Respondent's offices visited the site in question on 1/10/2021 and made the following observations:

a) That the eviction along Waiyaki way has no relation with any water body.

b) That there is an existing informal settlement next to Kangemi Dam which has encroached into the riparian reserve of the dam.

c) That there is an existing electricity line within the informal settlement that had malfunctioned sometime back.

d) There is pollution of the dam from waste, both solid and effluent from the informal settlement.

b. From the foregoing, the technical team recommended that the 3<sup>rd</sup> Respondent ought to provide proper settlement and ensure conventional waste disposal facilities for the informal settlement are put in place.

c. That the 6<sup>th</sup> Respondent has duly performed its mandate as required by law.

## **Submissions**

### **Petitioners' Submissions**

**10.** The Petitioners filed their submissions dated 1/11/2021 in support of their application wherein they submitted that the Petitioners' have filed a Petition and verifying affidavit dated the 13/08/2021 pages 73 to 161 stating that their rights as residents at land parcel situated at Dagoretti/Kangemi/712 along Waiyaki Way have been denied, violated/infringed and is threatened. They aver that it is because they have

been denied the right to use, access and gain of all the qualities they should by being served with the 10-meter public road due to the Respondents' failure to ensure that the said road is accessible and free from any encroachments, see annexures "AM 2 to AM 6".

11. They contend that the Respondents' have all but confirmed that indeed there is a road and encroachment is ongoing as alleged by the Petitioners'. The 5<sup>th</sup> Respondent however raised a Preliminary Objection that the Court Lacks Jurisdiction to hear and determine his dispute as against them as the Petition offends some sections of the Energy Act, 2019, its regulations and the Constitution.

12. According to the petitioners, the issues for determination are as follows: -

*a) Whether the Court can issue conservatory orders.*

*b) Whether the Court has jurisdiction to entertain this matter.*

13. It is their submission that **Article 23 of the Constitution** gives this Honourable Court, the Authority to uphold and enforce the Bill of Rights. **Article 23 (3) (c)** states that the Court can grant appropriate reliefs in safeguarding these rights and this includes conservatory orders. **Article 62 (h)** of the Constitution classifies public road as all roads and through fares provided for by an Act of parliament.

14. Further, they submit that Article 66 of the Constitution mandates the state to regulate the use of any land, or any interest in or right over any land, and in our case in the interest of public safety, public order, public health and land use planning.

15. Therefore, in their petition the Petitioners' have shown and elaborated that there exist a public road which has been encroached into and is of this action that they have firstly been denied the access and use, Secondly due to public safety, there has been a number of fire incidents caused by electricity faults leading to loss of property and lives and there being no access road for the emergency personnel to access the area, they have resulted in entering the Petitioners' premises in order to put it out.

16. Finally, for the sake of public order, health and planning the Court has to issue the said orders, the Petitioners therefore submit that the Court has Jurisdiction to issue conservancy orders in this case.

17. On the issue of preliminary objection, they submit that the essence of a preliminary objection was given by law in the case of **Mukisa Biscuits Manufacturing Co. Ltd Vs. West End Distributors (1969) E.A. 696 at page 700.**

18. It is their submission that it is the actions of the 5<sup>th</sup> Respondent by connecting electricity at a road that has caused numerous fire incidents that has led to the loss of property and lives thus necessitating this Petition.

19. Therefore, the petitioners believe that they have demonstrated that the Court should issue conservatory orders and dismiss the preliminary objection.

#### **Respondents' Submissions**

20. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents did not file written submissions.

#### **1<sup>st</sup>, 2<sup>nd</sup>, and 7<sup>th</sup> Respondents' submissions**

21. The 1<sup>st</sup> 2<sup>nd</sup> and 7<sup>th</sup> Respondents herein filed written submissions dated 25/11/2021 in opposition to the Application dated 13/08/2021.

22. The Attorney General submitted that the Petitioners/Applicant filed an application dated 13/08/2021 seeking for amongst other orders that the Kenya Urban Roads Authority does mark out, peg and put beacons identifying the 10-meter road and its reserve as adjoining parcel of land number Dagoretti/Kangemi/712 as well as orders seeking to have the Ministry of Interior and Co-ordination of National Government and KURA to provide, maintain the 10-meter road and stop any encroachments and ensure its usable and motor-able standards to and by everyone.

