Agnes Nthenya Kilonzo t/a Kokomo Beach Bar and Restaurant & another v County Executive Committee Member for Lands, Physical Planning, Housing and Urbanization & another; Lion Beach Resort (Interested Party) (Environment & Land Petition E13 of 2024) [2025] KEELC 788 (KLR) (25 February 2025) (Ruling)

Neutral citation: [2025] KEELC 788 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND PETITION E13 OF 2024

FM NJOROGE, J

FEBRUARY 25, 2025

BETWEEN

AGNES NTHENYA KILONZO T/A KOKOMO BEACH BAR AND RESTAURANT ..... 1ST PETITIONER

KOKOMO BEACH BAR AND RESTAURANT LIMITED ..... 2ND PETITIONER

AND

COUNTY EXECUTIVE COMMITTEE MEMBER FOR LANDS, PHYSICAL PLANNING, HOUSING AND URBANIZATION ..... 1ST RESPONDENT

COUNTY GOVERNMENT OF KILIFI ..... 2ND RESPONDENT

AND

LION BEACH RESORT ..... INTERESTED PARTY

RULING

1. The application before the Court is a Notice of Motion application dated 2/9/2024 wherein the Petitioners pray for the following orders: -

    1. Spent.

    2. Spent.

    3. That this Honourable Court be pleased to issue a conservatory order restraining the Respondents and/or their agents and/or employees and/or servants or any other person (s) acting on the Respondents' behalf from demolishing the Petitioners' business premises known as Kokomo Beach Bar & Restaurant situate at a riparian reserve (shoreline) land at Watamu

Marine Protected Area (the suit premises herein) within Kilifi County pending hearing and determination of the Petition.

4. Spent.

5. That this Honourable Court be pleased to issue a conservatory order restraining the Respondents and/or their agents and/or employees and/or servants or any other person (s) acting on the Respondents' behalf from implementing and/or enforcing the demolition order issued by the Respondents vide a letter dated 9th October, 2023, which directed the Petitioners' business premises known as Kokomo Beach Bar & Restaurant situate at a riparian reserve (shoreline) land at Watamu Marine Protected Area (the suit premises herein) within Kilifi County to be demolished, pending hearing and determination of the Petition.

6. That costs of this application be borne by the Respondents.

2. The Notice of Motion is supported by grounds set out on the face of the application and the supporting affidavit of Agnes Kilonzo Nthenya sworn on 2/9/2024. The grounds upon which the reliefs are sought were tailored as follows:

a. That the Petitioners are the lawful and legal owners of a business premise known as Kokomo Beach Bar & Restaurant situate at a riparian reserve land at Watamu Marine Protected area having been authorized by Kenya Wildlife Service (KWS) and Watamu Youth Development group, a self-help group permitted by the former to maintain the marine ecosystem in the area alongside undertaking other activities in keeping the beach secure at all times;

b. That pursuant to the aforementioned authorization, the Petitioners invested heavily by putting up a temporary structure for purposes of running a bar and restaurant as aforementioned to the tune of Kshs. 185, 477, 108/- and employed 31 individuals benefitting almost over 200 families within the neighborhood, essentially meeting the obligations imposed by KWS and other laws, such as the convention and biodiversity;

c. That following the said authority, the Petitioners applied for a business permit from the Respondents in the year 2023, which said application was allowed through the issuance of a single business permit dated 3rd January 2023, essentially meaning that the Respondents equally permitted and/or authorized the existence of the Petitioners' business on the portion of land;

d. That before the said permit could lapse as it was meant to last up to December 2023, the Respondents strangely colluded with Lion Beach Resort Limited and allegedly (because they never served the Petitioners) issued an enforcement notice on 21st September 2023 for purported demolition of the Petitioners' temporary structure, holding the Beach Bar & restaurant;

e. That the failure to serve the Petitioners with the enforcement notice was a gross violation of *the Constitution* and its provisions, amongst them being Article 47 of *the Constitution*, which requires in mandatory terms, a hearing before any administrative action is taken;

f. That the Respondents with an obvious hidden agenda for the benefit of their masters, Lion Beach Resort Limited issued a demolition order on 9th October 2023 and proceeded to demolish the Petitioners' beach bar & restaurant, on 22nd January 2024 at 3:18 am and since they were unable to fully demolish the suit premises for lack of enough tools and personnel, they gave a copy of the said order to Lion Beach Resort Limited, who moved the Court

through a Miscellaneous Civil Application File No. 1 of 2024 (Malindi) for enforcement and/or implementation of the demolition orders.

