Wangamati & another v CECM - Lands, Urban, Physical Planning, Housing & Municipalities - Bungoma County & 5 others (Constitutional Petition E001 of 2024) [2024] KEELC 3549 (KLR) (25 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3549 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

CONSTITUTIONAL PETITION E001 OF 2024

EC CHERONO, J

APRIL 25, 2024

BETWEEN

PATRICK WANGAMATI ..... 1ST PETITIONER

WANGAMATI ESTATES LIMITED ..... 2ND PETITIONER

AND

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

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

COUNTY GOVERNMENT OF BUNGOMA ..... 3RD RESPONDENT

CABINET SECRETARY FOR YOUTH AFFAIRS, SPORTS & ARTS ..... 4TH RESPONDENT

ATTORNEY GENERAL ..... 5TH RESPONDENT

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

RULING

1. This Petition was filed contemporaneously with a Notice of Motion application dated 1st February, 2024 in which the Petitioners are seeking the following orders;

   a. (Spent)

   b. That a conservatory order to prohibit and restrain the Respondents jointly & 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 Petitioner's ownership, rights, use and occupation of the property known

as Bungoma/Kanduyi/1 referred to as Wangamati Estates Limited pursuant to the Public Notice dated 31st January, 2024 pending hearing and determination of this application inter-partes.

c. That a conservatory order to prohibit and restrain the Respondents jointly & severally, their agents, employees, officers and/or any person acting on behalf, authority, instructions and/or directives of the Respondents from trespassing on, vandaliing, demolishing and generally interfering with the Petitioner's ownership, rights, use and occupation of the property known as Bungoma/Kanduyi/1 referred to as Wangamati Estates Limited pursuant to the Public Notice dated 31st January, 2024 pending hearing and determination of the 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' property Bungoma/Kanduyi/1 referred to as Wangamati Estates Limited pursuant to the Public Notice dated 31st January, 2024.

e. That any other Order and/or relief that this Honourable Court may deem fit and just to grant in the premises.

f. That the costs of the application be provided for.

2. The application is premised on17 grounds shown on the face of the said application as follows;

a. That the Petitioner applied for a plot in Kanduyi on the 18th March, 1965 from the Bungoma County Council for purposes of establishing a petrol filling station at the Junction of Kanduyi to Bungoma Town. The application was referenced 436222 of 18/03/65.

b. That the application was subsequently processed and allocated a plot vide a notification form dated 1st September, 1969, after the Trade and Markets Committee in Bungoma County Council meeting held on 18th June, 1969 under Minute no. 37/69 and further approved by the Bungoma County Council minute no. 35/69 (8) of 29th July, 1967.

c. That the Petitioner/Petitioners has ever since been in possession by virtue of being issued with a 33 years lease commencing in 1969.

d. That the Petitioner/Petitioners then subsequently entered into an agreement with Agip Limited to set up a petrol station on the premises vide a sublease for 30 years from 1st January, 1972.

e. That the Petitioner/Petitioners further obtained a Certificate of Lease over a property namely Title No. Bungoma/Kanduyi/1 for a further period of 66 years.

f. That the said property has been further established and developed by the plaintiff/petitioners which has served as a source of income for the 1st plaintiff and his family.

g. That the Petitioner/Petitioners has been duly and regularly paying land rates of the said property to the County Government of Bungoma and has been complying with all the statutory requirements regarding the suit property.

h. That prior to the Petitioner/Petitioners establishing and developing the property, the same was approved by the Physical Planner and a map plan and sketches were furnished by the County Government of Bungoma Town Planner.

i. That the Petitioner/Petitioners further sought a charge from Stanbic Bank in order to develop the said property and a mortgage facility of Kshs. 144,206,312/= was advanced to the plaintiff by the bank which the plaintiff has been advancing payment to clear the same.

j. That the Bank undertook due diligence of the said property, carried out valuation and further agreed to secure the property under a mortgage facility.

k. That the Petitioner/Petitioners was surprised upon seeing a Notice dated 31st January, 2024 stating that any illegal development on Public space around the Masinde Muliro Stadium at Kanduyi among other areas within the County should be removed /demolished within 7 days from the issuance of the notice.

l. That the said unfortunate event was communicated to the office of the County of Bungoma however, no response has been given regarding the said issue.

m. That the Petitioner/Petitioners is apprehensive that their property stands to be demolished which as a result will prejudice the plaintiff as the Building is their main source of livelihood and the said property has been devoid of any illegalities.

n. That if conservatory orders are not granted restraining the Respondents from demolishing the plaintiff's property, the Petitioner/Petitioners stands to suffer irreparable loss by losing their property means of livelihood out of an irregular procedure by the Respondents that has denied the Petitioner/Petitioners the information and time to engage any available avenue towards the issue herein.

o. That the Petitioner/Petitioners is willing to comply with any conditions set out by the Court.

p. That it is in the interest of justice that the application be allowed.

q. That there has been no delay in bringing this application.

