



Kariuki & 3 others (Suing as Chairman, Vice Chairlady, Secretary and Treasurer of members on their behalf and of Lake Naivasha Riparian Association) v National Land Commission & 8 others; Ethics & Anti-Corruption Commission & another (Interested Parties) (Environment and Land Petition E9 of 2022) [2024] KEELC 5693 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5693 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND PETITION E9 OF 2022**

LA OMOLLO, J

JULY 25, 2024

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 2(2), 10, 20(2), 21, 22(1), 23(3), 27(1), (2), (5), 40(6), 47, 50(1), 60(1), 62(1), (1), (N), 67, 69, 70, 162 (2) AND 258 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

**MARK KARIUKI 1ST PETITIONER
ALEXANDRA BELL 2ND PETITIONER
MAIRO RETIEF 3RD PETITIONER
GARY HOPCRAFT 4TH PETITIONER
SUING AS CHAIRMAN, VICE CHAIRLADY, SECRETARY AND TREASURER
OF MEMBERS ON THEIR BEHALF AND OF LAKE NAIVASHA RIPARIAN
ASSOCIATION**

AND

**NATIONAL LAND COMMISSION 1ST RESPONDENT
CHIEF LAND REGISTRAR 2ND RESPONDENT
DIRECTOR OF SURVEYS 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT
DUNCAN WACHIRA KABITHE 5TH RESPONDENT
GEOFFREY MUHORO 6TH RESPONDENT
LAWRENCE TONY KURIA 7TH RESPONDENT
MARGARET W KAGWE 8TH RESPONDENT**



COUNTY GOVERNMENT OF NAKURU 9TH RESPONDENT

AND

ETHICS & ANTI-CORRUPTION COMMISSION INTERESTED PARTY

WATER RESOURCES AUTHORITY INTERESTED PARTY

RULING

Introduction.

1. This ruling is in respect of the Petitioners/Applicants Notice of Motion application dated 20th December, 2022. It is expressed to be brought under Order 42 Rule 6 & Order 51 Rule 1 of the Civil Procedure Rules, Section 13(7) (a) & (b) of the Environment and Land Court Act, Articles 22, 23, 27, 41, 47, 48, 50(1), 159(2) (d), 162 (2) (b), 258, 259 and 260 of the Constitution of Kenya and Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
2. The application seeks the following orders;
 - a. Spent
 - b. Spent
 - c. That pending the inter-partes hearing and determination of Petition (sic), a conservatory order be and is hereby issued restraining the 1st, 2nd, 3rd, 5th, 6th, 7th and 8th Respondents whether acting directly or indirectly through their servants, officers, proxies and/or third parties from accessing, trespassing, developing, fencing, clearing bushes, harvesting trees, cultivating, farming, constructing, wasting, dissipating, disposing of, surveying, alienating, allocating, selling, leasing, transferring to anyone, remaining on, wasting away, damaging, removing, cutting trees or any vegetation thereon, draining the water thereon, charging, encumbering and or in any way dealing or interfering with all that portion of land within Moi North Road and South Lake Road of Naivasha District which falls below the 1892.8 meters above sea level or 6,210 feet above sea level contour or within the high and lower water mark of Lake Naivasha whether identified as comprised in or as LR No. 22597/1, LR No. 22597/2, LR No. 22597/3 and LR No. 22597/4 measuring 44.0 Hectares or 113.67 acres.
 - d. That pending the inter-partes hearing and determination of petition (sic), an order be and is hereby issued compelling the 1st, 2nd and 3rd Respondents to file in court a detailed and final survey report containing the survey work carried out between 28th February 2022 and 25th March and on 18th November 2022 to establish whether land parcel numbers LR No. 22597/1, LR No. 22597/2, LR No. 22597/3 and LR No. 22597/4 falls within the 6210 feet contour line that defines Lake Naivasha riparian land reserve.
 - e. That the honorable court be pleased to make such further orders and/or directions that are necessary for the ends of justice.
 - f. That the cost of the application be provided for.
3. The application is based on the grounds on its face and the supporting affidavit of Mark Kariuki sworn on 20th December, 2022.