g. That the said Miscellaneous Civil Application proceedings would not have been filed had Lion Beach Resort Limited obtained favorable injunctive orders in a case which they had filed on 24th November, 2023 being ELC No. E046 of 2023 (Malindi) as orders of injunction sought against the Petitioners were refused upon filing of an application in the suit, forcing them to secretly file the Miscellaneous Civil Application proceedings through their manager, one Ignce Mchana Nyambu, with the obvious fear that moving the Court in the name of the company would amount to abuse of the court process, which offends the rule of sub-judice.

h. That strangely, the issuance and existence of the demolition orders by the Respondents were made known to the Petitioners in July, 2024, when Lion Beach Resort Limited applied to have a ruling on an injunction application filed in ELC E046 of 2023 (Malindi) arrested on account of an ex-parte order on demolition issued in the miscellaneous application on the strength of the demolition orders of the Respondents.

i. That as hereinabove stated, the substantive suit, being ELC E046 of 2023 is pending a ruling scheduled for the 2nd October 2024 on the injunction application, but since the demolition orders issued by the Respondents may be enforced at any time by the Respondents who are not parties in the suit, yet the issuance of the demolition orders was in violation of the law and more so, *the Constitution* of Kenya, including the Bill of Rights, there is an urgent need for conservatory orders to be issued pending the hearing and determination of the Petition.

j. That though there is a status quo order issued in ELC E046 of 2023, whose parties are Lion Beach Resort Limited and Agnes Kilonzo of Kokomo Beach Bar & Restaurant, the Petitioners are apprehensive that the proceedings therein might have a lesser bearing on the transactions and/or dealings between the parties herein and thus the petitioners' grievances ought to receive separate attention and/or consideration on account of violation of the fundamental rights and interest of the Petitioners as enshrined in *the Constitution*.

k. That the Petitioners' fear emanates from the fact that the Respondents do not care or give any relevance to Article 47 of *the Constitution* and would wake up one day to execute their demolition orders and to prove the same, the Petitioners have heard a word from the Respondents that they would demolish the Petitioners' business premises in the next 7 days, notwithstanding the status quo orders as they claim that they are not bound by such orders for being non-parties to the substantive suit aforementioned.

l. That the Petitioners' fear is fortified by the fact that they paid a sum of Kshs. 98,000/- for the renewal of the permit on 17th January 2024 but still were not issued with the permit because the Respondents have seriously been corrupted by Lion Beach Resort Limited, a fact that the Petitioners confirmed from the Respondents who confirmed that they were not aware of the demolition orders as they might have been issued by junior staff with corrupt minds, ignorant of the legitimacy of the existence of the Petitioners and its business premises.

m. That for the above said reasons, this application ought to be heard urgently and orders issued immediately.

n. That no prejudice shall be suffered to the Respondents if the sought for orders are granted, but the Petitioners will suffer irreparable loss and damage is the said orders are not granted.

3. As earlier stated, the Petitioners have supported this application with an affidavit sworn by Agnes Nthenya Kilonzo on 2/9/2024 where she basically reiterated the above grounds with the exhibits to demonstrate their averments.

4. The Respondents vehemently opposed this application and have based their opposition on the grounds of opposition dated 7/1/2025. The grounds raised are as follows: -

    a. That the application lacks merit for failure to meet the threshold required for the orders being sought;

    b. That the application is made in bad faith and in an attempt to mislead this Honourable Court as the Petitioners have conveniently failed to disclose that the subject temporary structure was erected by the Applicants on riparian land reserve without approval of the county government planning authority;

    c. That the Petitioners' subject massive structure was erected on riparian land reserve without the authority of the National Land Commission which is a violation of Article 62 (2) of *the Constitution* of Kenya, 2010;

    d. That the Petitioners have also conveniently failed to disclose that enforcement notices were issued to the 1st Petitioner/ applicant and she failed to comply with the same leading to the issuance of the demolition order;

    e. That the application is vexatious, unmaintainable and a total waste of the Court's precious judicial time;

    f. The application and prayers sought are unmeritorious and ought to be dismissed with costs to the Respondent.