23. In opposition to the same, the 1<sup>st</sup> Respondent filed a replying affidavit sworn on 27/08/2021 by one Paul Owino Odak the Assistant Director for Surveys at the Kenya Urban Roads Authority. The 1st Respondent stated that the cause of action concerns a public road which abuts the Petitioners property that is situate at Dagoretti sub county Kangemi Location within Nairobi and is a residential access road categorized as a County Road. The said access road being a County Road, its superintendence, management, and control vests in the County Government of Nairobi and based on that the 1<sup>st</sup>, 2<sup>nd</sup> and 7<sup>th</sup> Respondents herein lack jurisdiction over the road and are thus nonsuited and therefore cannot as a matter of law implement the orders prayed for herein. The Kenya Urban Roads Authority (KURA) is a statutory body established by the Kenya Roads Acts, 2007. KURA is responsible for the management, development, rehabilitation, and maintenance of National Trunk Roads in the urban areas of the Republic of Kenya.

24. According to the 1<sup>st</sup> 2<sup>nd</sup> and 7<sup>th</sup> Respondents, the issue for determination is whether the Petitioner/Applicants are entitled to the orders sought.

25. They submitted that the management, development, rehabilitation, and maintenance of all public roads, save the national trunk roads, are functions of county governments. They relied on **Petition No. 472 of 2014 Council of County Governors vs Attorney General & 4 others [2015] eKLR**. They further submitted that the Respondents cannot be ordered to perform acts that are not within their mandate as it will be outside its powers and illegal. They relied on the case of **Republic v Public Procurement Administrative Review Board Ex parte Kenya**

26. It is their submission that the road in dispute is a county road which falls under the functions of the County government. Kenya Urban Roads Authority (KURA) has no mandate to manage such a road, and should the orders sought against KURA be granted then they would be undertaking an illegal action.

27. Further that the principle of separation of powers requires that there be mutual respect between the courts and the legislature, and that courts should exercise restraint when called upon to determine matters relating to the exercise of legislative power by Parliament.

### **3<sup>rd</sup> Respondent's submissions**

28. The 3<sup>rd</sup> Respondent herein has filed written submissions dated 29/11/2021 in opposition to the Application dated 13/8/2021 and in support of the Preliminary Objection dated 30/9/2021.

29. They submitted that The Petitioners having filed a Notice of Motion vide a certificate of Urgency dated 13/08/2021 seeking for temporary Orders, the 3<sup>rd</sup> Respondent opposed the said Application vide a Replying Affidavit sworn on 24/09/2021. Before the Petitioner's Application dated 13/08/2021 could be adjudicated, the 5<sup>th</sup> Respondent moved the Court with a Notice of Preliminary Objection dated 27/09/2021, challenging the Jurisdiction of this Honourable Court. The preliminary objection as presented by the 5<sup>th</sup> Respondent consists of a pure point of law which has been pleaded and which attacks the entire Petition. The Preliminary Objection was supported by the 3<sup>rd</sup> Respondent.

30. According to the 3<sup>rd</sup> Respondent, the issues for determination are as follows: -

*a. Whether the Notice of Preliminary Objection as raised by the 5<sup>th</sup> Respondent raises points of Law and whether it has merit?*

*b. Whether Orders can issue in a Vacuum and where they have not been pleaded?*

*c. Whether this Suit is frivolous, vexatious, scandalous and an abuse of the Court Process?*

*d. Whether the entire Petition dated 13/08/2021 should be dismissed with costs to the 3<sup>rd</sup> Respondent?*

31. The 3<sup>rd</sup> Respondent submitted that the Preliminary Objection as filed raises pure points of law and should be allowed as prayed by the 5<sup>th</sup> Respondent. They relied on the locus classicus authority on Preliminary objections, the case of **Mukisa Biscuits Versus West End Distributor Ltd 1969 (Supra)**.

32. It is their submission that where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. The escalated issues in the Petition are beyond the scope of this Honourable Court as the Petitioners have by passed the rightful forum i.e. the Energy and Petroleum Tribunal as espoused in section 25 of the Energy Act 2019 and also Section 9 of the Energy and Petroleum Regulatory Authority.

33. The 3<sup>rd</sup> respondent submits that it is trite Law that Jurisdiction is a weighty fundamental issue, and without it a Court should down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

34. The instant Petition as framed goes against the letter and the spirit of Article 22, 23, 159 2(c) and 165 of the Constitution. The Orders and the declarations sought in the Petition are *sui generis*, and the same can only be granted by a Court that has jurisdiction, this Honourable Court lacks that jurisdiction at the moment.

35. It is their submission that The Petitioners have not exhausted all the statutory available remedies in the Energy Act, 2019 before presenting the instant Petition, the same violates the provisions of the Energy Act, 2019 holistically. They relied on the case of **Hassan Ali Joho & another -v- Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR**. As such, they pray and submit that this Honourable Court does allow the preliminary objection.