Factual Background.

4. This suit was commenced by way of a Petition dated 20th December, 2022 and filed on 21st December, 2022.
5. The Prayers sought in the Petition are as follows;
 - a. A declaration be and is hereby issued that the alienation, demarcation and allocation of all that land within Moi North Road and South Lake Road of Naivasha District which falls below the 1892.8 metres above sea level or 6.210 feet above sea level contour or within the High and lower water mark of Lake Naivasha comprised in or referred as LR No. 22597/1, LR No. 22597/2, LR No. 22597/3 and LR No 22597/4 allocated to the 5th, 6th, 7th and 8th Respondents by way of a Certificate of Lease, Deed Plans and any other document of title thereto is illegal, unlawful, unprocedural, irregularly, contrary to the Constitution of Kenya, 2010 hence null and void *ab initio*.
 - b. An order of judicial review by way of certiorari do issue to call, remove, deliver up to this Honourable Court and quash the decision of by (sic) the 1st, 2nd and 3rd Respondents particularly the decision by the 1st Respondent and or its predecessor to demarcate, alienate and allocate all that portion of land within Moi North Road and South Lake Road of Naivasha District which falls below the 1892.8 metres above sea level or 6.210 feet above sea level contour or within the High and lower water mark of Lake Naivasha or measuring 44.0 hectares or 113.67 acres comprised in or as LR. No. 22597/1, LR No. 22597/2, LR No. 22597/3 and LR No. 22597/4 allocated to the 5th, 6th, 7th and 8th Respondents respectively by way of a Certificate of Lease, Deed Plans and any other document of title thereto.
 - c. An Order be and is hereby issued directing the 1st, 2nd and 3rd Respondents to revoke and/or cancel all the entries of the Certificate of Lease, Certificate of titles, Deed Plans and any other document of title over all that portion of land within Moi North Road and South Lake Road of Naivasha District which falls below the 1892.8 metres above sea level or 6,210 feet above sea level contour or within the High and lower water mark of Lake Naivasha or measuring 44.0 hectares or 113.67 acres comprised in or as LR. No. 22597/1, LR No. 22597/2, LR No. 22597/3 and LR No. 22597/4 illegally, fraudulently and unprocedurally allocated to the 5th, 6th, 7th and 8th Respondents whether in 1997 or at a later stage.
 - d. A mandatory injunctive order of eviction, be and is hereby issued compelling the 5th, 6th, 7th and 8th Respondents, their servants, agents, employees or anyone claiming to be on possession to vacate all that portion of land within Moi North Road and South Lake Road of Naivasha District which falls below the 1892.8 metres above sea level or 6,210 feet above sea level contour or within the High and lower water mark of Lake Naivasha or measuring 44.0 hectares or 113.67 acres comprised in or as LR. No. 22597/1, LR No. 22597/2, LR No, 22597/3 and LR No. 22597/4 with immediate effect.
 - e. An order of permanent injunction do issue restraining the 5th, 6th, 7th and 8th Respondents herein either by themselves, through their servants and or officers or anyone whatsoever acting on their instructions from surveying, alienating, allocating, selling, leasing, transferring to anyone, trespassing, remaining on, wasting away, damaging, removing, cutting trees or any vegetation thereon, draining the water thereon, charging, encumbering and or in any way dealing or interfering with all that portion of land within Moi North Road and South Lake Road of Naivasha District which falls below the 1892.8 metres above sea level or 6,210 feet



above sea level contour or within the High and lower water mark of Lake Naivasha whether identified as measuring 44.0 hectares or 113.67 acres comprised in or as LR. No. 22597/1, LR No. 22597/2, LR No. 22597/3 and LR No. 22597/4 allocated to the 5th, 6th, 7th and 8th Respondents by way of a Certificate of Lease, Deed Plans and any other document of title thereto or otherwise.

