Namianya & 2 others v CECM Lands, Urban Planning, Housing and Municipalities - Bungoma County & 5 others (Constitutional Petition E003 of 2024) [2024] KEELC 3440 (KLR) (25 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3440 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

CONSTITUTIONAL PETITION E003 OF 2024

EC CHERONO, J

APRIL 25, 2024

IN THE MATTER OF ARTICLES 2,3,22(1),28 AD 40, 162(2)(B) OF THE CONSTITUTION

AND

IN THE MATTER OF PUBLIC NOTICE DEVELOPMENT CONTROL/ENFORCEMEN

BETWEEN

ROSE NANDAKO NAMIANYA ..... 1ST PETITIONER

REDEMPTA NABANGALA ..... 2ND PETITIONER

HARRIET NAFULA ..... 3RD PETITIONER

AND

CECM LANDS, URBAN PLANNING, HOUSING AND MUNICIPALITIES - BUNGOMA COUNTY ..... 1ST RESPONDENT

THE GOVERNER- BUNGOMA COUNTY ..... 2ND RESPONDENT

COUNTY GOVENRMNET OF BUNGOMA ..... 3RD RESPONDENT

CABINET SECRETARY FOR YOUTH AFFAIRS SPORTS AND ARTS ..... 4TH RESPONDENT

THE HONOURABLE COUNTY ATTORNEY ..... 5TH RESPONDENT

THE COUNTY ATTORNEY-BUNGOMA COUNTY ..... 6TH RESPONDENT

RULING

1. This ruling is in respect of the Petitioners Notice of Motion dated 9th February, 2024 brought under the provisions of Article 22 and 23 of *the Constitution* of Kenya, 2010 rules 23 and 24 of *the Constitution*

of Kenya (protection of rights and fundamental freedoms) practice and procedure rules 2013 seeks the following orders;

a. Spent.

b. Spent

c. That a conservatory order to prohibit and restrain the Respondents jointly an severally, their agents, employees, officers and/or any person acting on behalf, authority, instructions and/or directives of the Respondents from trespassing on vandalizing, demolishing and generally interfering with the Petitioners ownership, rights, use and occupation of the properties known as KANDUYI/20, PLOT NO.12A pursuant to public notice dated 31ST January, 2024 pending the hearing and determination of this petition.

d. That the Respondents herein, their agents, servants, employees and/or any other persons acting on its behalf be and are hereby temporarily restrained from destroying, removing and/or disposing by way of demolishing, or to alienate and/or interfere in any manner with the Petitioners' properties KANDUYI/20, PLOT NO.12A.

e. That any other order/or relief that this honourable court may deem fit and just to grant in the premises.

f. That costs of the application be provided for.

2. The application predicated on grounds shown on the face of the application and is supported by the affidavit of the 1st petitioner ROSE NANDAKO NAMIANYA sworn on 9th February,2024.

3. It is the petitioners' case that they legally acquired KANDUYI/20, PLOT NO.12A and have been in possession of the same having established and developed it significantly and are making a living out of the income realized therefrom. The Petitioners stated that they have faithfully paid the required land rates to the County Government since they purchased the same. It was their contention that the suit property had been gazette as one of those set to be removed and or demolished vide gazette notice dated 31st January, 2024 since it was within Kanduyi area.

4. The Petitioners averred that they stand to suffer losses and damages if the orders sought are not granted since the Respondents seek to enforce an irregular notice and that all avenues available to address the dispute have been thwarted by the Respondents thus this current petition which they argue has been brought in good faith and without undue delay.

5. When this Notice of Motion was placed before the court in the first instance on 14th February, 2024, the duty Judge granted a conservatory order pending hearing and determination of the application inter-partes. Directions were also given on how the application would be canvassed.

6. Upon being served with the said notice of motion, the 1st, 2nd, 3rd and 6th Respondents filed a joint replying affidavit in opposition to the application sworn on 1st March, 2024 together with grounds of opposition and a notice of preliminary objection of even date.

