Wesonga & 10 others v CECM Lands, Urban Planning, Housing and Municipalities-Bungoma County & 5 others (Constitutional Petition E002 of 2024) [2024] KEELC 3978 (KLR) (25 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3978 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

CONSTITUTIONAL PETITION E002 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/ENFORCEMENT

BETWEEN

MARGARET NASIMIYU WESONGA ..... 1ST PETITIONER

JOSEPH MASIBO ..... 2ND PETITIONER

GODFREY JACOB ..... 3RD PETITIONER

SIMON WAMALWA ..... 4TH PETITIONER

SAFARIPLIES LIMITED ..... 5TH PETITIONER

CLEOPHAS MISIKO ..... 6TH PETITIONER

SALU WEKESA ..... 7TH PETITIONER

JUMA WASWALA ..... 8TH PETITIONER

BLASIO BARASA ..... 9TH PETITIONER

ANDRIANO MAKOKHA ..... 10TH PETITIONER

GABRIEL NALIANYA ..... 11TH 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 Petition was filed contemporaneously with a Notice of Motion application dated 6th February, 2024 in which the Petitioners/Applicants seek the following orders;

   a. (SPENT)

   b. (SPENT)

   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, vandalizing, demolishing and generally interfering with the Petitioner's ownership, rights, use and occupation of the property known as Kanduyi/4,E.Bukusu/N/Kanduyi6573,E.Bukusu/N/Kanduyi/4644,E.Bukusu/N/Kanduyi/1716,E.Bukusu/N/Kanduyi/4635,Kanduyi/6,E.Bukusu/N/Kanduyi/4634,E.Bukusu/N/Kanduyi/4648,Kanduyi/3 pursuant to the Public Notice dated 31st January, 2024 pending 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 applicants property Kanduyi/4,E.Bukusu/N/Kanduyi6573,E.Bukusu/N/Kanduyi/4644,E.Bukusu/N/Kanduyi/1716,E.Bukusu/N/Kanduyi/4635,Kanduyi/6,E.Bukusu/N/Kanduyi/4634,E.Bukusu/N/Kanduyi/4648,Kanduyi/3 .

   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 on 17 grounds shown on the face of the said application supported by the affidavit sworn by MARGARET NASIMIYU WESONGA-1st Petitioner herein on 6th February,2024.

THE PETITIONERS CASE

3. The petitioners' case at this interlocutory is articulated in the notice of motion dated 6th February 2024, the annexures thereto, the supplementary affidavit and replying affidavit of the respondents.

4. In the said Notice of Motion application, the Applicants stated that they applied for their plots in Kanduyi from the Bungoma County Council for purposes of establishing business premises within Bungoma County and upon allocation, they took possession of the same and were subsequently issued with title deeds for Kanduyi/4,E.Bukusu/N/Kanduyi6573,E.Bukusu/N/Kanduyi/4644,E.Bukusu/N/

Kanduyi/1716,E.Bukusu/N/Kanduyi/4635,Kanduyi/6,E.Bukusu/N/Kanduyi/4634,E.Bukusu/N/Kanduyi/4648,Kanduyi/3. (hereinafter 'the suit properties').

5. They stated that they further made developments on their respective portions which serve as their source of income. It was their contention that they have been complying with all statutory requirements established by the County Government of Bungoma including paying land rates for the said properties and obtaining approvals and licenses.

6. The petitioners stated that they were 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. It was their statement that they were apprehensive that their properties would be demolished as a result of which they would be prejudiced since the Buildings are their main source of livelihood and the said property has been devoid of any illegalities.

7. It was their contention that if conservatory orders are not granted restraining the Respondents from demolishing the plaintiff's property, they stand to suffer irreparable loss by losing their property which is their source 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 resolving the issue herein. They stated that they are willing to comply with any conditions the Court may give and argued that it was in the interest of justice that the application be allowed.

8. In the Replying affidavit to the Respondents' cross-Petition sworn by MARGARET NASIMIYU WESONGA on 20th March 2024, the Petitioners/Applicants stated that the Respondents had not provided proof of ownership of LR No. E.Bukusu/N.Kanduyi/882 and have simply alleged that the same was reserved for construction of Kanduyi stadium. They also argued that the respondents did not provide legal records of the decision to allocate and the gazettement of the said portion i.e. LR No. E.Bukusu/N.Kanduyi/882 as a public utility land. The deponent went on to reiterate the statements made in the notice of motion.