- f. An Order of permanent injunction do issue to restrain the 1st, 2nd, 3rd and 4th Respondents herein either by themselves, through their servants and or officers or anyone whatsoever acting on their instructions from surveying, demarcating, alienating, allocating, transferring to the 5th, 6th, 7th and 8th Respondents or any other private person and or in any way dealing or interfering with all that portion of land within Moi North Road and South Lake Road of Naivasha District which falls below the 1892.8 metres above sea level or 6,210 feet above sea level contour or within the High and lower water mark of Lake Naivasha whether identified as measuring 44.0 hectares or 113.67 acres comprised in or as LR. No. 22597/1, LR No. 22597/2, LR No. 22597/3 and LR No. 22597/4 allocated the 5th, 6th, 7th and 8th Respondents by way of a Certificate of Lease, Deed Plans and any other document of title thereto or otherwise in contravention of National Land Commission Act, the Land Act, 2012 and the Constitution of Kenya, 2010.
- g. An order of mandamus be and is hereby issued compelling the 1st, 2nd, 3rd and 4th Respondents to publish and/or issue a gazette notice declaring that all the portion of land within Moi North Road and South Lake Road of Naivasha District which falls below the 1892.8 metres above sea level or 6,210 feet above sea level contour or within the High and lower water mark of Lake Naivasha whether identified as measuring 44.0 hectares or 113.67 acres comprised in or as LR. No. 22597/1, LR No. 22597/2, LR No. 22597/3 and LR No. 22597/4 falls within Lake Naivasha Riparian reserve forms part of Lake Naivasha Riparian Land and is a public land.
- h. A restoration order be and is hereby issued directing the 5th, 6th, 7th and 8th Respondents to restore the land, including the replacement of soil, the replanting of trees and other flora and fauna comprised in or as LR. No. 22597/1, LR No. 22597/2, LR No. 22597/3 and LR No. 22597/4 into its initial state it was prior to ploughing, harvesting of trees and/or undertaking any prohibited activities on the riparian land.
- i. Any other relief that the Court may deem fit to grant in the circumstances of the Petition.

The application under consideration first came up for hearing on 23rd December, 2022 when the Petitioners/Applicants were directed to serve the application on the other parties.

6. In the intervening period a preliminary objection was filed, heard and a ruling delivered on 21st September, 2023.
7. Subsequently, after several mentions parties confirmed having filed their responses to the application. On the 11th December, 2023 the Court issued directions that the application be heard by way of written submissions.
8. On the 20th February, 2024 parties confirmed that they had filed submissions and the application was reserved for ruling.
9. It is important to note that the 1st and 2nd Interested Parties/Respondents support the Petitioners/Applicants case and do not object to the grant of interim orders.



The Petitioners/Applicants Contention.

10. The affidavit in support of the application is sworn by the 1st Petitioner/Applicant; Mark Kariuki.
11. It is his contention that he is the Chairman of Lake Naivasha Riparian Association and duly authorized by his co-petitioners to swear the affidavit.
12. It is also his contention that the Lake Naivasha Riparian Association was founded in the year 1929 by owners of land surrounding Lake Naivasha with the purpose of safeguarding riparian land around the lake particularly the marginal land covered and uncovered by the changing water levels of the lake and the adjoining members land.
13. It is further his contention that riparian land around Lake Naivasha is public land within the definition of Article 62(1)(i) and (ii) of the Constitution of Kenya and Section 2 of the Land Act which defines public land to include all lakes including Lake Naivasha and all the land between the high and low water marks.
14. The 1st Petitioner/Applicant contends that *Lake Naivasha Catchment Area Protection Order*, 2012 gazetted by Legal Notice No. 8 of 2002 published in the Kenya Gazette Supplement No. 8 of 16th January, 2013 defines Lake Naivasha Riparian Land to include all the land and water enclosed within Moi North Road and South Lake Road of Naivasha District which falls below the 1892.8 meters above sea level or 6,210 feet above sea level contour.
15. The 1st Petitioner/Applicant also contends that the Environmental Management and Coordination (Wetlands, River Banks and Lake Shores and Sea Shore Management) Regulations, 2009 gazetted by Legal Notice No. 19/2009 under the Environmental Management and Coordination Act, 1999 defines “high water mark” as the historical recorded point of the highest level of contact between the water and the shore or bank, as the case may be, “low water mark” as the historical recorded point of the lowest level of contact between the water and the shore or the bank as the case may be and “lake shore” to be the rising ground from the highest normal water mark, bordering or adjacent to a lake in the form of rock, mud, gravel or sand.
16. The 1st Petitioner/Applicant further contends that Section 10 of the Lake Naivasha Catchment Area Protection Order, 2012 has expressly prohibited any cultivation, clearing of indigenous trees or other vegetation, building permanent structures, developing or operating greenhouses, tunnels, growing horticultural crops, excavating soil or rocks within Lake Naivasha riparian land and feeder rivers.
17. It is his contention that therefore, all that land and water enclosed within Moi North Road and South Lake Road of Naivasha District which falls below the 1892.8 metres above sea level or 6,210 feet above sea level contour is public land and natural resource vested in the National Government of Kenya in trust for and administered by the 1st Respondent on behalf of the people of Kenya and cannot be disposed of except in accordance with the provisions Land Act, 2012.
18. It is also his contention that despite the various provisions of the law that he had relied on, on 16th September, 2015 one of the Petitioners members —namely John Githere (Deceased)who is the registered owner of land parcel No’s Naivasha Municipality Block 4/42 and Block 4/43 adjoining Lake Naivasha on the southern side reported trespass, unauthorized invasion and forceful detainer by some persons who declined to identify themselves or their Principal on Lake Naivasha riparian land adjoining the said member’s land.
19. It is further his contention that upon further investigations, the Petitioners/Applicants found out that Duncan Wachira Kabithe, Geoffrey Muhoro, Lawrence Tony Kuria and Margaret W. Kagwe (the 5th,