36. On the issue of whether orders can issue in a vacuum, the 3<sup>rd</sup> Respondent submits that orders cannot issue in a vacuum. The petition and the application have not raised any constitutional issue as against them and the issues raised against the 3<sup>rd</sup> Respondent are purely private law claims under the NEMA and Energy laws.

37. The Orders and the Declarations sought by the Petitioner are too ambiguous as neither the Application nor the Petition discloses any reasonable cause of Action against the 3<sup>rd</sup> Respondent. They relied on **Order 2 Rule 15 of the Civil Procedure Rules** (the Rules) and submitted that the court has power to strike out pleadings on several grounds which includes striking out where the pleading in question does not disclose a reasonable cause of action or defence in law. The petition as filed does not disclose any reasonable cause of action as against the 3<sup>rd</sup> Respondent. They submit that the causes of actions raised fall under the purview of the National Government and other private sectors.

38. It is the 3<sup>rd</sup> Respondent's submission that **Article 186** of the Constitution makes clarifications on functions and powers of the county governments. Under the Fourth Schedule, the Constitution clearly states the said functions and powers and further provides that other functions not assigned to the Counties by the Constitution, or any other written law, as a national government function, the purported violations of Human Rights is not in the province of the 3<sup>rd</sup> Respondents.

39. Based on the foregoing, they submit that the suit as against the 3<sup>rd</sup> Respondent, is an abuse of the Court Process and the same should be dismissed with costs to the 3<sup>rd</sup> Respondent. They relied on the cases of **Trust Bank Ltd v. Amin Co. Ltd Sanor (2000) KLR** and **Joseph Muthee Kamau & Another v. David Mwangi Gichure & Another (2013) eKLR**.

40. The 3<sup>rd</sup> Respondent submits that the suit as presented is premature, bad in law, misconceived and discloses no reasonable cause of action as against the 3<sup>rd</sup> Respondent, thus rendering it fatally defective and incompetent. Moreover, the issues in the Petition are beyond the scope of this Honourable Court as the Petitioners have by-passed the rightful forum i.e., the Energy and Petroleum Tribunal as espoused in section 25 of the Energy Act 2019 and also Section 9 of the Energy and Petroleum Regulatory Authority, whenever there is a conflict between the Energy Act 2019 and any other Act, then the Energy Act, 2019 shall prevail.

41. Lastly, the 3<sup>rd</sup> Respondent contends that the Preliminary Objection dated 30/09/2021 sets out pure points of Law on Jurisdiction and they urge the Court to dismiss the entire petition and Application dated 13/08/2021 and allow the said Notice of Preliminary Objection.

#### **D. Issues for determination**

42. Having considered all the pleadings and submissions filed in this matter, the main issues for determination are as follows:-

*a. whether this court has jurisdiction to try the matter.*

*b. whether the Petitioner/Applicants are entitled to the orders sought?*

#### **E. Analysis and Determination**

**Whether this court has jurisdiction to hear and determine the dispute herein?**

43. The issue of jurisdiction has substantially been dealt with in court of Appeal in the **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR** where it was stated as follows on the question of jurisdiction of a Court of law.

*“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”*

44. In this Application and the Petition herein, the Petitioners seek the following reliefs against the Respondents:-

*a. Declaration that there exists a public road adjoining the land parcel no*

*DAGORETTI/KANGEMI/712.*

*b. A declaration that occupants of land parcel no DAGORETTI/KANGEMI/712 have been denied the use of the public road adjoining it.*

*c. An Order permanent injunction stopping Kenya Power and Lighting*

*Company limited from connecting and/or reconnecting any power on the*

*road adjoining DAGORETTI/KANGEMI/712.*

*d. An Order of permanent injunction for the removal of any structure on the*

*road and road reserve and the whole road adjoining*

*DAGORETTI/KANGEMI/712.*

*e. An Order of permanent injunction for the removal of any structure on the*

*riparian lands adjacent the dam.*

45. From the pleadings filed, the petitioners claim against the 5<sup>th</sup> Respondent is for an order stopping the 5<sup>th</sup> Respondent from connecting and/or reconnecting any power on the suit premises. There is no doubt that the dispute between the petitioners and the 5<sup>th</sup> Respondent revolves around the question of reconnection of electricity. This has been expressly stated and prayed for under order 2 and 5 in the Notice of Motion Application dated 13/8/2021. A reading of Sections 3, 6 and 61 (3) of the Energy Act 2019 clearly show that such a dispute is a preserve of the Energy Regulatory Commission. The first part of call in the circumstances should be the Energy Regulatory Commission which the petitioners have apparently by passed.