7. In the Notice of Preliminary Objection which raised three grounds, it was argued that the Petition does not with reasonable precision state the specific provisions of *the Constitution* and the rights allegedly threatened with violation and/or violated and that the manner of infringement is not stated and substantiated and the Respondents are thereby inhibited from understanding and appreciating the Petitioners alleged Constitutional issues and the Petition is thus for striking out and the Respondents will raise a Preliminary Objection accordingly.

8. Secondly, they argued that this Court lacks jurisdiction to hear and determine the Petition and the Notice of Motion pursuant to section 72(3) of the *Physical and Land Use Planning Act*, Cap 303 Laws of Kenya in so far as it purports to challenge the general public notice enforcement notice published in the Standard Newspaper of 31st January, 2024 and lastly that in furtherance of the overriding objectives of Article 159(2) of *the Constitution* and the Rules this Court peremptorily strike out the Petition and the Notice of Motion as an abuse of the process of the court, with costs to the Respondents.

9. In the grounds of opposition, the Respondents argued that the "suit properties" as purveyed by the Petitioners in their affidavit is part of the public land i.e. LR No. E.Bukusu/N.Kanduyi/882 the 'suit property' set aside for use as "public football ground" (Kanduyi Stadium subsequently renamed Masinde Muliro Stadium) and thus it ceased to be available government land to be re-allocated to the Petitioners herein or any other person(s) and the Petitioners do not have any property or proprietary rights capable of being protected under *the Constitution* and the law. It was stated that the purported transfer or re-allocation of the suit properties to the petitioners was fraudulent, illegal, improperly and irregularly obtained and liable for cancellation and/or rectification.

10. The Respondents further contend that the petitioners have failed to explain the origin of their titles and also the link between KANDUYI/20, PLOT NO.12A and E.BUKUSU/N.KANDUYI/4636.The Respondents argued that it is a misnomer for a party to agitate Constitutional rights on illegality and fictitious documents as the Petitioners have done and the Petition is dead on arrival in the Constitutional Court. They added that the Petitioners have not established a prima facie case to anchor the conservatory orders, interlocutory injunction sought herein and neither have they met the threshold set in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR given that the purported Title to the suit property is fraudulent, illegal, and irregular as the subject suit land was designated as public utility for the general public and in particular as a public football ground and remains public land and can only be used for the purpose for which it was set aside. It was stated that the public interest in this matter far outweighs, overrides individual rights and the same tilts in favour of dismissing the application and the petition.

11. The Respondents also argued that the 1st, 2nd, and 6th Respondents are improperly joined as parties to these proceedings not being the constitutional and statutory legal entities charged with the mandate in the impugned general public notice of 31st January, 2024 the subject of these proceedings and who ought and cannot, by dint of section 133 of the *County Governments Act*, 2012, be sued in their personal capacity in discharge of their public mandate vested in the County Government of Bungoma and whose offices are not capable of being sued and the suit ought to be struck off as against them.

12. Lastly, the Respondents contend that the Petitioners are claiming property rights registered under a Specific Act of Parliament and therefore their claims do not warrant adjudication under *the Constitution*. They urged that in furtherance of the overriding objectives of Article 159(2) of *the Constitution* and the Rules made thereunder for the timely disposal of proceedings that this Court peremptorily strikes out the Petition and its offshoot Notice of Motion as an abuse of the process of the Court with costs to the Respondents.

13. In their replying affidavit and in addition to the arguments made in their grounds of opposition, the Respondents argued that they are mandated by the law and more so *the Constitution* which establishes County Governments to carry out various duties concerning governance of the County. They made reference to their mandate and duties as specified in Article 174, 176,6, 40, 179(1), 183(1), 184,62, 61 of *the Constitution* of Kenya, 2010, the fourth and fifth schedule of *the Constitution*, 2010, Section 36 and part xi of the County Government Act of Kenya, 2012, Section 12(1) of the *Urban Areas and*

Cities Act, Cap 275 Laws of Kenya and Section 56,72(1), 73(2) & (4) *Physical and Land Use Planning Act*, Cap 303 Laws of Kenya amongst other provisions of the law.