- 6th, 7th and 8th Respondents herein) had illegally been allocated LR. No. 22597/1, LR No. 22597/2, LR No. 22597/3 and LR No. 22597/4 respectively which properties fall within Lake Naivasha riparian land.
20. The 1st Petitioner/Applicant contends that the Petitioners/Applicants reported the said trespass and forceful detainer on diverse dates including 16th September, 2015 and 1st October, 2015 to the 1st Respondent, who conducted independent investigations and rendered its decision on 22nd August, 2016 declaring the allocation of the Lake Naivasha riparian land to the 5th, 6th, 7th and 8th Respondents as illegal, null and void and subsequently revoked the said titles.
 21. The 1st Petitioner/Applicant also contends that from the investigations conducted by the 1st Respondent, it was discovered that the 6th Respondent claimed that he applied for and was allotted the land measuring 4.6 acres in 1967 under Temporary Occupational License (TOL) up to 1993. Further, vide a letter of allotment dated 4th April, 1997, he was allotted 42.0 acres. He claims that he subdivided the said parcel into 4 plots, being LR. No. 22597/1, LR No. 22597/2, LR No. 22597/3 and LR No. 22597/4 and later transferred the said parcels to the 5th, 7th and 8th Respondents and retained the first parcel for himself.
 22. The 1st Petitioner/Applicant further contends that the circumstances under which the Temporary Occupation Licence was converted into a lease are not clear and that no explanation was given on the increase of size of the suit properties from 4.6 acres to 44.0 hectares or 113.67 acres.
 23. It is the 1st Petitioner/Applicant's contention that the preliminary survey conducted on the said parcels of land confirmed that the suit properties fell within the Lake Naivasha riparian land reserve and was therefore not available for allotment to anyone.
 24. It is also the 1st Petitioner/Applicant's contention that the court in Nakuru ELC JR No. 244A of 2018; *Republic v National Land Commission & Others ex parte Duncan Kabethi Wachira* quashed the 1st Respondent's decision of 22nd August, 2016 that revoked the titles to the suit properties on the ground that the 1st Respondent did not have powers to do so under Section 14(5) of the *National Land Commission Act* and ought to have directed the 2nd Respondent to cancel the titles.
 25. It is further the 1st Petitioner/Applicant's contention that the 5th Respondent commenced Nakuru ELC Case No. 244B of 2018; *Republic v National Land Commission; Lake Naivasha Riparian Association (Interested Party) Ex parte Geoffrey Muhoro* [2020] eKLR where the court held that it had not made any determination on the validity of the ex parte applicant's title to the suit property as it was not an issue before the Court.
 26. The 1st Petitioner/Applicant contends that since the 1st Respondent's decision to revoke the 5th, 6th, 7th and 8th Respondents was quashed, the issue of whether or not the suit properties fall within Lake Naivasha riparian land reserve is open for determination and this court under Article 162 (2)(b) of the *Constitution* as read together with Section 13 of the *Environment and Land Court* has the jurisdiction to determine the dispute.
 27. The 1st Petitioner/Applicant also contends that in November 2021 the Petitioners/Applicants learnt that the 3rd Respondent was planning to conduct riparian boundary surveying around Lake Naivasha.
 28. The 1st Petitioner/Applicant further contends that on 11th November, 2021 the Senior Land Registrar at Naivasha sub- registry scheduled a meeting with the Petitioners/Applicants where they were to present a memorandum and an objection to the registration and issuance of titles with respect to the suit property but which meeting the Senior Land Registrar cancelled without notice.