46. From the provisions of the Energy Act 2019, it is apparent that parliament in its wisdom wanted such disputes to be taken away from the

mainstream courts to be handled by a specialized body known as the Energy Regulatory Commission. Article 162 (2) of the Constitution of Kenya provides that parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of and title to, land. Subsequently, the Environment and Land Court Act was enacted. Section 13 (1) of the Environment and Land Court Act provides that this court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution. Such disputes are provided in Section 13 (2) and they relate to the environment and land. The dispute between the petitioners and the 5<sup>th</sup> Respondent is about electricity connection and/or reconnection. This does not fall within the purview of Article 162 (2)(b) of the Constitution and the Environment and Land Court Act. I therefore find that the suit against the 5<sup>th</sup> Respondent is improperly before this court.

47. The Courts have for a long time emphasized on the need for aggrieved parties to strictly follow any procedures that are specially prescribed for resolution of particular disputes. In particular, the Court of Appeal in its decision in Speaker of the **National Assembly v James Njenga Karume [1992] eKLR** held that: -

*“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the constitution or an Act of Parliament, that procedure should be strictly followed.”*

48. The Court of Appeal in **Mutanga Tea & Coffee Company Ltd vs. Shikara Limited & Another [2015] eKLR** which cited with approval the High Court case of **Rich Productions Ltd vs. Kenya Pipeline Company & Another Petition No. 173 of 2014** where it was held that: -

*“The reason why the Constitution and the law establish different institutions and mechanism for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 to supervise bodies such as the 2nd respondent, such supervision is limited in various respects which I need not go into here. Suffice to say that it cannot exercise such jurisdiction in circumstances where the parties before it seeks to avoid the mechanisms and processes provided by law and convert the issue in dispute into a constitutional issue when it is not.”*

49. In the case of **Mutanga Tea & Coffee Company Ltd (supra)**, the court held that:

*“.....such alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a more cost-effective manner....”*

50. Having come to the above conclusion that the suit against the 5<sup>th</sup> Respondent is improperly before this court, the only available remedy is to order which I hereby do that the petitioners’ suit against the 5<sup>th</sup> Respondent be struck out.

51. From the pleadings and submissions filed in court, I find that the gravamen of the Petition herein is the Petitioner’s fundamental human rights under the Constitution of Kenya 2010, the Tribunals, in my view has no jurisdiction to enforce the fundamental rights and freedoms under the Constitution of Kenya 2010. It is clear that it is only the High Court and Courts of Equal Status which are clothed with the power to enforce the Bill of Rights; as to hold otherwise will not only be watering down the Constitutional rights of parties but acting contrary to the constitution.

52. Article 42 of the Constitution guarantees every person the right to a clean and healthy environment and to have the environment protected for the benefit of present and future generations through the measures prescribed by Article 69. The right extends to having the obligations relating to the environment under Article 70 fulfilled.

53. Unlike the other rights in the bill of rights which are guaranteed for enjoyment by individuals during their lifetime, the right to a clean and healthy environment is an entitlement of present and future generations and is to be enjoyed by every person with the obligation to conserve and protect the environment. The right has three components; the right itself, the right to have unrestricted access to the courts to seek redress where a person alleges the right to a clean and healthy environment has been infringed or is threatened; and the right to have the court make any order or give any directions it considers appropriate to either prevent or discontinue the act harmful to the environment, or compel any public officer to take measures to prevent or discontinue the act that is harmful to the environment or award compensation to any victim of a violation of the right to a clean and healthy environment.

54. The Constitution of Kenya 2010 has recognized the right to safe and sound environment to be a fundamental human right, which fundamental human right must not only be respected but enforced through the intervention of this Honourable Court. In view of the provision of Article 22, 23 and 42 of the Constitution of Kenya 2010 and considering the Petitioner’s prayers in the Petition, I am satisfied that this Honourable Court has jurisdiction to hear and determine this Petition to its logical conclusion.

55. In the upshot, I find that the suit against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents is properly before this court and the court has jurisdiction to determine the dispute. Ultimately therefore, upon consideration of all the matters herein, I uphold the Preliminary Objection to the extent that the 5<sup>th</sup> Respondent is struck out of the Petition. The objection raised cannot be upheld as against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> Respondents.

