



Sheria na Haki Human Rights Institute v Noor & 10 others; Ethics and Anti-Corruption Commission & another (Interested Parties) (Constitutional Petition E003 of 2023) [2024] KEELC 4519 (KLR) (20 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4519 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CONSTITUTIONAL PETITION E003 OF 2023
LL NAIKUNI, J
MAY 20, 2024
IN THE MATTER OF: THE REPEALED (FORMER) CONSTITUTION
AND
IN THE MATTER OF: THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF: SECTION 70 (A) AND
SECTION 77(9) OF THE REPEALED CONSTITUTION
AND
IN THE MATTER OF: ARTICLES 22, 40(6) AND ARTICLE 60(1)
(B) AND ARTICLE 62(1)(A) & (E) AND 62(1)(E) AND ARTICLE
62(2), 258 AND 159 (2)(D) OF THE CONSTITUTION 2010.

BETWEEN

SHERIA NA HAKI HUMAN RIGHTS INSTITUTE PETITIONER

AND

AHMED SIRAJ NOOR 1ST RESPONDENT

AISHA FATUMA MOHAMMED 2ND RESPONDENT

NGOZI AJ 3RD RESPONDENT

THE REGISTRAR OF TITLES MOMBASA 4TH RESPONDENT

NATIONAL LAND COMMISSION 5TH RESPONDENT

THE HON ATTORNEY GENERAL 6TH RESPONDENT

DIRECTOR LAND ADMINISTRATION 7TH RESPONDENT



CABINET SECRETARY MINISTRY OF LANDS AND URBAN
DEVELOPMENT 8TH RESPONDENT
COUNTY GOVERNMENT OF MOMBASA 9TH RESPONDENT
INSPECTOR GENERAL OF POLICE 10TH RESPONDENT
OCS BAMBURI POLICE STATION 11TH RESPONDENT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY
DIRECTORATE OF CRIMINAL INVESTIGATION INTERESTED PARTY

RULING

I. Introduction

1. This Honorable Court is tasked to make a determination onto two (2) applications. These are the Amended Notice of Motion application dated 25th August, 2023 by Sheria na Haki Human Rights Institute, the Petitioner herein and the other being the application dated 11th October, 2023 by Ahmed Siraj Noor, the 1st Respondent herein respectively.
2. Despite of service of the Notice of Motion applications, there were no responses filed. Nonetheless, the Honourable Court will still proceed to render its ruling on merit.

II. The Petitioner/ Applicant's case.

3. The Petitioner/Applicant brought the amended application under the provision of Articles 40, 47 and 159 of *the Constitution* of Kenya 2010, Sections 1A,1B and 3A of the *Civil Procedure Act*, Cap. 21, Order 40 Rules 1, 2, 3 and 4; Order 51 Rule of the Civil Procedure Rules (2010)of the Laws of Kenya, Rule 18 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 and Sections 7,17, 37 and 38 of the Limitations Act. They sought for the following orders:-
 - a. Spent.
 - b. Spent.
 - c. That this Honourable Court be pleased to issue conservatory orders restraining the Respondents by their servants, agents, and/or any other person claiming under them from conducting a survey, subdividing, evicting, alienating, dispossessing the occupants from the suit land CR Nos.56243/CR 46770/3 of subdivision No. IMN/18815 (org No. IMN /16634)Issuing of new CT/CR numbering from 60378 to 60589 of IMN/19653 to 19664 or in any other way interfering with the occupants quiet possession thereof pending the hearing and determination of this petition.
 - d. That costs of this Application be provided for.
4. The application was premised on the grounds, testimonial facts and the averments made out under the twenty (20) Paragraphed Supporting Affidavit of Etoe John Akaran, the Executive Officer of the Intended Interested Party herein sworn and dated on 25th August, 2023 and the six (6) exhibits annexed and marked as "EJA 1 to EJA 6" thereto. He averred as follows:-