14. The respondents confirmed that indeed on 31st January, 2024 they issued a notice through the standard newspaper giving guidelines on physical planning and land use within Bungoma county. They contend that the said notice did not take away any land legally acquired and that once an enforcement notice has been served according to the law, any aggrieved party ought to appeal to the relevant County Physical and land use Planning liaison committee within 14 days of service of the said notice and the committee shall determine the appeal within 30 days after which an appeal shall lie in court for determination.

15. It was Respondents further contention that the county government of Bungoma acquired all that land known as E.BUKUSU/N.KANDUYI/882 measuring approximately 11.8 hectares from its predecessors which was set aside for public utility and in particular a football stadium and a title deed issued on 22nd May, 1973 under the Register Map Sheet No.22 and an easement registered reserving the land for general public use and as such the land was not available for re-allocation to any other persons/individuals including the Petitioners/Applicants herein. They further stated that sometime in 3rd JULY, 1997 E.BUKUSU/N.KANDUYI/882 was purportedly sub-divided into two portions i.e. E.BUKUSU/N.KANDUYI/2725 measuring 10.7ha and E.BUKUSU/N.KANDUYI/2726 measuring 0.11ha while a portion of 0.90ha was unaccounted for.

16. It was averred that the suit property KANDUYI/20, PLOT NO.12A is non-existent and a mere conjecture plucked from the air which cannot be traced in the survey map and no search or green card or PDP has been produced to prove its existence, allocation and actual ownership. The Respondents contend that the process of acquisition of the suit properties cannot be properly traced and if at all KANDUYI/20, PLOT NO.12A and E.BUKUSU/N.KANDUYI/4636 exists, the same are a superimposition of E.BUKUSU/N.KANDUYI/882.

17. The respondents further contend that the Petitioners ought to have taken note of the easement registered over the title to the suit property as required under Section 31 of the Registered *Land Act*, Cap 300 Laws of Kenya (now repealed). It was argued that the petitioners cannot invoke Constitutional protection for an illegally obtained title. They set out particulars of fraud and illegality allegedly committed by the petitioners and urged the court to dismiss the notice of motion and the Petition as a whole with costs.

18. Directions were taken and by consent parties agreed to file and exchange written submissions. As at the time this Court withdrew to write this judgment, the Petitioners had not complied with those directions by filing their submissions for consideration by this honourable court.

19. On their part, the 1st, 2nd, 3rd and 6th Respondents filed their submissions dated 11th March, 2024 in support of their preliminary objection dated 1st March, 2024 and in opposition to the notice of motion dated 9th February, 2024.

20. The 1st, 2nd, 3rd and 6th Respondents submitted that KANDUYI 20 AND PLOT 12A are non-existent plots since they do not appear in the Registry map sheet no.22 and the notification form in the name of the 2nd petitioner in respect of PLOT 20 is unidentifiable and that it lacks a Part Development Plan(PDP). They argued that the plot no. 20 allegedly allocated to the Petitioners in the 1970's bears no resemblance to LR Title No. E.Bukusu/ N.Kanduyi/882 and further that it has not been shown how the 3rd petitioner became the registered owner of E.Bukusu/N.Kanduyi/4636 since all prior documents refer to the 2nd Petitioner.

21. On the issue of jurisdiction, it was submitted that this Court can only exercise jurisdiction donated to it either by *the Constitution* or statute and cannot arrogate itself jurisdiction beyond that which is

conferred by *the Constitution* and/or the law. It was argued that the pleadings by the parties is that the Petitioners are challenging the enforcement notice issued on behalf of the 3rd Respondent by the 1st Respondent in "the Standard Newspaper" of 31st January, 2024. According to the Respondents, the first port of call available to an aggrieved party under Section 72(3) and (4) of the *Physical and Land Use Planning Act* is the County Physical and Land Use Planning Liaison Committee and not this Court. They contend it would be an egregious usurpation of the law and the powers of the County Physical and Land Use Planning Liaison Committee for this Court to entertain this suit in the first instance as urged by the Petitioners.