3. By way of a response, the 1st, 2nd, 3rd & 6th Respondents filed a Notice of Preliminary Objection, Grounds of opposition and a replying affidavit dated and sworn on 26/02/2024 respectively. The Notice of Preliminary Objection raised three grounds as follows;

a. 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. 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.

b. That this Court has no 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

c. That it is meet and 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 strike out the Petition and the Notice of Motion as an abuse of the process of the court, with costs to the Respondents.

4. As regards the Grounds of opposition, the 1st, 2nd 3rd and 6th Respondents raised the following 21 grounds as follows;

a. That the ''suit property'' as purveyed by the Petitioners herein is part of the public land set aside for use as ''public football ground''(Kanduyi Stadium subsequently renamed Masinde Muliro Stadium) and the Petitioners herein do not have any proprietary rights capable of being protected under *the Constitution* and the law.

b. That once the ''suit property'' was designated and set aside for use as public utility for the general public and in particular as a public football Stadium and an easement duly registered on the Title, it ceased to be unalienated Government land that could be available for re-allocation to the Petitioners herein and any subsequent issuance of a lease in respect to the said public land for private commercial use and/or benefit other than ''for use as public football ground(Kanduyi Stadium)'', was a nullity ''ab-initio''.

c. That the purported Certificate of Lease in the name of the 2nd Petitioner herein in relation to the suit property herein which was designated as public utility for the general public and in particular as a public football Stadium is fraudulent, illegal, improperly and irregularly obtained and for cancellation, revocation;

d. That the 1st Petitioner did not have the ''purported lease'' of 33 years from the Bungoma County Council as alleged or at all and has failed to annex the said purported lease of 33 years to his pleadings to establish the assertions and nothing can be extracted from the purported lease between Patrick John Kimingich Wangamati and Agip Limited dated 1st August, 1973 as creating a lease between the 1st Petitioner and the County Government of Bungoma and/or its predecessor Bungoma County Council to premise the property rights pleaded;

e. That the purported grant of two distinct leases to the 2nd Petitioner and Patrick Wangamati Kimingich simultaneously allegedly over the same parcel of land for the same period of 66 years both from 1st November, 2003 is fraudulent, illegal, irregular and untenable in law;

f. That the Petitioners' case is underwritten in misrepresentations, non-disclosures, concealment, suppression of material facts, evidentiary content that negate their pretended property claims.

g. That fraud, illegality unravels all and the purported Certificate of Lease or Title to the suit property is a mere piece of paper and this Court ought not give any order, judgment to foster the patent fraud and illegality;

h. That the Petitioners did not plead, establish and prove the legality and regularity of their root titles and/or Certificate of Leases even though the Certificates of Leases are under the challenge to anchor the reliefs sought in the Notice of Motion and the Petition herein;

i. 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. 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.

j. That the Petitioners claim in the Petition are constructed on invalid and illegal documents, instruments, Title(s) and 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.

k. That the Petitioners alleged Title(s) sought to be protected under Article 40 of *the Constitution* of Kenya are fictitious and/or were acquired unlawfully being unlawful excision from land

earlier set aside as public land for public use and held in trust for the people of the County of Bungoma by the County of Bungoma since 1973.

l. That the Petitioners Notice of Motion is incompetent being constructed on straws and hearsay.