29. It is his contention that the Petitioners/Applicants vide the letter dated 5th January, 2022 asked to be involved in the process and 3rd Respondent responded vide the letters dated 8th February and 28th February, 2022 inviting them to a consultative meeting on 1st March, 2022.
30. It is also his contention that a topographical and shoreline survey work was carried out along the shore of Lake Naivasha and its surroundings to demarcate and establish the 6210 feet counter line defining the extent of the lake riparian reserve.
31. It is further his contention that the Petitioners/Applicants requested the 1st and 2nd Respondents together with the 2nd Interested Party to intervene in the present matter together with other riparian matters vide the letter dated 23rd August, 2021 and the Commission engaged them between 7th to 8th October 2021. The Petitioners/Applicants raised nineteen issues to be acted upon some of which were to put an embargo on all transactions on the lake riparian land and to place visible beacons along contour (6210 ft) along the entire lake.
32. The 1st Plaintiff/Applicant contends that on various dates including the 14th, 15th, 19th and 20th November, 2022, the 5th, 6th, 7th and 8th Respondents with the aid of government officials, including officials from the 1st, 2nd and 3rd Respondents unlawfully trespassed onto the suit properties, cleared bushes, harvested trees, subdivided the suit properties and ploughed the land.
33. The 1st Plaintiff/Applicant also contends that the 1st to 4th Respondents did not publish any notice of intent to allocate public land to the 5th to 8th Respondents. That the 5th to 8th Respondents have forcefully asserted possession of riparian land and cultivated it.
34. The 1st Plaintiff/Applicant further contends that there was no public participation as required under Section 10(1), (2) & (3) of the Lake Naivasha Catchment Area Protection Order as read together with Section 29 of the Water Act and Article 10 of the Constitution prior to approving the subdivision of the suit properties by the 5th to 8th Respondents.
35. It is his contention that that vide a Survey Report dated 6th December, 2022 the Director of Survey confirmed that the beacons of the four suit properties were within Lake Naivasha riparian land. Further, the alleged subdivision by the 5th to 8th Respondents has not been effected on the maps.
36. It is also his contention that even though the survey work conducted by the 3rd Respondent confirmed that the suit properties fall within Lake Naivasha Riparian Reserve, the 1st, 2nd, 3rd and 9th Respondents did not do anything to prevent the activities being undertaken on the suit properties by the 5th to 8th Respondents which actions are also causing obstructions to the Petitioners who own the adjacent properties.
37. It is further his contention that the riparian land around Lake Naivasha was not available for alienation and that the bona fide owners of properties adjacent to Lake Naivasha riparian reserve have a right to protect the riparian land and enjoy the ecological resources of the lake including wild life and bird viewing as well as other economic and entertainment activities within the lake. He contends that access to the lake by the public has been curtailed by the farming activities being undertaken by the 5th to 8th Respondents on the riparian land.
38. The 1st Petitioner/Applicant contends that the Petitioners/Applicants have on several occasions lodged complaints of the destruction of the ecological (flora and fauna) of Lake Naivasha riparian land by the 5th to 8th Respondents to the Naivasha Directorate of Criminal Investigations (DCI) as well as the 1st and 2nd Interested Party but no action has taken by the authorities.