5. Similarly, the Interested Party opposed the application. In a comprehensive replying affidavit sworn by Ignace Mchana Nyambu on 29/10/2024, the Interested Party's manager, it was deposed that it is the registered owner of a beach front property known as land parcel number 47 and 48 comprised in certificate of title number CR 11735/1 and 11736/1 where it has constructed the said resort; the Plaintiffs constructed the said restaurant on the face of the interested party resort, thus prompting the latter to seek the intervention of the county government; resultantly, the county government issued an enforcement notice which the Plaintiffs chose to ignore and a demolition order dated 9/10/2023 was thus issued by the County government.

6. The deponent added that the interested party subsequently sought and obtained this court's leave to enforce the demolition order in Malindi ELC Misc. Application No. 1 of 2024. This prompted the Petitioners to move the court for stay of the said orders, an application which was eventually dismissed in a ruling dated 29/5/2024.

7. The application was canvassed by way of written submissions.

The Petitioners' submissions

8. The Petitioners relied on submissions dated 13/12/2024 and 13/1/2025. Counsel for the Petitioners asserted that the enforcement notice was never served on the Petitioners contrary to Section 72 of the Physical and Land Use Act 2019, thus the Petitioners could not have appealed the same. Counsel added that under Section 57 (2) of the same Act, the Respondents did not have any powers to issue demolition orders but only to prosecute the Petitioners for failure to comply with the enforcement notice.

9. Counsel further submitted that the issuance of the enforcement notice was not only against the law but also in violation of Articles 25 (c), 40, 47 and 50 of *the Constitution*. He added that having presented the petition, the Petitioners are entitled to conservatory orders to preserve the subject matter of the suit. In support of this argument, counsel relied on the case of Bandid & another v Ministry of East African Community (EAC), the ASALS and Regional Development & 3 others (Petition E002 of 2024) [2024] KEHC 3479 (KLR).

Respondents submissions

10. In their submissions dated 9/1/2025, counsel submitted that the principles for granting interlocutory injunctions were settled in the case of Mrao Limited v First American Bank of Kenya Ltd & 2 others [2003] KLR 125 and Giella v Cassman Brown. To counsel, having failed to disclose that the subject structures were illegally erected on riparian land by the Petitioners, the Petitioners had in turn failed to establish a prima facie case. Therefore, so he submitted, having failed to surmount this first hurdle out of the three-test rule, the court ought not consider the remaining principles. To this end, counsel relied on the case of Hassan Huri & another v Japhet Mwakala [2015] eKLR.

Interested party's submissions.

11. Counsel filed skeleton submissions dated 10/12/2024 wherein he argued that the Petitioners' application was res-judicata their (petitioners') application in ELC Misc. Application No. 1 of 2024. He was guided by section 7 of the *Civil Procedure Act* and the case of Kennedy Mokua Ongiri v John Nyasende Mosioma & another [2022] eKLR.

Analysis

12. I have considered the Petitioners' application as well as the responses. I have also considered the submissions by the parties. The issues which emerge for determination are firstly whether the application is res judicata and secondly, whether the Applicant has made out a case for grant of a conservatory order.

13. On the first issue, the Interested party contends that the issues being raised in this application were dealt with in ELC Misc. Application No. 1 of 2024 and that by the Applicant raising the same issues herein, then it is contravening the principle of res judicata. The principle of res judicata is predicted on Section 7 of the *Civil Procedure Act* which states as follows: -

> " No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.
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> Explanation. (1) -The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.
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> Explanation. (2) -For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.
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> Explanation. (3) -The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.
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> Explanation. (4) -Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially

in issue in such suit. Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)-Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

14. In the case of Kenya Commercial Bank –v- Benjoh Amalgamated Limited (2017) eKLR the Court of Appeal stated as follows on the issue of res judicata: -

> " The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit; (a) The suit or issue was directly and substantially in issue in the former suit. (b) That former suit was between the same parties or parties under whom they or any of them claim. (c) Those parties were litigating under the same title. (d) The issue was heard and finally determined in the former suit. (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

15. In ELC Misc. Application No. E001 of 2024 Ignace Mchana Nyambu v Abudi Shoshi Abudi & Agnes Kilonzo, the dispute was evidently between different parties. For this reason alone, the interested party's contention on res-judicata cannot hold.

16. Courts have set out principles to be considered in determining whether or not to grant conservatory orders in constitutional petitions. In the case of Martin Nyaga Wambora -v- Speaker of the County Assembly of Embu & 3 Others Petition No. 7 Of 2014 the Court stated as follows: -

> " (59) In determining whether or not to grant conservancy orders, several principles have been established by the Courts. The first is that: "... [an applicant] must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*"
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> (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 attention or redress by the Court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the Court's attention.
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> (61) The second principle, which naturally follows the first, is whether if a conservancy order is not granted, the matter will be rendered nugatory."