9. The supplementary affidavit sworn on 20th March, 2024 by MARGARET NASIMIYU WESONGA- the 1st petitioner contends that the notice of preliminary objection dated 27th February, 2024 does not raise any triable issues since their petition clearly states the provisions of *the Constitution* violated by the respondents. Further, they argued that their property has been marked for demolition and they are apprehensive that if not stopped, the respondents through their assignees and/or agents will demolish their structures on the suit land.

10. It was their argument that the respondents are misleading the court by invoking the provisions of Section 72 (3) of the *Physical and Land Use Planning Act* which they breached in their notice dated 31st January, 2024 by issuing a notice period of 7 days as opposed to the statutory 14 days. They further argued that the said Land Use and Planning Laison Committee the respondent allege ought to have been approached in the first instance has not been established. It was argued that the petitioners have invoked the judicial control of irregular administrative action because if left on their own, the respondents will cause untold losses upon the petitioners

11. The petitioners went on to argue that the grounds of opposition relied by the respondents raise factual matters that are not supported by evidence as opposed to raising legal and procedural issues. It was their argument that other than the respondents claiming that the suit properties were part of land set aside for public utility, nothing has been placed before court to show that indeed the said land was demarcated, allocated and gazetted for public utility. Finally, the petitioners argued that the area in question was set apart to be a market for the benefit of the public thus the allocations.

12. When this matter was first placed before the duty court for directions, the same was certified as urgent. Later, on 28th February, 2024 further directions were taken to have the application canvassed by way of written submissions.

THE RESPONDENTS CASE

13. By way of a response, the 1st, 2nd, 3rd & 6th Respondents filed a Notice of Preliminary Objection, Grounds of opposition and a Replying affidavit sworn on 27/02/2024. The Respondents also filed a cross petition dated 6th March, 2024.

14. In the Notice of Preliminary Objection, the Respondents raised three grounds where they argued that the Petition is not framed with reasonable precision by stating 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 they are therefore inhibited from understanding and appreciating the Petitioners alleged Constitutional issues and that the Petition is thus for striking out and the indicated that they will raise a Preliminary Objection accordingly.

15. Secondly, the Respondents 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 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 made thereunder, 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.

16. In their grounds of opposition, the Respondents argued that the suit properties form part of 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 law. They argued that once the ''suit property'' was designated and set aside for use as public utility, it ceased to be unalienated Government land that could be available for re-allocation to the Petitioners herein and any subsequent issuance of a title in respect to the said public land for private commercial use and/or benefit was a nullity ab-initio, since the same were acquired fraudulently, improperly, irregularly and illegally.

17. They stated that the petitioners failed to identify the specific owners of the land parcels of land nor did they provide any relevant title deeds or clarify the origins of the titles. It was their argument that the petitioners claim is constructed on invalid and illegal documents and instruments which is a misnomer to agitate for protection under *the constitution*. Lastly, the Respondents argued that the petitioners have not made a case for the grant of the orders sought and that the application is for dismissal with costs.

18. In the replying affidavit sworn by Arch Douglas Sasita Wekesa, the 1st, 2nd, 3rd and 5th deposed that section 72(1) of the *Physical and Land Use Planning Act* CAP. 303 Laws of Kenya gives the 1st Respondent 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.

19. The County Executive Committee member, lands, Urban/Physical Planning Housing & Municipalities, County Government of Bungoma stated that it was pursuant to the powers given to him under the foregoing provisions of the law that he issued on behalf of County Government of

Bungoma the impugned general notice published on the Standard Newspaper of 31st January, 2024 to the general public. The deponent further deposed that the foregoing general notice did not take away the lawfully and legally acquired proprietary rights of any person or at all but sought to align the developments Physical and Land Use within the County with the applicable laws and Regulations.

20. 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.

21. He stated that any person challenging the general notice ought to first 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 which advise he believes to be true that where there is a procedure for redress, that procedure ought to be exhausted first before a party moves 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* Cap 303 Laws of Kenya.

22. It was further 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).

23. It was also 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''.

24. 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 ''DSW2A''.

25. 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 cards in respect of the parcels of land which is annexed and marked ''DSW3''.