39. The 1st Petitioner/Applicant also contends that despite the Petitioners/Applicants complaints, the 5th to 8th Respondents have continued to endanger the environment and expose the wetlands and endangered species of flora and fauna of Lake Naivasha.
40. The 1st Petitioner/Applicant further contends that the allocation of the suit properties was unlawful and illegal and the purported certificates of lease issued to the 5th to 8th Respondents are impeachable as they were obtained un procedurally.
41. It is his contention that Sections 19 to 26 of the Government Land Act which was repealed by Section 109 of the Land Registration Act provided for disposition of unalienated public land by public auction to the highest bidder which processes incorporated public participation by issuance of not less than 90 days' notice of an auction inviting bids for such land available for disposal.
42. It is also his contention that the Republic of Kenya is a signatory member of RAMSAR convention on Wetlands of International importance especially as waterfowl Habitat and in 1995, Kenya designated Lake Naivasha as a wetland of significant importance requiring special protection measures.
43. It is further his contention that on 5th July, 1998 the Petitioner caused a publication of *Caveat Emptor* notice to the public in the local dailies warning the public that the Riparian Land at Lake Naivasha is public land and a wetland which ought to be protected and not available for alienation.
44. The 1st Petitioner/Applicant contends that despite complaints by the Petitioners/Applicants, save for publishing a report acknowledging that the impugned land as public land irregularly allocated by the 3rd and 4th Respondents, the 1st Respondent has to date, failed or abdicated to discharge its public duty under Articles 67(2)(a), (e), and (h), 68(v) of the Constitution of Kenya as well as sections 14 and 15 of the National Land Commission Act particularly to manage public land on behalf of the national and county governments, monitor and oversight land use and planning, initiate investigations and review the propriety or legality of the said allocation of riparian land and render necessary recommendations or take necessary steps to recover the land.
45. The 1st Petitioner/Applicant also contends that the survey and allocation of the suit property to the 5th to 8th Respondents occurred when public land was governed and managed by the Commissioner of Lands whose functions were taken over by the 1st Respondent as provided for by Article 67 of the Constitution of Kenya and the Provisions of the National Land Commission Act. It is his contention that Rule 7 of the 6th Schedule of the Constitution of Kenya assigned the responsibilities of the Commissioner of Lands to the 1st Respondent.
46. It is also his contention that the decisions of the Respondents herein are ultra vires, illegal, unlawful, null and void and should be quashed by an order of *Certiorari* and an Order of prohibition to restrain further violations of the law.
47. The 1st Petitioner/Respondent ends his deposition by stating that the Respondents and more particularly the 5th, 6th, 7th and 8th Respondents have threatened and intend to invade the unfolded portion of the impugned land and commence personal developments thereon and unless the said actions are restrained by this Court, the prohibited activities will continue to endanger the Lake and species therein in further violation of the law and the public will suffer much prejudice, irreparable loss and miscarriage of justice.

2nd, 3rd and 4th Respondent's Response.

48. In response to the Petitioners/Applicants application, the 2nd, 3rd and 4th Respondents filed grounds of opposition dated 16th October, 2023 which are as follows;



- a. That the Application is misconceived, incompetent and without merit.
- b. That the application does not meet the threshold for grant of the orders sought.
- c. That the orders sought by the Applicant in the application offend the provisions of Section 107 of the Evidence Act.
- d. That the issues being raised by the petitioners in their application are issues that can be handled at the hearing of the main petition.
- e. That it is in the interests of fairness and justice that the Applicant's application dated 20th December, 2023 be dismissed with costs to the Respondents.

6th Respondent's Response.