17. Further, the Supreme Court in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR also pronounced itself on conservatory orders: -

> " ...Conservatory orders' bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the "prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the applicant's case for orders of stay. Conservatory orders consequently, should be granted on

the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes .... However, in the context of *the Constitution* of Kenya, 2010, a third condition may be added, namely public interest.... That it is in the public interest that the order of stay be granted. This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through *the Constitution*."

18. In Wilson Kaberia Nkunja -v- The Magistrate and Judges Vetting Board and Other [2016] eKLR the principles for granting conservatory orders were stated as follows;

"(a) An Applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the Court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*.

(b) Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and

(c) The public interest must be considered before grant of a conservatory order."

19. In light of the above principles, I will determine whether the Applicant has made out a case for grant of a conservatory order. Guided by the case of Damour Florian Emmeric v Director of Immigration Services [2022] eKLR, a prima facie case was defined as follows: -

"In determining whether a matter discloses a prima-facie case, a Court must look at the case as a whole. It must weigh, albeit preliminarily, the pleadings, the factual basis, the respective parties' positions, the remedies sought and the law. In so doing, a Constitutional Court must be guided by Articles 22 (1) and 258(1) of *the Constitution* which provisions are on the right to institute Court proceedings whenever a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened or the when *the Constitution* has been contravened, or is threatened with contravention."

20. In the present case, it is undisputed that the Petitioners have put up structures on riparian reserve land, their claim being that they were permitted to do so by KWS and Watamu Youth Development Group. The Petitioners have however failed to disclose any evidence that they obtained any development permission from the county government to utilize the said parcel. However, the structure that they constructed is within the county government's jurisdiction. It can not be deciphered from the present record as to whether the county officials concerned were aware of the process of construction of the petitioner's structure. What is clear is that the county government charged sanitary inspection fees, food hygiene licence fee, fire safety inspection fee, and medium restaurant with bar and membership fee and upon payment it consequently issued as single business permit licence to the petitioners on 3/1/2023.

21. Though the interlocutory stage the proceedings dictate that no mini-trial be conducted, various vexing questions inevitably arise from the situation the petitioners find themselves in, and this court is perfectly within its jurisdiction to consider them in giving a ruling on the present application. The development regulation and planning authority in the area is the county government. The authority charged with the protection of the marine reserve is the KWS. These two are involved in one way of the other in the situation the petitioners find themselves in, the KWS having apparently granted permission to develop the riparian land and the County Government having licenced its operations same upon completion.

22. Further, *the Constitution* provides for good governance, integrity, transparency and accountability. Delving into compliance with these virtues and their bearing on the petitioner's predicament is inevitable in these proceedings and that can not be ventilated to conclusion at the interlocutory stage. What are the implications of the county government's acceptance of fees and licensing on the propriety of the petitioner's structure and business carried on there while, if the present record is correct, no planning permission had been issued? It is yet to be determined if there was condonation of the by the county government and if the same ranks as estoppel against demolition and that needs be explored in a well-considered decision on the merits of the petition before court. What are the implications of the KWS letter dated 11/11/2021 permitting the construction of a temporary banda? What are the rights of a person in the shoes of the petitioner who invests with either the tacit or express authority of the regulatory authorities, when those same authorities come calling, seeking to vacate that development? What happens to covenants for environmental conservation the petitioners have bound themselves to in their contractual documents? Those questions cannot be answered at this interlocutory stage without prejudicing the hearing of the main petition, but they convey one fact: serious issues relating to environmental governance, planning and development regulation arise in such a situation. Therefore, in the light of the definition of conservatory orders given in the Peter Gatirau Munya (supra), I am not inclined to examine the issue of whether the petitioners have established a prima facie case; rather, I am inclined to express satisfaction that there are serious issues of public law and national values and principles of governance that arise in the present petition and which need ventilation through a substantive hearing of the main petition whose outcome can not be predicted as at now.

23. The outcome is that the Notice of Motion dated 2/9/2024 is merited and I allow it in terms of Prayers No 3 and 5 thereof. The costs of the motion shall be in the cause.

24. The hearing of this petition shall be expedited. The respondents shall, if they have not yet done so, file and serve their responses within the next 14 days without fail and all parties shall appear for a mention for directions as to hearing on 11/3/2025.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 25TH DAY OF FEBRUARY 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI