Mbindi v County Executive Committee Member for Lands, Urban/Physical Planning, Housing & Municipalities County Government of Bungoma & 2 others (Environment and Land Constitutional Petition E002 of 2024) [2024] KEELC 4466 (KLR) (23 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4466 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E002 OF 2024

EC CHERONO, J

MAY 23, 2024

IN THE MATTTER OF ARTICLE

10,20,21,22,23,24,25,27,35,40,47,50,60,159,162(2)

(B),232,258,259 AND 260 OF THE CONSTITUTION OF

KENYA 2010

AND

IN THE MATTER OF THE ALLEGED VIOLATIONS OF THE

RIGHTS PROTECTED UNDER THE CONSTITUTION

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

2010(PROTECTION OF RIGHTS AND FUNDAMENTAL

FREEDOMS) PRACTICE AND PROCEDURE FREEDOMS

PRACTICE AND PROCEDURE RULES 13,19 AND 23 OF 2013

AND

IN THE MATTER OF THE PHYSICAL AND LAND USE

PLANNING ACT NO. 13 OF 2019

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT, 2013

AND

IN THE MATTER OF TITLE E. BUKUSU/N.KANDUYI/4632

BETWEEN

GODFREY JACOB MBINDI ..... PETITIONER

AND

COUNTY EXECUTIVE COMMITTEE MEMBER FOR LANDS, URBAN/ PHYSICAL PLANNING, HOUSING & MUNICIPALITIES COUNTY GOVERNMENT OF BUNGOMA ..... 1ST RESPONDENT

THE GOVERNER, COUNTY GOVERNMENT OF BUNGOMA .... 2ND RESPONDENT

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

RULING

1. This ruling arises from the Petitioners' Notice of Motion dated 6th February,2024 brought under the provisions of Article 22 and 23 of *the Constitution* of Kenya, 2010 (protection of rights and fundamental freedoms) practice and procedure rules 2013 seeking the following orders;

    a. Spent

    b. Spent

    c. That a conservatory order do issue prohibiting and restraining the Respondents jointly and severally, their agents, employees, officers and/or any person acting on their behalf, authority, instructions and/or directives from demolishing or in any way interfering with the Petitioners/ applicants, use and occupation of the building erected on Land Parcel no. E.bukusu/n. Kanduyi/4632 pending the hearing and determination of this petition.

    d. The costs of this application be borne by the respondents.

2. The application predicated on grounds shown on the face of the application and is supported by the affidavit of the petitioner Godfrey Jacob Mbindi sworn on 6th February,2024.

3. It is the petitioner's case that, he is the registered owner and occupant of all that land known as Land Parcel no. E.bukusu/n. Kanduyi/4632(hereinafter 'the suit property') having been issued with a title on 10th March, 2011. He stated that the suit property boarders Masinde Muliro Stadium Kanduyi to the north and is located along Eldoret-Malaba Highway at Kanduyi Market. It is his case that upon acquiring the suit property from its previous owner, he obtained all necessary approvals from the defunct County Council of Bungoma and erected a two storey commercial building valued at more that 35 Million which is used as a hotel.

4. It is his contention that the suit property fits the description of the properties that had been gazetted for removal and or demolision vide gazette notice dated 31st January, 2024 since it was within Kanduyi area. He stated that he has never been summoned by the officials of the County Government of Bungoma to give his side of the story over the suit property. Further, he stated that the validity and legality of the title deed has never been challenged and with the said enforcement notice having been advertised, he is apprehensive that the public notice could be used to demolish and or pull down the suit property.

5. The petitioner stated that the suit property has existed side by side with Kanduyi stadium since 1960's when the plots were surrendered by the locals to the predecessor of the 3rd respondent herein for

purposes of establishing Kanduyi Market. The Petitioners urged that he stands to suffer losses and damages if the orders sought are not granted since the Respondents seek to enforce an irregular notice

6. Upon being served with the said notice of motion, the 1st, 2nd and 3rd Respondents filed Grounds of opposition, a Notice of Preliminary Objection dated 26/02/2024 and a replying affidavit also sworn on even date.

7. In the Notice of Preliminary Objection, the Respondents raised three grounds. First, the Respondents argued that the Petition does not state with reasonable precision the specific provisions of *the Constitution* and the rights allegedly violated and/or threatened with violation and that the manner of infringement is not also stated and substantiated and the Respondents are therefore unable to understand and appreciate the Petitioners alleged Constitutional issues and the Petition is therefore liable for striking out and the Respondents will raise a Preliminary Objection accordingly.