49. The 6th Respondent filed a Replying Affidavit sworn on 10th February, 2023 and filed on 13th February, 2023.
50. He deposes that John Githere (deceased) was the registered owner of a parcel of land adjacent to his land which was Naivasha/Municipality Block 4/42 and they both enjoyed riparian land rights. He relies on Geoffrey Muhoro v Lake Flowers Limited [2011] eKLR.
51. He also deposes that it was not true that the subdivision of LR 22957 into 22957/1, 22957/2, 22957/3 and 22957/4 and the subsequent registration of the said parcels in the names of the 5th, 6th, 7th and 8th Respondents was illegal and unprocedural.
52. He further deposes that before he subdivided LR No. 22957, he applied for consent to subdivide and transfer the land which consent was granted.
53. It is his deposition that in Nbi. HC *Misc. Civil Application No. 1238/1998*, the then Assistant Commissioner of Lands one Zablon Agwata Mabeya swore an affidavit confirming how the land had evolved to him which was evidence that due process was followed.
54. It is also his deposition that paragraph 11 of the Petitioners/Applicants supporting Affidavit is a political statement which amount to a criminal offence called forceful detainer whose particulars the Petitioners/Applicants had not provided.
55. It is further his deposition that the Petitioners/Applicants indeed reported the issue in dispute to the 1st Respondent and after a hearing was done titles for land parcel No's 22957/1, 22957/2, 22957/3 and 22957/4 were cancelled. The said decision was revoked after he initiated judicial review proceedings against the 1st Respondent in Republic v National Land Commission; Lake Naivasha Riparian Association (Interested Party) Ex Parte Geoffrey Muhoro [2020] eKLR.
56. He deposes that the Petitioners/Applicants were Interested Parties in the said suit where they supported the 1st Respondent's case. Judgement was delivered in the matter which quashed the decision of the 1st Respondent on 3rd July, 2020.
57. He also deposes that the initial parcel of land allocated to him was 4.6 Hectares and that he followed due process by paying the required stamp duty. Thereafter the Commissioner of Lands issued to him a temporary occupational license.
58. He further deposes that pursuant to the development plan of 1967, J.M Dauson was allocated the adjacent parcel of land measuring 234 Ha.



59. It is his deposition that sometime later, J.M Dauson vacated the property and he applied for the land and he was issued with an allotment letter reference number 1944/XX11 Plan No. 1259/97/1 dated 4th April, 1997.
60. It is also his deposition that he paid the required fee of kshs. 1,556,793/= and was issued with a lease under the Registration of Titles Act Cap 281 of the Laws of Kenya.
61. It is further his deposition that the lease was accompanied by conditions of use and despite having the lease, he has not been able to utilize the land because of the various cases filed by the Petitioners/Applicants herein since the year 1997.
62. He deposes that in response to paragraph 14 of the Petitioners/Applicants supporting Affidavit, where the Petitioners/Applicants aver that the court ought to have directed the 2nd Respondent to cancel the titles, the Petitioners/Applicants ought to have appealed the said decision instead of filing the present case.
63. He also deposes that he was issued with a title deed dated 1st April, 1997 under Section 3 of the Registration of Titles Act which is conclusive evidence that he is the absolute and indefeasible owner of the property.
64. He further deposes that his ownership of the suit property has not been challenged on the grounds of fraud or misrepresentation of facts and he cannot trespass on his own land and the said allegations were not true.
65. It is his deposition that he is advised by his advocates on record that the validity of his title was determined in Geoffrey Muhoro v Lake Flowers Limited [2011] eKLR.
66. It is also his deposition that he was not involved in the meetings the Petitioners/Applicants allege to have participated in and therefore the outcome of the said meetings must have been illegal in nature as he was not involved as an important stakeholder.
67. It is further his deposition that the Petitioners/Applicants objection to the lease is an afterthought as the lease was issued in 1997.
68. He deposes that the Temporary Occupation License was issued to him in 1967 and the Petitioners/Applicants did not object to the then Commissioner of Lands and yet their organization has been in existence since the year 1929.
69. He also deposes that the Petitioners/Applicants allege that he connived with unnamed government officials which is unfortunate and should not be condoned by this court as no evidence in support of the same has been given.
70. He further deposes that the 1st Respondent was not in existence in the year 1998 when the suit property was sub divided and further the land regime then did not require a notice of intent to allocate public land and gazettelement to be issued and done respectively.
71. It is his deposition that the issue of public participation came after the promulgation of the Constitution of Kenya 2010 and the enactment of the Land Act, 2012.
72. It is also his deposition that upon allocation, a survey was done and approved vide Survey Plan No. FR326/74 before the suit property was subdivided to create LR No. 22957/1, 22957/2, 22957/3 and 22957/4.