- a. The Petitioner was registered in the year 2022 as a non-governmental organization charged with the duty of defending and protecting the rights of the weak and vulnerable within the Republic of Kenya, (Annexed in the affidavit was a copy of the Certificate of Registration of the Petitioner marked as “EJA – 2”).
- b. The Applicant being a Human Rights Institute interacted with several people with varying complaints over infringement of their freedoms and rights as guaranteed under *the Constitution*.
- c. In the recent days, the occupants had registered dozens of complaints relating to the conduct of the Petitioner herein. The complaints encompassed a deliberate and determined effort by the 1st Respondent and 3rd parties to curtail the right to own property of the Occupants of the suit property.
- d. The Petitioner was acting in public interest for the occupants of all that parcel of land known as CR 56243/CR 46770/3 of subdivision NO.IMN/18815 (org IMN/16634) Issuing of new CT/CR numbering from 60378 to 60589 of IMN/19653 to 19664 Comprising of many families including women, school going children and aged persons. (Annexed herewith and marked as “EJA – 3” was a true copy of the title documents with entry No.12 dated 21st July, 2013 transferred by the 1st Respondent to 3rd parties).
- e. The occupants and/or their fore fathers had been living on the suit properties for a very long time being sometimes in the year 1960s in harmony enjoying peaceful and quiet possession of the property until sometimes in the year 2022 when the 1st Respondent and 3rd Parties laid various claims on the suit property demanding that the occupants do vacate the place they have always known to be their home.
- f. Several occupants feeling aggrieved by the conduct of the 1st Respondent and 3rd Parties moved to court laying various claims including claims of adverse possession and to their surprise the 1st Respondent and 3rd Parties to the claims by filing various title documents laying allegation that the property had been owned by the 1st Respondent and 3rd Parties.
- g. Upon perusal of the title documents in the name of the Respondents herein, they established that the provisional title was issued on the 4th March, 2023 and 21st July, 2013 which day was a Sunday, (Annexed in the affidavit and marked as “EJA – 4” was a true copy of the calendar for the Month of July 2013).
- h. The 21st July 2013 was a Sunday and that it was public day and/or general knowledge that public offices and/or in particular the office of the Land Registrar had never been operational on a Sunday as such the same was a product of a forgery, an illegality and/or a well-orchestrated scheme.
- i. The 1st Respondent and 3rd Parties sometimes in the year 2022 through goons and/or Security officers invaded the suit properties at dawn, unlawfully and/or unconstitutionally evicted the occupants therein, demolished their houses and places of worship, graves of ancestors and historical heritage. (Annexed herewith and marked as “EJA 5 & - 6” were true copies of the previous photographs of the demolished houses and destroyed shrine respectively).
- j. At the time of eviction women and children were assaulted and treated in a degrading manner in total degradation of *the constitution*.



- k. Be that as it may the procedure followed by the 3rd and 4th Respondents in allocating the suit properties to the 1st Respondent and thereafter transferring the same and allocating it to the 2nd Respondent was illegal as the due process was not followed and the occupants of the suit properties were neither heard nor involved in any way.
- l. The 1st Respondent and 3rd Parties always conducted an eviction and demolition whenever they were served with court summons with respect to the suit properties with the view of defeating justice.
- m. The Respondents whenever they were served with court summons with respect to the suit properties with the view of defeating justice.
- n. The occupants had at several times been rendered homeless and destitute with no roof above their heads and thus it was just enough that this court do grant the interim orders at first instance the 1st Respondent and 3rd Parties might proceed and evict the Occupants of the suit properties in the pursuit to frustrate them and defeat justice.
- o. The occupants of the suit properties were likely to suffer an irreparable loss where the orders herein sought were not granted.
- p. The Occupants were willing to abide and obey any further orders that this Honourable court makes in granting the orders so prayed for.

II. The Notice of Motion application dated 11th October, 2023 by the 1st Respondent.

- 5. The 1st Respondent brought the application under the provision of Order 40 Rule 7, Order 51 Rule I of the Civil Procedure Rules, 2010 and sought for the following orders:-
 - a. Spent.
 - b. That there be a temporary stay of order No. 6 given on 30th August, 2023;
 - c. That order No. 6 given on 30th August, 2023 be set aside unconditionally;
 - d. That this matter is sub judice hence it be stayed pending hearing and determination of ELC No. 011 of 2022 (O.S.) Mombasa; and
 - e. That costs of this Application be provided for.
- 6. The application was premised on the grounds, testimonial facts and the averments made out under the fourteen (14) Paragraphed Supporting Affidavit of AHMED SIRAJ NOOR, the 1st Respondent herein sworn and dated on 11th October, 2023. He averred as follows:-
 - a. The Applicant's suit and application were totally defective and it ought to be struck out on the Courts own motion. The Applicant lacked locus standi to swear the Affidavit, indeed the alleged affected persons never produced and or indicated their identity cards, plots the were occupying nor sign the same hence the suit was defective from the very onset and he prayed that the Court on its own motion to strike it out.
 - b. He confirmed that the suit properties initially had one (1) mother title that is Plot No. C.R. No. 56243 Sub-divisions No.18815/T/MN, which sub-divided into 133 sub-plots in April, 2013, he produced hereto on pages 1 to 11 copy of his exhibit marked as "ASN - 1" the mother title with all the relevant entries. He bought the Plot on 15th May, 2012 as per copy of Transfer on pages 12 to 15 of his exhibit.