22. In support of their arguments for applicability of the doctrine of exhaustion, they relied on the following cases; Susan Wanjiku Maina v Director, Physical and Land Use Planning Kiambu County Government & another [2022] eKLR and Ngomo Multi-Purpose Co-operative Society Ltd v County Government of Mombasa [2021] eKLR. They contend that it is trite law that where a procedure is provided for in law, that procedure ought to be followed before invoking the jurisdiction of the Court. They urged the Court to down its tools and order the Petitioners to exhaust the adjudication mechanism provided by the law before invoking the appellate jurisdiction of this Court.

23. On the second issue, it was submitted that the 2nd, 3rd and 4th defendants are improperly joined to this suit since they are not legal persons and for not being constitutional and statutory legal entities capable of suing and being sued under the law. They argued that without the personal names of the holders of those offices, the purported suit against those offices is a non-starter and still- born and an absolute abuse of the Court process.

24. The 1st, 2nd and 3rd Respondents further submitted that under section 133 of the *County Governments Act*, 2012 they cannot be sued in their personal capacity or otherwise as they are not legal entities capable of being sued for commissions or omissions done in their official duties. Reliance was placed on the case of John Mining Temoi & another v Governor of Bungoma County & 17 others [2014] eKLR , John Rimui Waweru & 3 others v Githunguri Constituency Ranching Co Limited & 5 others [2015] eKLR and Khamala Kizito *Temba & and another v the Governor Bungoma County Government & others ELC Case No. 007 of 2023* at Bungoma (unreported).They therefore urged that the suit against the 1st, 2nd and 3rd Respondents be struck out with costs.

25. On the third issue which is the criteria applicable for grant of conservatory orders, it was submitted that the same had not been met as set out by judicial precedents and the law. They quoted the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR, Nkunja v Magistrates and Judges Vetting Board & another (Petition 154 of 2016)[2016] KEHC 7269 (KLR) (Constitutional and Human Rights) (20 May 2016) (Ruling), Centre for Rights Education and Awareness (CREAW) & another v Speaker of the National Assembly & 2 others [2017] eKLR and Muslims for Human Rights (MUHURI) & 2 others v Attorney General & 2 others [2011]eKLR.

26. It was argued that from the Petitioners' own admissions in their pleadings and documents as well as correspondence annexed to the Replying affidavit, the Petitioners have not made out a prima facie arguable case to trigger this Court's exercise of its discretion to grant the conservatory orders sought for the simple reason that Title No.Kanduyi/20, Plot No.12A is non-existent and no injunction can be issued against a non-existent parcel of land. They argued that the petitioner did not present a copy of the title deed, official search or green card to show ownership of the property. It was their further argument that there was no connection between the asserted property Kanduyi/ 20, Plot No.12A and E.Bukusu/N.Kanduyi/4636.

27. The Respondents also submitted that LR No. E.Bukusu/N.Kanduyi/882 measuring approximately 11.8 hectares was designated and set aside for use as public utility for the general public and in particular

as a public football stadium and a Title Deed issued and registered on 22nd May, 1973. To that effect,. LR No. E.Bukusu/N.Kanduyi/882 is a public land reserved for use as public football ground (Kanduyi Stadium which was subsequently renamed Masinde Muliro Stadium) and as such no property rights or claims can be asserted by the Petitioners over the purported E.Bukusu/N.Kanduyi/4636 which admittedly falls within and forms part of LR No. E.Bukusu/N.Kanduyi/882 to form the basis of the injunction and/or conservatory orders sought herein.

28. The Respondent further submitted that no conservatory order can be issued against a non- existent parcel of land. They relied on the case of Josephine Kerubo Nyasimi (Suing as legal representative of the estate of Teresia Moraa Mogendi (Deceased) v Julius Nyamwaka Mogendi & 2 others [2015] Eklr. They submitted that there cannot be rights, property rights or claims of property rights for non-existent "property" E.Bukusu/N.Kanduyi/4636 to which the Petitioners have neither enclosed a copy of the title deed or an official search from the land registry to show a prima facie case of ownership to anchor their claim. They also cited the case of B. V. Attorney General [2004] 1 KLR 431 where the court held that court orders cannot be granted in vain.