m. 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) KLR given that the purported Certificates of Leases to the suit property is fraudulent, illegal, 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;

n. That public land must only be used for the purpose for which it was acquired and cannot be allocated to the individual persons such as the Petitioners herein for commercial or other purposes and an irregular, illegal and fraudulent Certificates of Leases cannot be protected under Article 40(6) of *the Constitution* of Kenya, 2010;

o. That absent a prima facie case established by the Petitioners for the grant of the injunction sought, it is needless for this Court to consider other conditions for grant of the conservatory order or injunction and the application is for dismissal with costs;

p. 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;

q. 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 Government 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;

r. That the purported 1st, 2nd and 6th Respondents are legal phantoms for they are neither human beings nor an incorporated or statutory legal entity capable of suing or being sued and this Honourable Court is obligated to strike them off from this suit as it is an abuse of the Court process to purport to sue non-existent entities;

s. That the Petition and the application herein are premature and speculative as the impugned general public enforcement notice did not single out the Petitioners' lawful property and if the said lawful property falls under the said notice, the Petitioners were duly called upon to regularize where necessary and/or leave the public land and it is premature to come to this Court without addressing the issue to the channels provided for by the notice and the law;

t. That *the Constitution* is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringement of rights can be found a claim under substantive law, the proper course is to bring the claim under that law and not under *the constitution*. The Petitioners are claiming property rights registered under specific Acts of Parliament and therefore their claim does not warrant adjudication under *the Constitution*

u. That it is meet and 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 strike out the Petition and its offshoot Notice of Motion as an abuse of the process of the Court with costs to the Respondents.

5. The Replying affidavit which is also in opposition to the said application is sworn by one Arch Douglas Sasita Wekesa working as the County Executive Committee member responsible for lands, Urban/ Physical Planning Housing & Municipalities, County Government of Bungoma. In the said replying affidavit, the deponent Arch Douglas Sasita Wekesa deposed that section 72(1) of the *Physical and Land Use Planning Act* CAP. 303 Laws of Kenya gives him power as a County Executive Committee Member responsible for Physical and Land Use Planning to serve the owner, occupier, agent or developer of property or land with an enforcement notice if it comes to his notice that a developer commences development on any land without the required development permission having been obtained, or any condition of a development permission granted under the law has not been complied with.

6. The County Executive Committee member, lands, Urban/Physical Planning Housing & Municipalities, County Government of Bungoma further stated that it was pursuant to the powers provided for under the foregoing provisions of the law that he issued the impugned general notice published on the Standard Newspaper of 31st January, 2024 to the general public on behalf of the County Government of Bungoma. The deponent further deposed that the foregoing general notice did not take away lawfully and legally acquired proprietary rights of any person or entities but only sought to align the developments Physical and Land Use within the County with the applicable laws and Regulations.

7. He further deposed that Section 72(3) and (4) of the *Physical and Land Use Planning Act* provides that 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 and 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. He stated that any person challenging the general notice ought to first prefer an appeal to the County Physical and land Use Planning Liaison Committee within fourteen days of being served with the notice and not this Court. He stated that he has been advised by their advocate on record that where there is a procedure for redress, that procedure ought to be exhausted first before a party comes to court and to the extent that the Petitioners herein are challenging the enforcement notice of 31st January, 2024, they must first comply with section 72(3) of the *Physical and Land Use Planning Act* Cap303 Laws of Kenya.

8. It was deposed that the County Government of Bungoma through its predecessor, Bungoma County Council, became the owner of the Parcel of land LR No. E.Bukusu/N.Kanduyi/882 Measuring approximately 11.8 Hectares which 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 in the name of Bungoma County Council (the predecessor of County Government of Bungoma).

9. It was deposed that an easement ''reserved for use as public football ground (Kanduyi Stadium)'' was duly registered on the green card as a notice to the public that the land was acquired for public utility, owned by the Bungoma County Council (the predecessor of County Government of Bungoma) and unavailable for re-allocation to individual persons. He annexed a copy of the green card for the said land parcel No. E.Bukusu/N.Kanduyi/882 and marked "DSW1".

10. He stated that in 1997, the said land parcel No. E.Bukusu/N.Kanduyi/882 reserved for use as public football ground (Kanduyi Stadium) was purportedly subdivided to give rise to new parcels of land L.R No.E.Bukusu/N.Kanduyi/2725 Measuring approximately 10.7 Hectares and L.R No. E.Bukusu/

N.Kanduyi/2726 Measuring approximately 0.11 Hectares both registered in the name of the 3rd Respondent's predecessor, Bungoma County Council. However, a portion of 0.99 Hectares that was part of the original Stadium parcel of land is not accounted for by the aforesaid subdivision. He annexed a copy of Bungoma Registry Map Sheet NO.22 and marked ''DSW2''. He stated that a copy of Bungoma Registry Map Sheet NO.22 is not entirely legible and that they have sought a clearer and legible copy vide a letter dated 26th February, 2024, a copy of which is annexed and marked ''DSW2''.