26. The deponent further stated that LR No. E.Bukusu/N.Kanduyi/4462 was further subdivided into E.Bukusu/N.Kanduyi/6573 and E.Bukusu/N.Kanduyi/6574. He annexed a copy of the green cards in respect of the parcels of land which is annexed and marked ''DSW3''. It was further stated that despite the abovementioned subdivision, the registry sheet map no. 22 in relation to E.Bukusu/N.Kanduyi/2725 which gave rise to E.Bukusu/N.Kanduyi/4623-4649 the said sub-divisions are not captured which goes to show that the purported sub-division was patently illegal and improper. The deponent further went on to list particulars of fraud as against the petitioners.

27. 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 that was in 1973 designated as reserved for use as public football ground (Kanduyi Stadium) and having been so designated, it was rendered a public utility and therefore not available for alienation to anyone else particularly the Petitioners either as a freehold or leasehold.

28. Directions were taken whereby the parties agreed to have the said application canvassed by filing and exchanging written submissions. As at the time of preparing this judgment, the Petitioners had not filed their submissions for consideration by this honourable court.

29. However, the 1st, 2nd, 3rd and 6th Respondents filed submissions in opposition to the Notice of motion and in support of their preliminary objection where they submitted on four issues.

30. First, they began by stating that the electronic evidence by way of photos 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 by law required and urged the Court to wholly disregard the electronic evidence by way of photographs for failure to comply with the law. They relied on the case of Re Winding up of Nature Green Holdings Limited [2019] eKLR.

31. 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. From the Petition and the Notice of Motion, the main complaint by the Petitioners is in regard to 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 that under Section 72(3) and (4) of the *Physical and Land Use Planning Act*, the 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.

32. 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 to exhaust the adjudication mechanism provided by the law before invoking the appellate jurisdiction of this Court.

33. On the second issue, it was submitted that the 1st, 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.

34. They went on to submit that the 1st, 2nd, 3rd and 4th Defendant/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 and/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.

35. On the third issue which is 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.

36. It was argued that the Petitioners' own 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 Title No. Kanduyi/3, Kanduyi 4 and Kanduyi 6 are non-existent plots and no injunction can be issued against a non-existent parcel of land. They argued that the petitioners did not present a copy of the title deed, official search or green card to show ownership of the property.

37. It was further 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 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/8 82 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/ claims can be asserted by the Petitioners over the purported E.Bukusu/N.Kanduyi/6573,E.Bukusu/N.Kanduyi/4644,E.Bukusu/N.Kanduyi/1716,E.Bukusu/N.Kanduyi/4635,E.Bukusu/N/Kanduyi/4634,E.Bukusu/N/Kanduyi/4648 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.

38. 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 any property rights or claims of proprietary nature that cant issue for non-existent "property" E.Bukusu/N.Kanduyi/4636 to which the Petitioners 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.

39. 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 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 from an

unlawful act as per Kamau Mucuha v Ripples Ltd [1993] Eklr and Chemey Investment Limited v Attorney General & 2 others [2018] eKLR.

40. 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

41. I have carefully considered the Petition, Notice of Motion application, the supporting affidavit, replying affidavit, cross petition, supplementary affidavit and the annexures thereto. I have also considered the Replying affidavit, the cross petition and 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.

42. From the pleadings and proceedings, the court is of the view that the following issues commend for determination herein

    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.

43. The Respondents in their preliminary objection argued 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, the court established the specificity test and stated as follows;

> 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.

44. I also find persuasion in the pronouncements by 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 he held as follows;

> '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."

45. Having said that however and on a quick perusal of the petition, I note that the Petitioners have cited various provisions of *the Constitution* that in their view have been violated or threatened to be violated in part D of the petition and has gone further 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 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/buildings on the suit property and the seizure of their land. There is no doubt that Article 40 of *the Constitution* protects the right to property. Therefore, as far as format is concerned, this Petition is worth sustaining.

46. On whether this court has jurisdiction to hear and determine this Petition/application, the Respondents argued that the petitioner's erred in filing this matter before this court prior to filing an appeal against the enforcement notice before the Physical and Land Use Planning Laison 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*.

47. 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."

48. 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.

49. Having considered the arguments and the applicable law relied upon by the Respondents in support of their Preliminary Objection, it is now my duty to determine whether the Respondents have indeed established whether the suit and the application herein fall within the purview as circumscribed under Section 72 of the *Physical and Land Use Planning Act*.

50. The Respondents argue that the current application and the Petitioners petition are ideally premised on what the 1st respondent caused to be published in the standard newspaper dated 31st January, 2024 titled development control/enforcement. In that notice, the 1st Respondent alluded to the discovery of 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 proceeded 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.