29. The Respondents further cited the case of Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment) where the court held that an illegally and unprocedurally acquired title is not protected under Article 40(6) of *the Constitution* of Kenya, 2010 and that a person cannot be allowed to benefit from an unlawful act as per Kamau Mucuha v Ripples Ltd [1993] Eklr and Chemey Investment Limited v Attorney General & 2 others [2018] eKLR.

30. Finally, the Respondents argued that the County Government of Bungoma is to hold the 61st Madaraka Day National Celebrations at Masinde Muliro Stadium and that it was in the interest of the public that the conservatory orders be denied since the land in issue forms part of the land reserved for construction of the public utility stadium. They urged that the application be dismissed with costs.

Legal Analysis And Determiantion

31. I have carefully considered the Notice of Motion application dated 9th February 2024, the supporting affidavit, further affidavit, the annexures thereto and the Petition. I have also considered the Replying affidavit, the annexures thereto, submissions by the parties as well as the applicable law. The Petitioners in the application under review are seeking two reliefs namely; conservatory and injunctive orders.

32. From the pleadings and the annexures thereto, this court is of the view that the following issues commend for determination;

    a. Whether the notice of preliminary objection has merit.

    b. Whether the Petitioners have made out a case for the grant of the conservatory and injunctive order sought.

    c. Who shall bear costs of the application.

33. The Respondents in their Notice of preliminary objection argued that the Petitioners' petition is not precise on the specific provisions of *the Constitution* and the rights allegedly threatened with violation or violated. In the case of Anarita Njeru vs. Republic No.1 (1979) I KLR which established the specificity test stated thus;

> We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that

of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

34. In pronouncements of Olao J which I find persuasive in the case of Martin Wanyonyi C.E.O Centre for Human Rights Organization) & another v County Government of Bungoma & 2 others [2019] eKLR held;

> 'However, I do not see the Anarita and Mumo Matemu cases (supra) as laying down a hard rule that a Petition which does not set out with particularity the Constitutional provisions alleged to have been infringed must suffer the fate of dismissal or striking out. Indeed, the Mumo Matemu case (supra) refers to "reasonable precision" while the Anarita Karimi Njeru case (supra) talked about a "reasonable degree of precision." The Anarita Karimi Njeru case (supra) also emphasizes the need "to ensure that justice is done." The view I take of the matter is that whereas it is important to follow the guidelines and draw proper pleadings because they are the background upon which Constitutional Petitions and indeed all other claims are determined, transgressions that do not prejudice the opposing party should not in themselves be employed to defeat a claim because even Article 159(2) (d) of *the Constitution*, while not a panacea, for all ills, recognizes that:-
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> > "Justice shall be administered without undue regard to procedural technicalities ...."
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> It is also provided for in Article 22(3) (b) of *the Constitution* with regard to the enforcement of the Bill of Rights that: -
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> > "Formalities relating to the proceedings including commencement of the proceedings, are kept to the minimum, and in particular that the Court shall, if necessary, entertain proceedings on the basis of informal documentation."

35. Having said that and on a quick perusal of the petition, I note that the Petitioners have quoted various provisions of *the Constitution* which in their view have been violated or threatened to be violated in part D of the petition and has gone ahead to explain how the said provisions have been violated and the injury he has suffered as a result in part C of the petition. Further, it is clear from reading the petition in totality, that the Constitutional right that the Petitioners allege to have been infringed upon by the Respondents is the right to acquire and own property which is said to be under threat due to the looming demolition of the property on the suit property and the seizure of the suit land. There is no doubt that Article 40 of *the Constitution* protects the right to property. Therefore, as far as the format is concerned, this Petition is worth sustaining.

36. On whether this court has jurisdiction to hear and determine this application, the Respondents argued that the petitioner's erred in filing this matter before this court prior to preferring an appeal against the enforcement notice before the Physical and Land Use Planning Laison Committee (hereinafter 'the committee'). The Respondents invoked the doctrine of exhaustion where they argued that the Petitioners ought to have commenced these proceedings at the committee level before approaching this honourable court as required under Section 72(3) and (4) of the *Physical and Land Use Planning Act*.