11. The deponent further deposed that whereas the purported subdivision of LR No. E.Bukusu/N.Kanduyi/882 giving rise to LR No. E.Bukusu/N.Kanduyi/2725 and LR No. E.Bukusu/N.Kanduyi/2726 was allegedly done on 3rd July, 1997, a transfer was registered to one Alexander Kitungu Kamwele at Kshs.50,000/ on 7th July, 1992 and a Title deed issued to him on even date for L.R NO.2726 marked ''DSW3''.

12. Further, he stated that the 1st Petitioner in a letter dated 17th July 1998 had raised the issue that the purported transfer of the property LR No. E.Bukusu/N.Kanduyi/2726 to one Alexander Kitungu Kimwele was illegal, improper and irregular as that was facilitated by the then District Physical Planning Officer, Bungoma whose husband was Alexander Kitungu Kimwele. A copy of the said letter is annexed as ''DSW4''.

13. The deponent went on to state that in respect to LR No. E.Bukusu/N.Kanduyi/2725, an easement '' reserved for use as public football ground (Kanduyi Stadium)'' was retained but the parcel was purportedly, and illegally further subdivided into 27 parcels of land on 15th December,2008 to give rise to LR Nos. E.Bukusu/N.Kanduyi/4623-4649. He annexed a copy of the green card as ''DSW5''. He stated that whereas the Petitioners purported to lay claim of ownership and property rights on LR No.E.Bukusu/N.Kanduyi/2726, the 1st Petitioner did not establish their ownership of the said parcel of land and no instrument legally granting them ownership and property rights. In fact, the Municipal Council of Bungoma by a letter dated 27th November, 2008 purported to again separately illegally allot LR No.E.Bukusu/N.Kanduyi/4649, a subdivision of LR No. E.Bukusu/N.Kanduyi/2725 to the 1st Petitioner and cross-reference it as plot number 1. He annexed a copy of the said letter as ''DSW6''.

14. He further deposed that the 1st Petitioner vide a letter to the lands officer Bungoma District dated 12th January, 1993 sought for extension of lease for his alleged parcel of land which extension was never given and no process was undertaken in that regard and the Petitioners herein did not establish any extension of their alleged property. He annexed copies of the two letters dated 12th January, 1993 and 14th October, 1999 as ''DSW7''

15. He stated that the purported suit property Bungoma/Kanduyi/1 does not exist both in the land records and on the ground and the geo space occupied by the purported suit property was by the 1st Petitioner's own admission supposedly covering the same geo space for L.R No. E.Bukusu/N.Kanduyi/2726 that emanated from LR No.E.Bukusu/N.Kanduyi/882, the Kanduyi Stadium public utility.

16. He stated that the 1st Petitioner vide his letter to the land Registrar, Bungoma District dated 11th February, 2000 confirmed that his purported land Bungoma/Kanduyi/1 was sitting on the same geo space as LR No.E.Bukusu/N.Kanduyi/2726 which he purportedly sought an extension of lease in his letters of 12th January 1993 and 17th July, 1998 which extension was never granted. He annexed a copy of the letter dated 11th February, 2000 as ''DSW8''.

17. It was also deposed that Wangamati Estate Limited, the 2nd Petitioner herein was incorporated and came into being on 27th September, 2010 post the date of the commencement of the purported lease, the premise of this suit. He annexed a copy of the Business Registration service search dated 13th February, 2024 and marked ''DSW9''. He stated that the purported subdivision of the public

utility land LR No. E.Bukusu/N.Kanduyi/882 ''reserved for use as public football ground (Kanduyi Stadium)'' into two resultant parcels LR No. E.Bukusu/N.Kanduyi/2725 and LR No. E.Bukusu/N.Kanduyi/2726 and subsequent subdivisions giving rise to the suit properties herein registered to private individuals was illegal, improper and irregular as the suit property, being a portion of L.R No. E.Bukusu/N.Kanduyi/882 was ''reserved for use as public football ground (Kanduyi Stadium)'' and unavailable for re-allocation or alienation to private individuals whether as a leasehold or freehold interest.