51. On examination of the Petitioners' case, it emerges that the properties in issue waere marked for demolition to pave way for the construction of 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 in numerous decisions that a

preliminary objection deals with a pure point of law and where facts are not contested. Where the court has to look outside the case for evidence to establish the facts presented, then this falls under a case where a full hearing has to be conducted to disprove those contested facts.

52. 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."

53. 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."

54. 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."

55. In my considered view, the Petitioners in their petition are seeking for the protection of what they claim to be a legally and lawfully acquired title deeds and structures as erected therein 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 as follows; 'AN ACT of Parliament to make provision for the planning, use, regulation and development of land and for connected purposes'. The law is clear and elaborate on the scope of its application.

56. 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. According to the Petitioners/Applicants, the properties purportedly faces imminent demolition by the Respondents and the Petitioners aim to seek legal protection for them. In that regard, Article 23 of *the Constitution* grants the High Court and in this case the Environment and Land Court as established under Article 162(2) of *the Constitution* 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.

57. 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.

58. 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.''

59. 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.'

60. 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 their threats seriously and demolish their buildings and seize their parcels of land while they hold what they allege is a legal title deed for said parcels of land. They exhibited various title documents in support of their claim and contend 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.

61. This court is aware that this being an interlocutory application, the court should avoid delving into the merits of 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 appears that in a letter from the Town Clerk, Municipal Council of Bungoma addressed to the District Land Registrar dated 27th November 2008, the 2nd,6th ,7th, 8th, 9th ,10th and 11th petitioners were allocated LR No. E.Bukusu/N.Kanduyi 4643,4631, 4635, 4644, 4643,4645 and 4646 respectively. On the other hand, the 3rd petitioner presented a title deed issued in his name for LR No. E.Bukusu/ N.Kanduyi/4632 while the 5th petitioner presented a title deed issued in his name for LR No. E.Bukusu/N.Kanduyi/4634, as per the attached documents.

62. From the foregoing and guided by the applicable legal provisions and precedents, my view is that the issues raised in the petition are weighty and ought to be investigated in a full Hearing and cross-examination of witnesses on the veracity of those documents/evidence to be presented by both sides and determining which of the titles is/are legit.

63. 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 fraudulently allocating the new resultant parcels of land to private individuals/entities. They have further enumerated particulars of fraud where they claim the manner in which the Petitioners came about 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"

64. It is trite that, although the standard of proof of fraud is not 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"

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

66. At this interlocutory stage, however, I am satisfied that the Petitioners have demonstrated the existence of arguable grounds that require to proceed for hearing as enunciated in the case of Mrao v First American Bank of Kenya Limited & 2 Others [2003] Eklr.

67. The court has further considered the evidence on record as regards the second principle 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 developments on the suit land where they allege derive their livelihood over the years that they have been in occupation. In that regard, I find that

the Petitioners shall suffer serious hardship if the developments therein are demolished since the same are the Petitioners'/Applicants' source of livelihood. The court is of the opinion that such damage cannot be adequately compensated by an award of damages.

68. 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 properties. I am 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 would suffer if the conservatory order was granted.

69. The court is of the considered 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 was lawfully and procedurally acquired and therefore 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 threat of being infringed, the outcome of the petition may be rendered nugatory or just an academic exercise.

70. 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. (see the case of Hussein Janmohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287). This court has considered the fact that this petition is still pending hearing and determination. In the circumstances, this court is of the view that costs of the application should abide the event.

71. In the end and for the foregoing reasons, it is my finding that the Petitioners' Notice of Motion application dated 9th February, 2024 has merit and the same is hereby allowed on the following terms;

    A. A conservatory order in the nature of an injunction be and is hereby issued for a period of six(6) months only prohibiting and 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, vandalizing, demolishing and generally interfering with the Petitioner's ownership, rights, use and occupation of the property known as Kanduyi/4,E.Bukusu/N/Kanduyi6573,E.Bukusu/N/Kanduyi/4644,E.Bukusu/N/Kanduyi/1716,E.Bukusu/N/Kanduyi/4635,Kanduyi/6,E.Bukusu/N/Kanduyi/4634,E.Bukusu/N/Kanduyi/4648,Kanduyi/3 pursuant to the Public Notice dated 31st January, 2024 pending hearing and determination of this petition.

    a. 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 Petitioner/Applicants.

2. Mr Wesonga appearing with Mr. Wekesa and Mr Wangila Masinde for the Respondents.

3. Bett C/A.