37. It is trite law that a Court cannot act in a matter where it has no jurisdiction for jurisdiction is everything, and a premise upon which a Court or Tribunal derives its power, authority and legitimacy to entertain any matter before it. This proposition is supported by the pronouncements of the Court

in the case of Phoenix of E.A. Assurance Co. Limited vs. S. M. Thiga t/a Newspaper Service [2019] eKLR where the Court stated thus:-

> "…'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae."

38. The provision in issue; Section 72 of the *Physical and Land Use Planning Act* states as follows;

72. Enforcement notice

(1) A county executive committee member shall serve the owner, occupier, agent or developer of property or land with an enforcement notice if it comes to the notice of that county executive committee member that—

(a) a developer commences development on any land after the commencement of this Act without the required development permission having been obtained; or

(b) any condition of a development permission granted under this Act has not been complied with.

(2) An enforcement notice shall—

(a) specify the development alleged to have been carried out without development permission or the conditions of the development permission alleged to have been contravened;

(b) specify measures the developer shall take, the date on which the notice shall take effect, the period within which the measures shall be complied; and

(c) require within a specified period the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.

(3) Where a person on whom an enforcement notice has been served is aggrieved by that notice, that person may appeal to the relevant County Physical and Land Use Planning Liaison Committee within fourteen days of being served with the notice and the committee shall hear and determine the appeal within thirty days of the appeal being filed.

(4) Any party aggrieved with the determination of the county physical and land use planning liaison committee may appeal to the court only on a matter of law and the court shall hear and determine the appeal within thirty days.

39. Having stated the relevant law relied upon by the Respondents in support of their Preliminary Objection, it is now my duty to find out whether the Respondents have established whether the suit and the application fall within the purview as circumscribed under Section 72 of the *Physical and Land Use Planning Act*.

40. The Respondents argue that the current application and the Petitioners petition is ideally premised on what the 1st respondent caused to be published in the standard newspaper dated Wednesday, 31st January, 2024 titled development control/enforcement. In that notice, the 1st Respondent disclosed the discovery of alleged illegal developments/occupations and issuance of business/trade permits by the county and national government within Bungoma county municipalities, towns, Markets and other urban areas. The notice invoked the provisions of *the Constitution*,2010 i.e. Chapter 5 Article 62 (2) and the fourth schedule Part 2(8) and the *Physical and Land Use Planning Act* No.13 of 2019, the Environmental Management and Coordination Act1999(Amended 2015), *Urban areas and Cities Act* 2011 and the County Government Act 2012 Section 103.The notice went ahead and issued an advisory to the residents, developers/investors and officers in both County and national government and called for the strict adherence of the issues discussed thereafter.

41. On examination of the Petitioners' case, it emerges that the property in issue was marked for demolition to pave way for the Masinde Muliro Stadium, Kanduyi. The Petitioners allege that the suit property belongs to them having legally and procedurally acquired the same. At this juncture, it is imperative to note that the threshold for preliminary objections is now well settled and there would be no reason to reinvent the wheel. Courts have held more than once that a preliminary objection deals with pure points of law where facts are not disputed. Where the court has to look outside the case for evidence to establish the facts presented, then this falls outside the threshold where a full hearing has to be conducted to disprove certain facts.

42. In Mukisa Biscuit Manufacturing Co Ltd v West End Distributors ltd [1969] EA 696, the court stated as follows:-Per Law, JA

> "So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit." This was followed up by the judgment of Sir Charles Newbold, P in the same case:
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> > "The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop."

43. In the case of Lemitei Ole Koros & another v Attorney General & 3 others [2016] eKLR, Munyao, J stated as follows:

> "Where facts are not contested, the court is able to make a determination of law on the preliminary objection, but where facts are in contest, then automatically, the issue falls out of the ambit of a preliminary objection. It would be improper for a court to make a contested determination of fact within a preliminary objection."

44. Again, in the case of Oraro vs Mbaja [2005] KLR 141, the court held as follows;

> " Anything that purports to be a preliminary objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence."

45. In my considered view and understanding, the Petitioners in the petition herein are seeking for the protection of what they claim to be a legally and lawfully acquired title deed and their structures as erected in the suit property as opposed to an issue of land use and planning. The preamble of the *Physical and Land Use Planning Act*, CAP 303 Laws of Kenya which states 'AN ACT of Parliament to make provision for the planning, use, regulation and development of land and for connected purposes' is clear and elaborate on the scope of its application.

46. The institution of the petition herein, although primarily triggered by the development control/ enforcement notice, predominantly rests on the assertion that the Petitioners are the registered owners of the suit property. The suit property purportedly faces imminent demolition by the Respondents, and the Petitioners aim to seek legal protection for it. In relation to this; Article 23 of *the Constitution* grants the High Court and in this case the Environment and Land Court as established under Article 162(2) jurisdiction to hear and determine applications for redress of a denial, violation or infringement or threat to a right or fundamental freedom in the Bill of Rights.

47. Further, a quick look at the Respondents' grounds of opposition and replying affidavit reveals that the mode in which the Petitioners acquired title of the suit property takes center stage as opposed to matters of planning, use and development of land. It is trite law that the power to determine all disputes relating to the environment, the use and occupation of, and more so thelegality of title to land is vested in the Environment and Land Court under Article 162 (2) (b) of *The Constitution* of Kenya, 2010 and Section 13 of the *Environment and Land Court Act*, No. 19 of 2011. Further, the ELC Court has powers under Section 13 (7) of the ELC Act to grant interim or permanent preservation orders including injunctions, prerogative orders, award of damages, compensation, specific performance, restitution, declaration or costs. For the abovementioned reasons therefore, the preliminary objection fails.

48. Moving on to the second issue for determination, the principles for the grant of conservatory orders has been discussed in numerous decisions by the superior Court. In the case of Gatirau Peter Munya V Dickson Mwenda Kithinji And 2 Others (2014) KLR, the Supreme Court held;

> ''(86) Conservatory orders bear a more decided public-law connotation; for these are orders to facilitate ordered functioning within the 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 the case; or ' high probability of success' in the Petitioners' case for orders of stay.
>
> Conservatory orders, consequently, should be granted on the inherent merits of the case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes.''

49. Again, in Martin Nyaga Wambora V Speaker Of The County Assembly Of Embu And 3 Others (2014) KLR, it was held;

> ''(59) In determining whether or not to grant conservatory orders, several principles have been established by the courts. The first is that—'(an Petitioners) must demonstrate that he has

a prima facie case with a likelihood of success and that unless the court grants conservatory order, there is real danger that he will suffer danger that he will suffer prejudice as a result of the violation or threatened violation of *the constitution*'

(60) To those erudite words I would only highlight the importance of demonstration of 'real danger'. The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial action or redress by the Court. Thus an allegedly threatened violation that is remote and unlikely will not attract the court's attention.'

(61) 'The second principle, which naturally follows the first, is whether if a conservatory order is not granted, the matter will be rendered nugatory.'

50. On whether the Petitioners have made out a case for the grant of conservatory and injunctive orders; the Petitioners argue that they are apprehensive that the Respondents may take steps to demolish their buildings and seize their parcel of land while they hold what they allege is a legal title deed for the suit land. They annexed copies of the alleged title in support of their claim and argued that they acquired ownership of the same upon successful application to the defunct County Council of Bungoma that saw the said property being allocated to them.

51. The court is aware that this being an interlocutory application, the court should avoid delving into the matter in great detail or making any comments or conclusions which may prejudice the fair trial of the Petition. However, on examination of the documents presented by the Petitioners, it appears that one Susan Nekesa Nasibo initially applied to the defunct Bungoma County Council to have the plot Kanduyi 12A allocated to her back in the year 1969 and that she later sold the same to the 1st petitioner while the 2nd petitioner applied for and was allocated Plot 20 in Kanduyi in the year 1970 and was later issued with a title deed for E.Bukusu/N.Kanduyi/4636 in the year 2009 as per the attached documents.