18. In addition, he stated that the suit property herein Bungoma/Kanuyi/1 does not have its own geo space but occupies the geo space of LR No. E.Bukusu/N.Kanduyi/2726 and the purported allocation of LR No. E.Bukusu/N.Kanduyi/4649 cross referenced as plot NO.1 to the 1st Petitioner both originally LR No. E.Bukusu/N.Kanduyi/882 are still part of the public land belonging to the 3rd Respondent reserved for use as public football ground(Kanduyi Stadium) and were never alienated to the Petitioners herein either by way of leasehold or freehold interest and green cards show that they are still in the name of the 3rd Respondent.

19. The deponent also stated that he has been advised by their advocates on record which advise he believes to be true that the Certificates of Leases purveyed and uttered by the Petitioners to this Court are fraudulent, illegal, improperly and irregularly obtained as there are two separate Certificates of Leases apparently over the same property for the same tenure from 1st November, 2003 issued on different dates, one lease to the 2nd Petitioner and the other to Patrick Wangamati Kimingich of Webuye. He set out 8 particulars of fraud and illegality allegedly committed by the Petitioners/applicants as follows;

    a. Purportedly procuring a lease on public land and when the same was incapable of being granted;

    b. Purporting to create a lease on public land without following the statutory mandatory procedures and processes;

    c. Purporting to obtain a lease on already alienated land and being public land without part development plan for identification of the physical location of the purported leased property;

    d. Obtaining two different leases over the same property for the same period of 66 years both from 1st November, 2003 in the names of two different persons;

    e. Purporting to have two concurrent leases over the same property;

    f. Fictitiously creating a land Reference NO. Bungoma/Kanduyi/1 that does not exist on the ground and creating a fictitious Certificate of Lease thereof and which masquerades to occupy a geo space excised from the original LR No.E.Bukusu/N.Kanduyi/882 registered in the name of the County Government of Bungoma, as public land;

    g. Purporting to grant a lease to Wangamati Estates Limited from 1st November, 2003 yet Wangamati Estates Limited was incorporated and came into being on 27th September, 2010 post the date of the commencement of the purported lease;

    h. Purporting to create a charge on Bungoma/Kanduyi/1 which in fact is a non-existent parcel of land conjured up on public land originally registered in the name of the County Government of Bungoma in 1973.

20. In conclusion, the deponent deposed that the suit property being purveyed by the Petitioners was excised illegally from the original LR No. E.Bukusu/N.Kanduyi/882 designated and reserved for use as public football ground (Kanduyi Stadium) in 1973 and having been so designated, it was rendered

a public utility and therefore not available for alienation to the 2nd Petitioner and Patrick Wangamati Kimingich of Webuye or any other private individual/entity either as a freehold or leasehold.

21. When the application came up for directions, the parties agreed to canvass the application by written submissions. The petitioners filed their submissions dated 19th March, 2024 where they submitted on 5 issues. On the first issue whether the application is merited to warrant conservatory orders against the impugned notice dated 31st January, 2024, the Petitioners submitted that they are at risk of losing their property which has been marked for demolition as an illegal development pursuant to the abovementioned notice without following any due process as prescribed by the law as they have done with other neighboring properties. The Petitioners argued that they are facing real danger and a violation of their right to property as enshrined in article 40 of *the Constitution* since the property owned by the Petitioners since time immemorial is subject to demolition thereby infringing on their constitutional right to own property and peaceful enjoyment of the same.

22. They averred that the respondents' actions have further affected the Petitioner's economic and social rights as provided under article 43 of *the Constitution* of Kenya. They relied on the case of Wilson Kaberia Nkunja v Magistrates and Judges Vetting Board & another [2016] eKLR and Samuel Asiago Kiari v Directorate of Criminal Investigations & 2 others which cited the case of Centre for Rights Education and Awareness (CREAW) & another v Speaker of the National Assembly & 2 others [2017] eKLR while arguing that they have satisfied the requirements for the grant of conservatory order.

23. The petitioners submitted that by issuing out notice of demolition and by their threats and consequent action of demolishing neighboring properties, the Respondents are in breach of various laws and their continued actions poses a threat to the Petitioner's rights and fundamental freedoms as envisaged in *the Constitution* particularly under Article 40. They urged that should the court fail to grant conservatory orders against the action of the respondents, the petitioner's rights will be rendered nugatory as they have carried out heavy investment on the suit property. It was further argued that the same notice was in breach of Section 72 of CAP 303 which requires issuance of a 14-day notice.