8. Secondly, the Respondents argued that this Court lacks jurisdiction to hear and determine the Petition and the Notice of Motion herein 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 a general public notice enforcement notice published in the Standard Newspaper of 31st January, 2024. Thirdly, it was argued that this matter is sub-judice for being directly related to another Petition being Elcepet No.e002 Of 2024 In The Enviroment And Planning Division 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 for being an abuse of the court process with costs to the Respondents.

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

10. They further contend that the petitioners have failed to explain the origin of their titles. The Respondent argued that it is a misnomer for a party to agitate Constitutional rights on illegality and fictitious documents as the Petitioners have done and the Petition is dead on arrival in the Constitutional Court. He added that the Petitioners have not established a prima facie case to anchor the conservatory orders, interlocutory injunction sought herein and neither have they met the threshold set in the celebrated case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR given that the purported Title to the suit property is fraudulent, illegal, and irregular as the subject suit land was designated as public utility for the general public and in particular as a public football ground and remains public land and can only be used for the purpose for which it was set aside. He stated that the public interest in this matter far outweighs and/or overrides individual interests and the same tilts in favour of dismissing the application and the petition.

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

Bungoma and whose offices are not capable of suing or being sued and this Petition ought to be struck out as against them.

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

13. In their replying affidavit and in addition to the arguments made in their grounds of opposition, the Respondents argued that they are mandated by the law and more so *the Constitution* which establishes County Governments to carry out various duties concerning governance of the County. They made reference to their mandate and duties as specified in Article 174, 176,6, 40, 179(1), 183(1), 184,62, 61 of *the Constitution* of Kenya, 2010, the fourth and fifth schedule of *the Constitution*, 2010, Section 36 and part xi of the County Government Act of Kenya, 2012, Section 12(1) of the *Urban Areas and Cities Act*, Cap 275 Laws of Kenya and Section 56,72(1), 73(2) & (4) *Physical and Land Use Planning Act*, Cap 303 Laws of Kenya amongst other provisions of the law.

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

15. It was the Respondents' further contention that the county government of Bungoma acquired all that land known as E.BUKUSU/N.KANDUYI/882 measuring approximately 11.8 hectares from its predecessor which was set aside for public utility and in particular a football stadium and a title deed issued on 22nd May, 1973 under the Register Map Sheet No.22 and an easement registered reserving the land for general public use and as such, the land was not available for allocation to individuals or private entities. They further stated that sometime on 3Rd July, 1997 E.bukusu/n.kanduyi/882 was purportedly sub-divided into two portions i.e. E.bukusu/n.kanduyi/2725 Measuring 10.7ha And E.bukusu/n.kanduyi/2726 measuring 0.11ha while a portion of 0.90ha was unaccounted for.

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

17. At the close of pleadings, Directions were taken in which the parties agreed to canvass the Notice of Motion application by way of written submissions.

18. The petitioner filed his submissions in support of the notice of motion and in opposition to the preliminary objection, Grounds of opposition and the Replying affidavit dated 12th March, 2024

19. On the preliminary objection, the petitioner submitted that the petition filed herein meets the criteria for a constitutional petition as laid down by the Mutunga Rules as the petitioner in his petition has set out the legal foundation of the petition stating the relevant Constitutional provisions relevant to the

dispute between the parties. He argues that he has laid down with precision the material facts giving rise to the complaint against the respondents and has also given particulars of breach and contravention of *the Constitution* matching the Constitutional provisions contravened with sets of factual basis of the impugned actions.

20. Secondly, it was submitted that the County Physical and Land Use Planning Liaison Committee lacks the capacity to determine constitutional issues as raised in this petition since the issues complained of in the petition are anchored on Articles 40, 47 and 50 of *the Constitution*. It was further argued that the petitioner was not served with the enforcement notice and that the said notice was improper for giving an ultimatum of 7 days as opposed to the 14 days afforded in the Act. As such, the petitioner submitted that the process was rigged from the beginning geared at denying him justice.

21. Thirdly, it was submitted that this petition was not sub-judice and that no material has been presented to court to make any determination on this particular issue. As such, he argued that the allegations on this ground were unfounded. The petitioner urged the court to dismiss the respondents notice of preliminary objection with costs.

22. In support of his application, the petitioner submitted that he has met the requirements for the grant of interim orders sought according to the principles set out in Giella vs. Cassman brown and Co Ltd [1973] EA 358 as confirmed BY Justice Ngugi in Simon Gatutu Kimamo & 547 others vs. East African Portland Cement (2011) eKLR Machakos High Court Petition No.333 of 2011. It was further submitted that the Petitioners exhibit G6(d) gave the history of how plots were allocated to individuals by the defunct County Council of Bungoma in the 1960's and titles eventually issued with the Kanduyi stadium and market having been set apart. The petitioner stated that the Town Planning Committee, Bungoma County Council in a resolution shown in Petitioners exhibit G6(d-g) authorized the sub-division of Land Parcel No. E.bukusu/n.kanduyi/2725 into 27 plots including the suit property herein which was issued with a title deed. The petitioner submitted that as per the title deed presented, he was registered as the fourth owner.

23. The petitioner stated that unless challenged, Titles deeds are in law protected under Section 23 of the Registration of Titles Act (repealed) which is a replica of Section 26 of the *Land Registration Act*, 2012. As such, they argued that the petitioner has proven a prima facie case with a probability of success. Reliance was placed in the case of Moya Farm Drift vs. Theuri (1973) EA 114

24. It was further submitted that unless the orders sought are granted, the petition herein would be rendered nugatory. It was submitted that the suit property has been developed and the petitioner is conducting his business therein as indicated by a single business permit annexed and marked as Exhibit G3. He submitted that if the court had not issued the interim orders issued on 7th February, 2024 then the respondents would have demolished the buildings erected on the suit land. He urged the court to confirm the interim orders as it proceeds to determine the main Petition.

25. Lastly it was submitted that the petitioner is entitled to be protected under the law from loss of property unless it is shown that the property was obtained illegally and through fraud. They argued that unless the respondents are stopped from proceeding with its threats, this court will be condoning anarchy where the law will be held in total disregard. They urged that the issuance of the orders sought will uphold the fidelity of the law and *the Constitution*.

26. The 1st, 2nd and 3rd Respondents filed submissions dated 21st March, 2024 in support of the preliminary objection dated 26th March, 2024 and in opposition to the notice of motion dated 6th February, 2024 on five issues.

27. On the first issue, it was submitted that the Court lacks jurisdiction under the *Physical and Land Use Planning Act* and that this Court can only exercise jurisdiction donated to it either by *the Constitution* or the law and cannot arrogate itself jurisdiction beyond that which is conferred by *the Constitution* and /or statute. They submitted that the

applicant's case was based on the notice placed in the standard newspaper dated 31st January, 2024 issued by the County Government of Bungoma through the Chief Executive Committee Member Department of Lands, Urban/Physical Planning, Housing and Municipalities which gave intention of the County Government of Bungoma to remove and/or demolish all developments around Kanduyi area in which the suit property falls in. It was their argument 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 which has the appellate jurisdiction. Reliance was placed in the cases 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.

28. The Respondents urged this court to apply the principle of exhaustion as was considered in the abovementioned cases adding 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 cited the case of Speaker of the National Assembly v James Njenga Karume [1992] eKLR.

29. On the second issue, it was argued that this suit is sub-judice ELC Petition E002 of 2024 between Margaret Nasimiyu Wesonga, Joseph Masibo, Godfrey Jacob Mbindi, Simon Wamalwa, Safariplies Limited, Cleophaz Misiko, Salu Wekesa, Juma Waswala, Blasio Barasa Adriano Makokha and Gabriel Nalianya against the Defendants/Respondents herein over the same subject matter to which E.Bukusu/N.Kanduyi/4634 in the Environment & Planning Division of this Court at Bungoma. Counsel referred to Section 6 of the *Civil Procedure Act* while arguing that the concept of sub judice which in latin means "under Judgment" denotes that where an issue is pending in a Court of law for adjudication between the same parties, any other Court is barred from trying that issue so long as the first suit goes on. In such a case, an order ought to be issued by the subsequent Court to stay the proceeding and such order can be made at any stage. Reliance was placed in the case of Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR. They therefore asked the court to dismiss this suit with costs.

30. On the third issue, it was submitted that the 2nd, 3rd and 4th defendants are improperly joined to this suit since they are not legal persons and for not being constitutional and statutory legal entities capable of suing and being sued under the law. They argued that without the personal names of the holders of those offices, the purported suit against those offices is a non-starter and still born and an absolute abuse of the Court process. They also on submitted that the 1st, 2nd and 3rd 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 being sued for commissions or omissions done in their official duties. Reliance was placed in the case of John Mining Temoi & another v Governor of Bungoma County & 17 others [2014] eKLR and John Rimui Waweru & 3 others v Githunguri Constituency Ranching Co Limited & 5 others [2015] eKLR. They therefore urged that the suit against the 1st, 2nd and 3rd respondents be struck out with costs.

31. On the fourth issue, it was submitted that no prima facie case has been established by the plaintiff/applicant. The respondents contend that the suit property forms part of land set aside for purposes of public utility and that the mode of acquisition of title by the applicants was illegal and marred

with fraud. It was their submission that illegally obtained land cannot be protected under Article 40 of *the Constitution*. Reliance was placed on the case ofDina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment).It was the respondents' further contention that even if the application is to be considered on merit, the Plaintiff/Applicant has not met the three stage tier sequential conditions for the grant of the equitable injunction orders set out in the celebrated case of Giella v Cassman Brown and Co Ltd [1973] EA 358.

32. The respondents argued that if at all the applicants had carried out their due diligence by checking at the history of the suit property, they would have realized that the same had been set aside/reserved for public utility and more particularly a stadium. They argued that the applicants can therefore not be allowed to benefit from an illegality. They cited the cases of Kamau Mucuha v Ripples Ltd [1993] eKLR , Munyu Maina v Hiram Gathiha Maina Civil Appeal No 239 of 2009 [2013] eKLR, Chemey Investment Limited v Attorney General & 2 others [2018] eKLR and Abu Chiaba Mohamed v Mohamed Bwana Bakari & 2 others [2005] eKLR.

33. On the last requirement, the Respondents submitted that since the Applicants have not established the first two conditions and deciding the application on a balance of convenience, they argued that suit property being one of general public utility, the balance of convenience tilts in favour of the public as represented by the respondents. Finally, they submitted that the Respondents having successfully defended the suit and the application, they are entitled to the costs of the suit and the application.

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

35. In considering the matters aforementioned, I have identified the following issues for determination of the application;

    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.

36. The respondents in their preliminary objection argued that the petition as framed and filed is not precise on the specific provisions of *the Constitution* and the rights allegedly threatened and 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.

37. 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 he stated;

'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."

38. Having said that and on a quick perusal of the petition, I note that in Part A thereof, the Petitioners have referred to various provisions of *the Constitution* which have allegedly been violated or threatened to be violated. In Part C of the petition, the petitioner has explained how the said provisions have been violated and the injury he has suffered are laid out in part D of the petition. From the perusal of the petition in its totality, it is clear 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 in my view is worth sustaining.

39. On whether this court has jurisdiction to hear and determine this application, the respondents argued that the petitioners erred in filing this matter before this court instead of filing an appeal against the enforcement notice before the Physical and Land Use Planning Liaison Committee (hereinafter 'the committee'). The Respondent invoked the doctrine of exhaustion where he argued that the petitioner ought to have commenced these proceedings at the liaison committee level before approaching this honourable court as required under Section 72(3) and (4) of the *Physical and Land Use Planning Act*.

40. 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."

41. 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.

42. From the provisions of the law cited above, I now return to find out whether the suit and the application fall within the provisions of Section 72 of the *Physical and Land Use Planning Act*.

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

44. On examination of the petitioners' case, it emerges that the property in issue neighbors the Masinde Muliro Stadiun in Kandyi and fits the description of the properties proposed to be demolished to pave way for the Masinde Muliro Stadium, Kanduyi. The petitioner alleges that the suit property belongs to him having legally and procedurally acquired the same. At this juncture, it is imperative to note that the threshold for a preliminary objection is now well settled and there would be no reason to re-invent the wheel. Courts have held on numerous decisions that a preliminary objection deals with a pure point of law where facts are not disputed and not where the court has to look outside the case for evidence to establish the point of law as raised.

45. 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."

46. 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."

47. 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."

48. In my understanding, the petitioner is seeking for the protection of a right in which he claims to have legally and lawfully acquired title and buildings erected thereon as opposed to an issue of land use and planning. From the preamble of the *Physical and Land Use Planning Act*, CAP 303 Laws of Kenya, the Act is clear and elaborate on the scope and application of its application and states as follows; 'AN ACT of Parliament to make provision for the planning, use, regulation and development of land and for connected purposes'

49. 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. From the materials placed before me, the suit property faces imminent demolition by the respondents and the petitioner have approached this Court seeking legal protection. In relation to

Article 23 of *the Constitution*, the High Court and Courts of equal status including the 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.

50. Further, on a quick perusal 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 and the use and occupation of, and more so thelegality of acquisition 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 lacks merit.

51. As to whether the petitioner has satisfied the requirement to grant the conservatory and injunctive orders sought, 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's 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.''

52. 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.'

53. On Whether the Petitioner have made out a case for the grant of a conservatory and injunctive orders; the Petitioner is apprehensive that the Respondents may take steps 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 allege is a valid certificate of title for the suit land. He annexed the said title documents and plans of the developments on the suit property.

54. The court is alive to the fact that this being an interlocutory application, the court should avoid delving into the merits of the case in great detail or making any comments or conclusions which may prejudice the fair trial of the Petition. However, on examination of the documents presented by the petitioners, it appears to me that the petitioner was registered as the 4th proprietor of the suit property with a title deed being issued to him on 6th October, 2011. He also annexed documents in an attempt to show how the first registered owner of the suit property obtained the same. There are also council minutes presented to show the resolution made by the defunct County Council of Bungoma to subdivide E.Bukusu/ N.Kanduyi/2725 which he claims gave rise to 27 plots with the suit land being among the 27 plots. In my view, the issues raised in the petition are issues which need to be investigated by cross-examination during the full hearing of the case and not at the interlocutory stage.

55. Further, the respondents in their replying affidavit have admitted to the existence of sub-divisions on the initial title i.e L.R.No. E.Bukusu/ N.Kanduyi/882 which gave rise to new parcel and allocations of the new resultant parcels of land. They have further enumerated particulars of fraud and the manner in which the petitioners purportedly acquired the suit property which they allege is suspect and marred with irregularities making the entire 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"

56. It is trite that, although the standard of proof required in fraud is not one beyond reasonable doubt, however, 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"

57. In my considered view, the real issues in trial in this matter cannot be determined by affidavit evidence at an interlocutory stage but upon full hearing.

58. From my analysis of the materials placed before me, I am satisfied that the Petitioners have established a prima facie case with a probability of success at the trial as enunciated in the case of Mrao v First American Bank of Kenya Limited & 2 Others [2003] eKLR.

59. Regarding the second condition, this court is also satisfied that it would cause greater hardship to the Petitioner if he was to be evicted from the suit property and the developments therein demolished compared to the inconvenience the Respondents may suffer if the interim injunction were granted.

60. Even if this court was to apply the third option, the balance of convenience in my view would tilt in favour of the Petitioner who is in possession of the suit property

61. In my view, 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 and the developments thereon were to be alienated and/or demolished before determining whether the same was acquired legally, procedurally or through a corrupt scheme by the petitioners or the same belongs to the County Government of Bungoma and whether indeed the petitioner's constitutional rights have been infringed or are under the threat of being infringed, this petition may be rendered nugatory or just an academic exercise.

62. 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. In the case of Hussein Janmohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287. The court has considered the fact that the constitutional petition is still pending hearing and determination. In the circumstances, I am of the view that costs of the application should abide the Petition.

63. For the foregoing reasons, it is my finding that the petitioner's application dated 6th February, 2024 has merit and the same is allowed in the following terms;

    a. A conservatory order in the nature of an injunction is hereby issued for a period of six(6) months prohibiting and restraining the Respondents jointly and severally, their agents, employees, officers and/or any person acting on their behalf, authority, instructions and/or directives from demolishing or in any way interfering with the Petitioners/applicants, use and occupation of the building erected on Land Parcel no. E.bukusu/n. Kanduyi/4632 pending the hearing and determination of this petition.

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

DATED, SIGNED AND DELIVERD AT BUNGOMA THIS 23RD DAY OF MAY, 2024.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

Mr. Maloba for Applicant

Mr. Wesonga & Mr. Wangila for the Respondents

Bett C/A