- c. On 5th December, 2021, he instructed Messrs. Pimatech Land Surveyors and Consultants to carry out a comprehensive survey and do a report in respect to the suit properties, and indeed a report was done on 6th December, 2022. He produced in the affidavit on page 16 and 17 of his exhibit a copy of the instructing letter of 5th December, 2022 and on pages 18 to 30 of my exhibit the Survey Report. He also produced two (2) other self-explanatory reports on pages 31 to 64 of his exhibits the Reports were by the Regional Surveyor and Deputy Registrar on the ground report of the suit property.
- d. He was aware that on 30th August, 2023 this Honourable Court gave orders in this matter and in particular order No. 6 of 30th August, 2023, which had adversely affected him and other third parties who were innocent purchasers in occupation, usage and or in the process of developing their sub - plots. He produced on page 65 and 66 of his exhibit the copy of the said Order of 30th August, 2023.
- e. In light of his exhibit on pages 1 to 11 and 18 to 64 he averred to this Honourable Court that the Applicants/Petitioner mislead this Court by misrepresentation that they were indeed in fully occupation, usage and developing suit properties, which allegations were not factual and indeed wrong as a result the Court issued order No. 6 of 30th August, 2023 which was now adversely affecting him and other third parties who were innocent purchasers There was now urgent need to slay the said order No. 6 and suit order No 6 and subsequently set in aside since none of the Applicants in occupation or any of the suit sub-plots as initially alleged.
- f. The names appearing as having been instructed Sheria na Haki Human Rights Institute which he produced hereto on page 67 of his exhibit were the same names appearing as Plaintiffs in the civil suit “ELC (OS) (Mombasa) No. 011 of 2022 pending before this Court. He produced a similar list on page 68 of his exhibit. Hence this matter was actually sub - judice since the same parties were in Court over the same matter he produced hereto on produced hereto on pages 69 to 78 of his exhibits documents to verity the same.
- g. Indeed the Petitioner's allegations that a title deed or title deed were issued on 21st July, 2013 which was a Sunday the date was per error since all the mentioned title deed were issued on 21st June, 2013 and not 21st July, 2013. He produced copies of the alleged titles on the alleged titles on page 79 to 105 of his exhibit which clearly showed they were all issued on 21st June, 2013 and not 21st July, 2013 as alleged.
- h. There was an urgent need to have the order No. 6 of 30th August, 2023 stayed in the interim period because it was obtained by misrepresentation and him being affected adversely together with innocent third parties who were in occupation of their sub-plots.
 - i. The Petitioner would not suffer any prejudice because he were or his people had never occupied, stayed and or used the suit ped and or used the suit properties as shown by the Surveyors Report 6th December, 2022 and indeed he was a liar with so many other cases as per copies of self - explanatory pleadings produced on pages 106 to 144.
- j. The interest of justice, fairness and natural justice required that the orders being sought be granted in his favour forthwith. He produced his exhibits marked as “ASN – 1” on pages 1 to 144.
- k. He had demonstrated that there was need to stay Order No. 4 of the orders granted on 30th August, 2023 pending the inter parte hearing of this application.
- l. The Affidavit was in support of his application.



II. Submissions

7. On 19th January, 2024 while all the parties were in Curt directions were granted to have the Notices of Motion applications dated 25th August, 2023 and 11th October, 2023 be disposed of by way of written submissions. Pursuant to that on 4th April, 2024, the Honourable Court reserved 6th May, 2024 as the date to deliver its Ruling thereof.

A. The Written submission by the Petitioner/ Applicant

8. The Petitioner/Applicant through Sheria na Haki Human Rights Institute their written Submissions dated 5th February, 2024. The Learned Counsel commenced the submission by stating that the Petitioner/Applicant and their families had lived on the suit property since the year 2004. They entered the vacant parcel of land cultivated and eventually lived on it. They then became the beneficial owners of property known CR.56243/CR46770/3 of Subdivision NO. IMN/18815 (Original IMN/16634)issuing of new CT/CR numbering from 60378 to 60589 of IMN/19653 to 19664. The 1st Respondent allegedly that the suit property belonged to the party not mentioned and unknown who sold it to him in the year 2012. Evidence of this had not been provided by the 1st Respondent in his reply and documentation. He appeared on the suit property to claim ownership of in the year 2018 and produced a fraudulent copy of the title showing transfers made to him and several other parties for the suit property. One of the transfers by the 1st Respondent showed it was done and entered on a Sunday which was not a working day in Government Land offices.
9. The Learned Counsel submitted that the 1st Respondent's allegations of vacant occupation of the land that brought about their ownership could not be further from the truth because at the time of the alleged sale and eviction, the Petitioner/Applicants were living on the suit property and eviction did take place in the year 2018. The Learned Counsel posed the query whether the Petitioners/Applicants had met the threshold for granting a permanent injunction in their application. The Learned Counsel submitted that the criteria in granting injunctive orders were spelt out in Kenya in "Nguruman Limited – Versus – Jan Bonde Nielsen & 2 Others CA No. 77 of 2012 (2014) eKLR" where the Court of Appeal held that;

"in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a. establishes his case only at a prima facie level, b. demonstrates irreparable injury if a temporary injunction is not granted and c. ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially".
10. It was the humble submission of the Learned Counsel that the case by the Petitioners was a prima facie case with the probability of success. The Petitioner/Applicants lived peacefully on the suit property until the year 2018 when the 1st Respondent tried to encroach on it but found the Petitioners who had always lived there. However, he was able to evict the Petitioners from the suit property with the aid of police officers in a process that was marred with extreme violence and unnecessary force. The 1st Respondent produced a fraudulent copy of the title showing transfers made to him and several other parties for the suit property in their names. Upon further scrutiny, it was realized that the some of the entries on said transfers were made on 21st July, 2013 which was a Sunday.



11. According to the Learned Counsel, the 1st Respondent's allegations of ownership could not be any further from the truth because the alleged transfers that claimed to have given the 1st Respondent and others ownership to the suit property were outrightly irregular. The office of the Lands Registrar works on Mondays to Fridays between 8am to 4pm. It was clearly indicating on its website and physical offices that it was closed every weekday after 4pm and during the weekends which were Saturdays and Sundays.
12. The Petitioners/Applicants stood to suffer irreparable losses if the orders sought were not granted. By virtue of ownership acquired through the land Adverse Possession, the Petitioners/Applicants should have a right to peaceful enjoyment of their property. The injustice they would suffer if the orders sought were not granted could not be compensated. The law only sought to protect the right to property of Kenyans who acquire ownership regularly and not those who acquire it irregularly. To buttress on this point, he cited the case of: "Chemei Investments Limited – Versus - The Attorney General & 2 Others(2018) eKLR" held:-

“We also do not think that the Learned Judge can be criticized for referring in his judgment to Section 40 (6) of the current Constitution which expressly provides that title to property which is obtained illegally does not enjoy constitutional protection. The learned judge was very clear in the judgment that it was the former Constitution, which applied in this case, and merely referred to Article 40 (6) of the current Constitution to make the point, which he was entitled to do, that henceforth by dint of express constitutional edict, those who illegally acquire property cannot take refuge under the right to property that *the Constitution* guarantees.”
13. The balance of probability also tilted in favour of the Petitioners/Applicants; the 1st Respondent had produced documents acquired fraudulently/irregularly and from a null transaction to prove that he allegedly owned and could transfer the suit property or part of it to third parties. This was questionable since one could not purport to transfer that which did not belong to them and especially not during odd nonworking days and he should therefore not be allowed to benefit from an illegality. On this point, the Counsel relied on the case of:- "Elijah Makeri Nyangw - Versus - Stephen Mungai Njuguna & Another [2013] eKLR", Munyoya J held as follows:-

“The evidence in this case puts no one in doubt that the title to the 1st Defendant was obtained illegally, unprocedurally or through a corrupt scheme. The documents that conveyed title to him were forged. The title could not therefore have been obtained legally or procedurally. I am satisfied that the provisions of Section 26 (1) (b) have been met and that the title of the 1st Defendant is liable to be cancelled. I therefore proceed to cancel the title of the 1st Defendant and his registration as proprietor of the suit land. The Plaintiff should be registered as owner of the suit land. It is regretful that the 1st Defendant was snared by the scheme perpetuated by the 2nd Defendant. I sympathize with him but I must ensure that the real title holder is protected and that he is registered as the proper owner of the suit land.”
14. It was the Learned Counsel's humble submissions that 1st Respondent never had a claim to the suit property. As proved by the Petitioners/Applicants through the doctrine of adverse possession which they rightly and regularly acquired the suit property, the same herein belonged to them. The provision of Section 26 of the *Land Registration Act* provides for a certificate of title to be taken by court to be prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge. In this case however, the 1st Respondent's title validity and authenticity is being challenged and this can only be determined



after the suit is heard and determined. The 1st Respondent's application dated 11th October, 2023 was majorly spent in response to it the Petitioner/Applicant states that it's application was not sub - judice since the civil suit ELC NO. 11 of 2023 majorly sought to ascertain and prove ownership of the suit property through the Doctrine of Adverse Possession while this application sought to show the irregular and fraudulent ways in which the transfers had been done by the 1st Respondent through documents he filed himself in his response to the Petition.

15. In conclusion, it was the Learned Counsel's submission that the application by the Petitioners/Applicants' was merited and met the requisite threshold for granting an injunction. Thus, they prayed that the application dated 25th August, 2023 be allowed with costs to the Applicants.

V. Analysis and Determination

16. As indicated above, I have keenly considered the pleadings filed by all the parties, the written submissions, the cited authorities by the Learned Counsels, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
17. To proceed further, this Honourable Court has framed three (4) broad salient issues for its determination. These are:-
- a. Whether the amended application dated 25th August, 2023 and the suit in its entirety is sub judice and hence should be stayed pending the hearing and determination of ELC No. 011 of 2022 (O.S.) Mombasa;
 - b. Whether Order No. 6 issued on 30th August, 2023 should be set aside;
 - c. Whether the Amended Notice of Motion application dated 25th August, 2023 is merited after discerning:-
 - i. The nature of conservatory orders;
 - ii. The guiding principles in conservatory application; and
 - iii. The applicability of the principles to the application
 - d. Who bears the costs of the Notice of Motion application dated 25th August, 2023 and the Notice of Motion application dated 11th October, 2023?

ISSUE No. a). Whether the amended application dated 25th August, 2023 and the suit in its entirety is Sub - Judice and hence should be stayed pending the hearing and determination of ELC No. 011 of 2022 (O.S.) Mombasa

18. The concept of sub - judice is one that bars a Court from trying a matter that is in one way or other before another Court of competent jurisdiction by way of a previously instituted suit as long as it is between the same parties canvassing it under the same title. In essence, if both Courts were to proceed with the matters on merit and determine them, without deference to the former, they would arrive at similar or different results on the same rights claimed by the same parties and there would be a duplication of the reliefs or a conflict of them, which would be a recipe for confusion and chaos in the legal system. In the alternative of the scenario immediately above, where one of the Courts determined the matter before it the one still pending would be res judicata. It is governed under the provision of



Section 6 of the Civil Procedure Act, Cap. 21 which bars any court from engaging in matters sub judice before them. It provides as follows:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

19. In a recent decision, my brother Justice Mativo discussed the concept sub judice being “Republic – Versus - Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR” where he stated as follows:-

“.....there exists the concept of sub judice which in Latin means “under Judgement.” It denotes that a matter is being considered by a Court or Judge. The concept of sub judice 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 situation, order is passed by the subsequent court to stay the proceeding and such order can be made at any stage.”

20. The import of the concept is that as soon as the Court finds a matter sub judice it stays immediately the proceedings until the prior one is heard and determined. On this point, the “Supreme Court of Kenya in Kenya National Commission on Human Rights – Versus - Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)”, stated therein as follows: -

“(67) The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

21. In the instant case, on 5th December, 2021, the Petitioners/Applicants instructed Messrs. Pimatech Land Surveyors and Consultants to carry out a comprehensive survey and do a report in respect to the suit properties. Indeed a report was prepared on 6th December, 2022. He produced it in the affidavit on pages 16 and 17 of his exhibit a copy of the instructing letter of 5th December, 2022 and on pages 18 to 30 of his exhibit the Survey Report. He also produced two (2) other self-explanatory reports on pages 31 to 64 of his exhibits the Reports were by the Regional Surveyor and Deputy Registrar on the ground report of the suit property. He was aware that on 30th August, 2023 this Honourable Court gave orders in this matter and in particular order No. 6 of 30th August, 2023, which has adversely affected them and other third parties who were innocent purchasers in occupation, usage and or in the process of



developing their sub-plots. He produced on page 65 and 66 of his exhibit the copy of the said Order of 30th August, 2023.

22. In light of their exhibit on pages 1 to 11 and 18 to 64 the Petitioners/Applicants averred to this Honourable Court that they misled this Court by misrepresentation that they were indeed in fully occupation, usage and developing suit properties, which allegations were not factual and indeed wrong as a result the Court issued order No. 6 of 30th August, 2023 which is now adversely affecting him and other third parties who are innocent purchasers. There is now urgent need to slay the said order No. 6 and subsequently set aside since none of the Applicants were in occupation or any of the suit sub-plots as initially alleged. The names appearing as to have instructed Sheria na Haki Human Rights Institute which he produced hereto on page 67 of his exhibit were the same names appearing as Plaintiffs in ELC (Mombasa) (OS) No. 011 of 2022 pending before this Court. He produced a similar list on page 68 of his exhibit. Hence this matter is actually sub-judice since the same parties are in Court over the same matter he produced hereto on produced hereto on pages 69 to 78 of his exhibits documents to verify the same.
23. These cases have one thing in common: litigating over or against the same subject matter either on one side or opposites ones, and the expected outcome in the two courts both of which have competence in jurisdiction automatically impact on the same subject matter.
24. To avoid a situation such as the one described above, Parliament in its wisdom enacted the provisions to cater for cases where overzealous parties might run to and fro in the corridors of justice so as to mine for the best result in their estimation. In that regard, the provision of Section 5 of the Civil Procedure Act, Cap. 21 lays the basis for the operation of the provision of Section 6 of the Civil Procedure Act, Cap. 21 by stating that any court can try any suit of a civil nature as long as it has jurisdiction, except the suits in which that act or process is either expressly or impliedly barred. For these reasons, therefore, this court having found that it is barred by the operation of law and in particular, the provision of Section 6 of the Civil Procedure Act, Cap. it lacks the requisite authority to hear and determine this Petition. Be that as it may, for the sake of the interest of Justice, Equity and Conscience, I will still proceed to examine the other issues in the ruling.

ISSUE No. b). Whether Order No. 6 issued on 30th August, 2023 should be set aside

25. Under this Sub – title, it is imperative that I spend a little bit of time on the substratum and the legal position regarding review, varying and setting aside of Court orders. This jurisprudence is founded under the provisions of Order 40 Rule 7 if it's an injunction order or Order 45 (1) (2) & (3) of the Civil Procedure Rules, 2010 and Section 80 (a) & (b) of the Civil Procedure Act, Cap. 21. Section 80 provides:

“ any person who considers himself aggrieved:-

- a. By a Decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. By a decree or order from which no appeal is allowed by this Act, may apply for a review of Judgement to Court which passed the decree or made the Order and the Court may make such order thereto.”

26. The provision under Order 45 (1) states as follows:- “

Any person considering himself aggrieved:-



- a. By a Decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. By a decree or order from which no appeal is allowed by this Act, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of Judgement to the Court which passed the decree or made the order without unreasonable delay”.

27. Order 40 (7) provides:-

“Any Order for Injunction may be discharged, or varied or set aside by the Court on an application made thereto by any party dissatisfied with such order”.

On 30th August, 2023 the Court amongst other orders opined itself that:-

“That in the meantime, there be status quo to be maintained on the suit land. This means that the situation to remain as it was before the suit was filed. There shall be no interference whatsoever until 7th November, 023 where the said order shall be subject for review depending on the emerging circumstances then.”

28. From the afore stated provisions, it is quite clear that the orders for review, varying or setting side Court orders are discretionary in nature. Thus, the unfettered discretion must be exercised judiciously, not capriciously and reasonably by the Honorable Court. To qualify for being granted the orders for review, varying and/or setting aside a Court order for the above provisions to be fulfilled, the following ingredients, jurisdiction and scope are required:-

- a. There should be a person who considers himself aggrieved by a Decree or order;
- b. The Decree or Order from which an appeal is allowed but from which no appeal has been preferred;
- c. A decree or order from which no appeal is allowed by this Act;
- d. There is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by him at the time when the decree was passed or the order made; or
- e. On account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree or order.
- f. The review is by the Court which passed the decree or made the order without unreasonable delay.

29. Needless to say, from the already pronouncements made above in this Ruling, the court has no authority to maintain status quo where it has no jurisdiction to hear and determine the matter. The upshot is this Honourable Court finds that the Notice of Motion application dated 11th October, 2023 has merit and is hereby allowed.



ISSUE No. c). Whether the Notice of Motion application dated 25th August, 2023 is merited

30. Under this sub title the Court shall evaluate the merits of the conservatory orders in the Notice of Motion application dated 25th August, 2023. I, hereby, discern the following areas of discussions: -
- i. The nature of conservatory orders;
 - ii. The guiding principles in conservatory applications; and
 - iii. The applicability of the principles to the applications.
31. The Court will deal with the above sequentially. On the nature of conservatory orders, this Court references the case of “Civil Application No. 5 of 2014 Gatirau Peter Munya – Versus - Dickson Mwenda Kithinji & 2 Others (2014) eKLR”, the Supreme Court discussed, at paragraph 86, the nature of conservatory orders as follows: -
- (86) “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 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 a case; or “high probability of success” in the Applicant’s case for orders of stay.
32. The Court in the case of:- “Nairobi Civil Appeal 151 of 2011 Invesco Assurance Co. Limited – Versus - MW (Minor suing thro’ next friend and mother (HW) [2016] eKLR” defined a conservatory order as follows: -
5. A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.
33. Additionally, in the case of:- “Judicial Service Commission – Versus - Speaker of the National Assembly & Another [2013] eKLR” the Court had the following to say about the nature of conservatory orders:-
- Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under *the Constitution*, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.
34. Therefore, conservatory orders are aimed at preserving the substratum of the matter pending the determination of the main issues in dispute. Given the interlocutory nature of conservatory orders, it is argued, that there is need for a Court to exercise caution when dealing with any request for such prayers. I agree with that proposition for the reason by the Respondents that matters which are the preserve of the main Petition ought not to be dealt with finality at the interlocutory stage.
35. The foregoing was fittingly captured by Ibrahim, J (as he then was) in the case of:- “Muslim for Human Rights (Milimani) & 2 Others – Versus - Attorney General & 2 Others (2011) eKLR”. The Learned Judge, correctly so, stated as follows: -
- The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility



to prosecute their cases or present their defences without prejudice. There must be no conclusively or finality arising that will or may operate adversely vis-a vis the case of either parties. The principle is similar to that in temporary or interlocutory injunctive in civil matters. This is a cardinal principle and happily makes my functions and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side.

36. The decisions in “Centre for Rights Education and Awareness (CREAW) & 7 Others – Versus - Attorney General (2011) eKLR”, “Platinum Distillers Limited – Versus - Kenya Revenue Authority (2019) eKLR” and “Kenya Association of Manufacturers & 2 Others – Versus - Cabinet Secretary – Ministry of Environment and Natural Resources & 3 Others (2017) eKLR” also variously vouch for the cautionary approach. A Court, therefore, dealing with an application for conservatory orders must maintain the delicate balance of ensuring that it does not delve into issues which are in the realm of the main Petition. In this discourse, this Honourable Court will, therefore, restrain myself from dealing with such issues.
37. The principles for consideration by a Court in exercising its discretion on whether to grant conservatory orders have been developed by Courts over time. They are now well settled. The locus classicus is the Supreme Court in “Gatirau Peter Munya – Versus - Dickson Mwenda Kithinji & 2 Others case (supra)” where at paragraph 86 stated the Court stated as follows: -
- (86) Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant courses.
38. In “Board of Management of Uhuru Secondary School – Versus - City County Director of Education & 2 Others [2015] eKLR”, the Court summarized the principles for grant of conservatory orders as:-
- (i) The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.
 - (ii) The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
 - (iii) Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.
 - (iv) Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.
39. The above principles are, however, not exhaustive. Depending on the nature of the matter under consideration, there may be other parameters which a Court ought to look into. Such may include the effect of the orders on the determination of the case, whether there is eminent danger to infringement of the human rights and fundamental freedoms under the Bill of Rights, the applicability of the doctrine of presumption of constitutionality of statutes, whether the Applicant is guilty of laches, the doctrine of proportionality, among many others.



40. On the applicability of the principles to the application, the Court shall examine if there is a prima facie case. A prima facie case was defined in “Mrao – Versus - First American Bank of Kenya Limited & 2 Others (2003) KLR 125” to mean: -

“ In a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”

41. Further, on this point, I seek refuge from the a ruling rendered on 8th February, 2021 in the case of: “David Ndi & others – Versus - Attorney General & others [2021] eKLR”, the Court had the following to say about a prima-facie case: -

“ The first issue for determination in matters of this nature, is whether a prima facie case has been established and a prima facie case, it has been held, is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, it has to be shown that a case which discloses arguable issues has been raised and in this case, arguable constitutional issues.”

42. What constitutes a prima-facie case was further dealt with by the Court of Appeal in the case of:- “Mirugi Kariuki – Versus - Attorney General Civil Appeal No. 70 of 1991 (1990-1994) EA 156, (1992) KLR 8”. The Court, in an appeal against refusal to grant leave to institute judicial review proceedings by the High Court, stated as follows:-

“It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant’s interests without regard to the nature of his complaint. If he fails to show..... that there has been a failure of public duty, this court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables this court to prevent abuse by busy-bodies, cranks and other mischief-makers... In this appeal, the issue is whether the applicant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of this Act was brought into question. Without a rebuttal to these allegations, this appellant certainly disclosed a prima-facie case. For that, he should have been granted leave to apply for the orders sought. (emphasis added).

43. Thus, in sum while 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 the provision of 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.

44. In the Petition, the Petitioner have come before the Honourable Court complaining among other things that as a non -governmental organization charged with the duty of defending and protecting the rights of the weak and vulnerable within the Republic of Kenya. The Applicant being a Human Rights Institute interacts with several people with varying complaints over infringement of their freedoms and rights as guaranteed under *the Constitution*. In the recent days, the occupants have registered dozens



of complaints relating to the conduct of the Petitioner herein. The complaints encompass a deliberate and determined effort by the 1st Respondent and 3rd Parties to curtail the right to own property of the Occupants of the suit property. The Petitioner is acting in public interest for the occupants of all that parcel of land known as CR 56243/CR 46770/3 of subdivision NO.IMN/18815 (org IMN/16634) Issuing of new CT/CR numbering from 60378 to 60589 of IMN/19653 to 19664 Comprising of many families including women, school going children and aged persons. This Petition was filed in the year 2023 after the Originating summons were filed in the year 2022 by the Applicants in ELC No. E011 of 2022 making the advocate of the Applicants aware of the former suit as he is also the advocate for the Petitioner in this suit.

45. On the basis of the foregoing, there is no prima facie evidence that the Petitioner's constitutional rights as per the provision of Article 40 of *the Constitution* have been infringed or are in the process of being infringed by the Respondents.
46. Essentially, I dare state that the issues raised in the Petition are already being tackled in ELC (Mombasa) E011 of 2022 which is at its final stage of determination of the delivery of Judgment. It is on that background that this Court finds that the Petition does not raise a prima-facie case in the circumstances of this case.
47. The second requirement for the granting of conservatory orders dictates that an Applicant must demonstrate that if the application is not allowed, the substratum of the Petition will not be lost and as such the main claim will be rendered nugatory. In other words, the Applicant will suffer prejudice. Put differently, an Applicant must show, albeit on the face of it, that if not granted conservatory orders, the objective of the Petition to forestall the continued or threatened violation of the rights and fundamental freedoms or *the Constitution* will irredeemably be lost and there would be no need to further pursue to main Petition. In this particular case,
48. The Applicant submitted that since conservatory orders are meant to preserve the status quo, it was necessary to allow the application. It was contended that if no orders are granted, then the ordinary citizens will be unable to be compensated in the event the Petition is successful.
49. The 1st Respondent argued that the Petitioners' application does not disclose any reasonable cause of action against the 1st Respondent who has complied accordingly with the statutory requirements. The 1st Respondent has a title to the suit property that the Petitioner is making claims to.
50. In this case, it is in public interest that *the Constitution* and the law are respected and followed. Therefore, an allegation that *the Constitution* is violated or is threatened with violation ought not to be lightly taken. However, Courts must always exercise restraint so as not to deal with the main issues at interlocutory stages.
51. The Court has carefully considered this aspect of the dispute. One of the parties, concededly, stand to suffer prejudice either way this Court decides on this issue. Taking that the Petitioner has not established a prima facie case, the Honourable Court shall not allow the conservatory orders in the Notice of Motion application dated 25th August, 2023 in the interim.

ISSUE No. d). Who bears the costs of the Notice of Motion application dated 25th August, 2023 and the Notice of Motion application dated 11th October, 2023

52. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation



and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

53. In the case of:- “Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another – Versus - Mutula Kilonzo & 2 others [2013] eKLR” quoted the case of “Levben Products – Versus - Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227” the Court held;

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp – Versus - Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

54. In this case, based on the analysis made herein, I hold that the 1st Respondent is entitled to and hence be awarded the costs for both the Notice of Motion application dated 25th August, 2023 and the application dated 11th October, 2023.

VII. Conclusion & Disposition

55. The Upshot of this, having caused the indepth analysis of the framed issues herein, the Honourable Court holds that there has been made a case where one party partially succeeds while the other fails from the two applications filed. For avoidance of doubt, I therefore proceed to make the following findings:
- a. That the Notice of Motion Application dated the 25th August, 2023 be and is hereby found to have merit and is allowed entirely.
 - b. That the Notice of Motion Application dated 11th October, 2023 be and is hereby found to lack merit and the same is dismissed.
 - c. That this matter is sub judice hence an order be and is hereby issued staying this Petition pending the hearing and determination of ELC No. 011 of 2022 (O.S.) Mombasa whereby the parties can move the Court appropriately thereafter.
 - d. That this Honourable court do hereby issues an order vacating Order No. 6 issued on 30th August, 2023.
 - e. That the matter to be mentioned on 31st July, 2024 for attaining progress report and further directions by the Honourable Court.
 - f. That the costs of both the Notice of Motion application dated 25th August, 2023 and one dated 11th October, 2023 be awarded to the 1st Respondent.

It is ordered accordingly.

RULING DELIEVERED THROUGH MICRO - SOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 20TH DAY OF MAY 2024.



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HON. JUSTICE L.L. NAIKUNI,

ENVIRONMENT & LAND COURT AT MOMBASA

Ruling delivered in the presence of:

- a. M/s. Firdaus, the Court Assistant.
- b. No appearance for the Petitioners
- c. Mr. Omwenga Advocate for the 1st Respondent.
- d. Mr. Penda Advocate for the 4th, 6th, 7th, 8th, 10th & 11th Respondents and the 2nd Interested Party.