24. The petitioners further contend that the stadium land and suit property have co-existed separately for over 50 years with no issue of public interest being raised and added that if the respondents are desirous of compulsorily acquiring the suit property, the law is clear on the process to be followed.

25. It was further submitted that the Respondents contravened the *Physical and Land Use Planning Act* by not specifying what development, if any, the Petitioners/Applicants have carried out without the development plans. They argued that the Respondents contravened the said statute by not specifying any measures that the Petitioner can undertake if at all he had not complied with the measures given, the Respondents in utter breach of the law went ahead to mark the building of the Petitioner with the intention of demolishing it without following due procedure. It was argued that the Petitioner was not accorded ample time to lodge a complaint at the liaison committee as the notice was to take effect within seven days whereupon demolition was to take place. On the issue of validity of notices, the petitioners relied on the case of Kiscoba Association (acting through John Maina - Chairman James Ndiba -Organizing Secretary v Nairobi City County Government [2018] eKLR. In addition, it was argued that the Liaison Committee of the Respondents does not exist since the same has never been gazetted.

26. The petitioners further argued that the respondents have been collecting taxes and land rates emanating from the building of the petitioner and the petitioner has been remitting the same without fail and therefore the Respondents are estopped from claiming that the petitioner's building was unlawfully acquired when there exists a trail of evidence to confirm that the petitioner is the lawful and legal owner

of the suit property. Reliance was placed In the case of Serah Njeri Mwobi v John Kimani Njoroge (2013) eKLR.

27. The petitioners asked the court to dismiss the cross-petition dated 6th March, 2024 stating that the same was a reproduction of the averments on the respondents replying affidavit terming it as ambiguous and an afterthought. They urged the court to find that they have satisfied the requirements of granting the conservatory orders sought in the notice of motion dated 1st February,2024.

28. On their part, the Respondents filed submissions dated 20th March, 2024 where they submitted on four issues. To begin with, the Respondents stated that the electronic evidence by way of photographs annexed to the application did not comply with section 106B of the *Evidence Act*, Cap 80 Laws of Kenya as they are not accompanied by electronic certificate as required by law and urged the Court to wholly disregard the same for failure to comply with the law. They relied on the case of Re Winding up of Nature Green Holdings Limited [2019] eKLR.

29. On the issue of jurisdiction, it was submitted that this Court can only exercise jurisdiction donated to it either by *the Constitution* or statutory law and cannot arrogate itself jurisdiction beyond that which is conferred by *the Constitution* and/or the law. The Respondents argued that from the pleadings, the Petitioners are challenging the enforcement notice issued by the 1st Respondent on behalf of the 3rd Respondent in "the Standard Newspaper" of 31st January, 2024. It was their contention therefore that under Section 72(3) and (4) of the *Physical and Land Use Planning Act*, the Petitioners/Applicants' first port of call as by law provided is the County Physical and Land Use Planning Liaison Committee and not this Court. They contend that 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/Applicants.

30. They relied on the case of 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 in support of their argument for applicability of the doctrine of exhaustion. They argued 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/Applicants to exhaust the adjudication mechanism provided for by the law aforementioned before invoking the appellate jurisdiction of this Court.

31. On the third issue, it was submitted that the 1st, 2nd, and 3rd Respondents 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. They further submitted that the 1st, 2nd and 3rd Respondents, under section 133 of the *County Governments Act*, 2012 cannot be sued in their personal capacity or otherwise as they are not legal entities capable of suing or 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.

32. On the criteria applicable for the grant of conservatory orders, it was submitted that the same had not been met as set out by judicial precedents and the law. They cited 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. It was argued that the Petitioners through admissions in their pleadings and documents as well as correspondence annexed to the Replying affidavit 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 reasons that the Petitioners/Applicants annexed two Certificates of Lease/title deeds for Bungoma/Kanduyi/1, one in the name of Patrick Kimingich Wangamati (not a party herein) and the other in the name of the 2nd Petitioner in reference to the same subject matter i.e. Bungoma/Kanduyi/l, with a similar and commencement date and similar lease term but issued on different dates. The Respondents also argued that a single piece of land cannot have two titles and the 1st and 2nd petitioners were separate legal entities as was held in the case of Solomon v Solomon & Co. Ltd [1897] AC 22.

33. It was further submitted that It is a constitutional, statutory, logical absurdity, monstrosity for the Petitioners to purvey the lie that contemporaneously two distinct leases can subsist over the purported same parcel of land christened Title No. Bungoma/Kanduyi/Parcel No. 1, one in the name of "Patrick Wangamati Kimingichi" and another in the name of "Wangamati Estates Limited. Further, it was argued that the purported Certificate of Lease of 7th November, 2016 is a further absurdity on the face of it in purporting that the Lessor is the County Council of Bungoma when it is a matter of judicial notice that "County Councils" in Kenya ceased existence in 2013 and pursuant to Section 2 of the Sixth Schedule to *the Constitution* of Kenya, 2010.

34. Further, it was submitted that Bungoma/Kanduyi/1 is non-existent both in the land records and on the ground, mere conjecture having been plucked out from thin air and the geo space. It was their contention that Bungoma/Kanduyi/1 does not appear on the Registry Map Sheet No. 22 referred to in the pleadings. The Respondents submitted that Wangamati Estate Limited, the 2nd Petitioner herein was incorporated and came into being on 27th September, 2010 post the date of the commencement of the purported lease.

35. It was submitted that LR No. E.Bukusu/N.Kanduyi/882 measuring approximately 11.8 hectares was designated and set aside for use as a 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, Land parcel 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 proprietary rights or claims can be asserted by the Petitioners/Applicants over the purported Bungoma/Kanduyi/1 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 order sought herein.

36. The Respondents 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 and asserted that there cannot be rights, proprietary rights or claims of property rights for non-existent "property" Bungoma/Kanduyi/1 to which the Petitioners/Applicants have neither enclosed a copy of the title deed nor 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.

37. The Respondents further quoted 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) the court stated 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 fromm an unlawful act as per Kamau Mucuha v Ripples Ltd [1993] Eklr and Chemey Investment Limited v Attorney General & 2 others [2018] eKLR.

38. Finally, the Respondents submitted that the petition is imprecisely pleaded and this cannot prove any prima facie case. They submitted that the petition does not state with reasonable precision the specific provisions of *the Constitution* and the rights allegedly threatened with violation and/or violated and the manner of infringement as was held in the case of Anarita Karimi Njeru v Republic (No.1) [1979] KLR 154

Legal Analysis and Decision__**

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

40. From the said Notice of Motion and the affidavit evidence, 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.

41. The Respondents in their preliminary objection averred that the petitioners' petition was 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, the court 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.

42. Before I proceed, I subscribe to the pronouncements of Olao J in the case of Martin Wanyonyi C.E.O Centre for Human Rights Organization) & another v County Government of Bungoma & 2 others [2019] eKLR where the court stated thus;

> '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:-

> "Justice shall be administered without undue regard to procedural technicalities ...."
>
> It is also provided for in Article 22(3) (b) of *the Constitution* with regard to the enforcement of the Bill of Rights that: -
>
> > "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."

43. Having said that however and on a quick perusal of the petition, I note that the petitioners/Applicants have quoted various provisions of *the Constitution* that in their view have been violated or threatened to be violated in part D of the petition and have proceeded to explain how the said provisions have been violated and the injury they have suffered as a result in part C of the petition. Further, it is clear from my reading of the petition in its totality that the Constitutional right that the Petitioners allege to have been infringed 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.

44. On whether this court has jurisdiction to hear and determine this application, the Respondents argued that the petitioners erred in commencing these proceedings before this court prior to filing an appeal against the enforcement notice before the Physical and Land Use Planning Liaison Committee (hereinafter referred to as '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*.

45. 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 the 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."

46. The said provision; 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.

47. Having stated the relevant law relied upon by the Respondents in support of their Preliminary Objection, It is now my to determine whether the Petitioners/Applicants have established, whether the Petition and the application under review fall within the purview as circumscribed under Section 72 of the *Physical and Land Use Planning Act*.

48. The Respondents argue that the Petition and the current application are ideally premised on what the 1st Respondent caused to be published in the standard newspaper of Wednesday the 31st January, 2024 titled development control/enforcement. In that notice, the 1st Respondent discussed 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 said 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 thereunder.

49. On examination of the petitioners' case, it emerges that the property in issue was marked for demolition to pave way for construction of Masinde Muliro Stadium, Kanduyi. The Petitioners' allege that the suit property belongs to them having legally and procedurally acquired the same in accordance with the Law. 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 for the umpteenth time that a preliminary objection deals with a pure point of law and where facts are not disputed. Where the court has to look outside the case for evidence to establish the existence of a preliminary issue, then this falls under a case where the court must disallow the objection and direct full hearing of the case to be conducted.

50. 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:
>
> "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."

51. 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."

52. 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."

53. In my considered view, the petitioners in the petition herein are seeking for the protection of a Title deed they claim to have been legally and lawfully acquired and structures erected thereon 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 states 'AN ACT of Parliament to make provision for the planning, use, regulation and development of land and for connected purposes'. The law is therefore clear and elaborate on the scope of its application.

54. The institution of the petition, 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 therefore faces imminent demolition by the Respondents and the petitioners are therefore seeking legal protection from this Court. Under Article 23 of *the Constitution* of Kenya, 2010 the High Court (read Environment and Land Court) as established under Article 162(2) has 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.

55. Further, on a quick look at the respondents' grounds of opposition and replying affidavit reveals that the manner in which the petitioners acquired title to 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 and the use and occupation of, and more so the legality 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 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 aforementioned reasons, the preliminary objection fails for lack of merit.

56. As to whether the petitioners have satisfied the requirement for the grant of conservatory and injunctive orders sought, it is not in doubt that the principles for the grant of conservatory orders has been discussed in numerous decisions by the superior Courts. 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.''

57. 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.'

58. On Whether the Petitioners have made out a case for the grant of a conservatory and injunctive orders; the Petitioners are apprehensive that the Respondents would make good their threats to demolish the developments made on the suit land which they claim to have been established since time immemorial and their property seized while they hold what they regard as a valid certificate of lease for the suit land. They annexed the said title documents and plans of the developments they claim to have undertaken on the suit property.

59. The court is aware that this being an interlocutory application, the court should avoid delving into the merits of the matter in great detail or making any comments or conclusions which may prejudice the fair trial of the Petition. However, upon close scrutiny of the documents presented by the petitioners, it appears that they have been directly involved with the suit land since the year 1969. It also emerges that title documents were issued in the names of the petitioners at various stages. It is worth noting that at some point, the suit property was registered in the name of the defunct Bungoma County Council, an issue which in my view requires thorough scrutiny of the evidence as shall be presented by witnesses during the full hearing of this Petition.

60. Further, the Respondents in their replying affidavit have admitted to there being sub-divisions on the initial title i.e L.R.No. E.Bukusu/ N.Kanduyi/882 to new parcels and allocations of the new resultant parcels to private individuals and entities. 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"

61. It is trite that, although the standard of proof of fraud is not proof beyond a 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"

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

63. At this interlocutory stage, I am however satisfied that the Petitioners have demonstrated arguable grounds which in my view are sufficient to have the case proceed for trial as enunciated in the case of Mrao v First American Bank of Kenya Limited & 2 Others [2003] eKLR.

64. I have also considered 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 damages. It is not in dispute that the petitioners have made extensive developments on the suit land over the years that they have been in occupation. Further, it has been stated by the petitioners that they have taken out loan facilities with various financial institutions using the suit property as collateral security. This court finds that the petitioners shall suffer serious hardship if the developments therein were demolished before this petition is heard and determined. The court also finds that such damage cannot be adequately compensated by an award of monetary damages.

65. 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 of the suit property. The court is also of the opinion that it would cause the Petitioners/Applicants greater hardship 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/interim injunction were granted.

66. 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 before the issue of whether the property in dispute rightfully belongs 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.

67. 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 reason, directs otherwise as was held in the case of Hussein Janmohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287. The court has also considered the fact that the constitutional petition is still pending hearing and determination. In the circumstances, I find that the costs of this application shall abide the event.

68. For the foregoing reasons, it is my finding that the petitioners' application dated 1st February, 2024 has merit and the same is hereby 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 from today restraining the Respondents jointly & severally, their agents, employees, officers and/or any person acting on behalf, authority, instructions and/or directives of the Respondents from trespassing on, vandalising, demolishing and generally interfering with the Petitioner's ownership, rights, use and occupation of the property known as Bungoma/Kanduyi/1 referred to as Wangamati Estates Limited pursuant to the Public Notice dated 31st January, 2024 pending hearing and determination of the Petition.

    b. Costs of the application shall abide the event.

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

.....

HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. M/S Seif H/B for Wangila for the Applicants

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

3. Bett C/A