#### **Whether the Petitioner/Applicants are entitled to the orders sought?**

56. The principles in regard to the granting of interim or conservatory orders were outlined by the Supreme Court in the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others, Supreme Court Application NO. 5 of 2014 (2014) eKLR**, where the Court held

that: -

[85] *These are issues to be resolved on the basis of recognizable concept. The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of stay, conservatory orders and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of “stay orders” is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light.*

[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.” (Emphasis added).*

57. The principles in regard to thought of interim conservatory orders were reiterated in the case of **Nubian Rights Forum & 2 others vs. Attorney General & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre for Intellectual Property & Information Technology (Proposed Amicus Curiae) Petition Nos. 56, 58 & 59 of 2019 [2019] eKLR**, the Court reinstated principles in regard to the grant of interim conservatory Orders. The court observed that: -

[91] *This Court is granted powers to issue conservatory orders in constitutional petition under Article 23(3) (c) of the Constitution and Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and procedure Rules 2013.*

[92] *The applicable principles for the grant of conservatory orders were detailed by Onguto J. in Board of Management of Uhuru Secondary School v. City County Director of Education & 2 Others [2015] eKLR. In summary, the principles are that the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether, to grant or deny a conservatory order.*

[93] *We are also guided by the principle that in determining whether or not to grant conservatory orders, the Court must bear in mind that it is not required to enter into a detailed analysis of the facts and the law. As Musinga, J (as he then was) observed in High Court Petition No.16 of 2011, Nairobi – Centre for Rights Education and awareness (CREAW) & 7 others” “...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory order in terms of prayer 3 of the Petitioner’s Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”*

[105] *We have already found that the Petitioners have established, and the Respondent have conceded that there is a risk of prejudice being caused to members of the public and their right to privacy by the disclosure of certain types of personal information in the absence of proposals on how that data will be protected. As regards where the public interest falls in light of the respective prejudices that will be caused if the implementation of NIIMS is stayed, we are persuaded by the definition of public interest by the Indian Supreme Court in the case of Datraj Nathuji Thaware v State of Maharashtra, Indian & Others [2004] INSC 755 S.C 755 of 2004 which adopted the meaning of public interest as set out in Stround’s Judicial Dictionary Vol. 4 (v Ed) as: “A matter of public or general interest does not mean that which is interesting as gratifying curiosity or a love of information or amusement but that in which a class of community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected.”*

[106] *We take the view that it is in the public interest to have an efficient and organized system of registration of persons, and the responsible use of resources in the process, in light of the socio-economic gains of the system that have been illustrated by the Respondents. There is, however, also a public interest in ensuring that the said system does not infringe on fundamental rights and freedoms. There is thus a need for a balancing of the competing public interest rights while the consolidated Petitions are heard, so as to safeguard rights and resources, and ensure that the Petitions are not rendered nugatory.” (Emphasis Added).*

58. From various authorities of the Courts the principles required to be satisfied before granting conservatory orders or interim conservatory orders comprises of the following: -

a) *First, an Applicant must demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice.*

b) *The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.*

c) *Thirdly, the court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.*

*d) The final principle for consideration is whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.*

59. At this stage I am alive to the fact, that the Court is not supposed to examine the merits of the Petition but has to consider whether the Petitioner, has established a prima facie case to warrant interim orders of Protection, in order to secure the substratum of the suit and not to render the petition herein nugatory and become a mere academic exercise.

60. On the issue of public interest, public interest lies in favour of preserving and protecting values and interest. I find that public interest would not be greatly jeopardized and compromised should the court decline to grant the interim orders preserving the substratum of the suit herein.

61. In the instant application and applying the principles, that an Applicant seeking conservatory orders or interim orders is required to satisfy before grant of interim orders; as I have set them out herein above, I find, that the Applicant has not satisfied all the aforesaid principles in regard to the granting of interim or conservatory orders. The Applicant has only demonstrated an arguable prima facie case with likelihood of success but has not shown that in absence of the conservatory orders, they will be in real danger and that they will suffer prejudice as a result of the violation or threatened violation of the Constitution. Further, the Applicant has not demonstrated that, if interim orders or conservatory orders are not granted, the petition or its substratum will be rendered nugatory and finally has not demonstrated that public interest will be prejudiced by a decision not to grant conservatory orders.

62. It is however notable that applicable procedure described in the conservatory orders prayed for can only be determined upon full hearing of the Petition to confirm whose mandate it is to carry out the same. Therefore prayer 2 in the Chamber Summons dated 13/08/2021, prayer 3 and 4 in the Notice of Motion dated 13/8/2021 shall be determined together with the Petition filed herein.

63. Arising from the foregoing, I find that failure to grant the orders sought in the instant application, will not cause irreparable harm to the public. I therefore decline to grant the conservatory reliefs, sought in the application.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 7<sup>TH</sup> DAY OF DECEMBER, 2021.**

.....

**MOGENI J**

**JUDGE**

**In the presence of**

Mr. Okello for the Petitioners

N/A for the Respondents

Vincent Owuor Court Assistant