52. In my view, the issues raised in the petition are weighty and ought to be interrogated by way of cross-examination of evidence during the full trial and conclusively determined at that stage.

53. Further, the Respondents in their replying affidavit have admitted to there being sub-divisions of the initial title i.e. L.R. No. E.Bukusu/ N.Kanduyi/882 to new parcels and allocations of the new resultant parcels of land. They have further enumerated particulars of fraud where they claim the manner in which the Petitioners acquired the suit property is suspect and is marred with irregularities making the process flawed and fraudulent. In the case of Kinyanjui Kamau-vs-George Kamau (2015) eKLR, the Court of Appeal held;-

> " It is trite law that any allegations of fraud must be pleaded and strictly proved. see Ndolo vs Ndolo (2008)1KLR (G & F) 742 wherein the court stated that ".. we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely; proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases." In case where fraud is alleged it is not enough to simply infer fraud from the facts"

54. It is trite that, although the standard of proof of fraud is not proof beyond reasonable doubt, it is higher than proof on a balance of probabilities required in other civil claims. In RG PATEL VS LALJI MAKANJI (1957) EA 314 the court expressed itself as follows:

> " Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require prove beyond reasonable doubt, something more than a mere balance of probabilities is required"

55. In my considered view, the real issues in trial in this matter cannot be determined from evidence as presented in the various affidavits but upon full hearing.

56. At this interlocutory stage, however, the court is satisfied that the Petitioners have demonstrated a prima facie case and raised arguable grounds that deserve to proceed to full trial as enunciated in the case of Mrao v First American Bank of Kenya Limited & 2 Others [2003] eKLR.

57. The court has further considered the pleadings and the affidavit evidence on record against the second principle, that is, whether the Petitioners might suffer irreparable injury which cannot be adequately compensated by an award of monetary damages. It is not in dispute that the Petitioners have made extensive developments on the suit land where they derive their livelihood over the years that they have been in occupation. This court is of the opinion that the Petitioners shall suffer serious hardship if the developments therein were demolished since the same are their source of income before their petition is heard and determined. The court is of the opinion that such damage cannot be adequately compensated by an award of damages.

58. Even if the court were to consider the balance of convenience, the same would tilt in favour of the Petitioners who appear to be in possession. The court is of the view that it would cause greater hardship to the Petitioners if they were to be evicted from the suit property and the developments therein demolished compared to the inconvenience the Respondents may suffer if the conservatory order was granted.

59. Taking into consideration the totality of the matters, this court is of the opinion that the purpose of the conservatory order sought herein is to preserve the suit properties pending the hearing and determination of the petition and resolution of the various issues raised therein. If the suit property was to be alienated further before determining whether the property in dispute rightfully belonged to the Petitioners or the County Government of Bungoma and whether indeed the petitioner's constitutional rights have been infringed or are under the threat of being infringed, the outcome of the petition may be rendered nugatory or just an academic exercise.

60. Lastly, although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reasons, directs otherwise as was held in the case of Hussein Janmohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287.

61. This court has considered the fact that this constitutional petition is still pending hearing and determination. In the circumstances, the court is of the opinion that costs of the application should be in the cause.

62. In view of the matters aforesaid, it is my finding that the Petitioners' Notice of Motion application dated 9th February, 2024 has merit and the same is allowed on the following terms;

a. A conservatory order in the nature of an injunction is hereby issued for a period of six(6) months only restraining the Respondents jointly and severally, their agents, employees, officers and/or any person acting on behalf, authority, instructions and/or directives of the Respondents from trespassing on vandalizing, demolishing and generally interfering with the Petitioners ownership, rights, use and occupation of the properties known as KANDUYI/20, PLOT NO.12A pursuant to public notice dated 31ST January, 2024 pending the hearing and determination of this petition.

b. Costs of the application shall be in the cause.

DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 25TH DAY OF APRIL, 2024.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

M/S Seif H/B for Wangila for Petitioners/Applicants.

Mr. Wesonga appearing with Mr. Wekesa and Mr. Wangila Masinde for the 1st 2nd, 3rd & 6th Respondents.

Bett C/A