73. It is further his deposition that given the court's determination in *Geoffrey Muboro v Lake Flowers Limited* [2011] eKLR there was no way the 1st, 2nd, 3rd and 9th Respondents could have interfered with the quiet and peaceful possession of his property considering that he was the owner and was to enjoy the riparian rights like the other proprietors around Lake Naivasha.
74. He deposes that the Petitioners/Applicants allegations that complaints had been made to the criminal investigations department only amount to harassment because he is the registered owner of the suit property.
75. He also deposes that he has never contravened any special conditions of the lease while exercising his rights of use of riparian land and therefore the Appellants/Applicants are guilty of giving false information to the police which is a criminal offence.
76. He further deposes that in addition to the suit properties, there are other parcels of land that are adjacent to the 40 km square of Lake Naivasha and all proprietors of those parcels enjoy the riparian land rights and therefore the allegations by Appellants/Applicants are false since he has not done any developments on the land.
77. It is his deposition that the 2nd and 3rd Respondents acted in accordance with the law as the parcel is registered under the then *Registration of Titles Act* as he has demonstrated in this replying affidavit.
78. It is further his deposition that the Appellants/Applicants have not set out particulars of fraud in respect of his acquisition of his parcel of land and emphasizes that his land was registered under the *Registration of Titles Act* and not the *Government Land Act* as alleged by the Appellants/Applicants.
79. He deposes that not all use of riparian land is illegal and relies on *Geoffrey Muboro v Lake Flowers Limited* [2011]eKLR.
80. He also deposes that the Lake Naivasha Management Plan also has recommendations on the proper use of riparian land around Lake Naivasha.
81. He further deposes that some of the allegations in the Appellants/Applicants supporting affidavit ought to have been grounds of appeal from the decision given in *Republic v National Land Commission; Lake Naivasha Riparian Association (Interested Party) Ex parte Geoffrey Muboro* [2020] eKLR.
82. It is his deposition that that there is no caveat in place on LR No. 22957/4 as all the caveats that were in place were removed by the relevant authorities.
83. It is also his deposition that there was no land allocated to the 3rd and 4th Respondents as alleged by the Petitioners/Applicants and that the 5th, 6th, 7th and 8th Respondents are bonafide proprietors of the land and should enjoy the riparian land rights to the suit properties and adhere to the special conditions of use on the lease.
84. He ends his deposition by stating that the Appellants/Applicants are guilty of perjury as he has demonstrated in his affidavit and that their application is vexatious, scandalous and an abuse of the court process.

Petitioners/applicants Response to the Respondents Grounds of opposition and Replying Affidavit.

85. In response to the 2nd, 3rd & 4th Respondents Grounds of Opposition and the 6th Respondent's Replying Affidavit, the 1st Petitioner/Applicant filed a Supplementary Affidavit sworn 15th December, 2023 and filed on 16th February, 2024.



86. He deposes that he does not contest the averments contained in the 2nd Interested Party's Replying Affidavit as it confirms that LR No's 22597/1, 22597/2, 22597/3 and 22597/4 are within the protected Lake Naivasha riparian zone and that the activities being undertaken therein are prohibited under the Lake Naivasha Catchment Area Protection Order, 2012.
87. It is important to note that the 2nd Interested Party's Replying Affidavit is sworn in response to the Petition and not the Petitioners/Applicants application dated 20th December, 2022.
88. He also deposes that the 2nd, 3rd and 4th Respondents Grounds of Opposition are a sham response to their application as they are not supported by evidence to address substantive matters of fact as raised in his supporting affidavit.
89. He also deposes that the said Grounds of Opposition do not respond to the issue of illegal, fraudulent and un procedural allocation of the suit properties to the 5th, 6th, 7th and 8th Respondents as raised in his supporting affidavit.
90. He further deposes that the 2nd, 3rd and 4th Respondents did not address the prohibited activities being undertaken by the 5th, 6th, 7th and 8th Respondents on riparian land despite several complaints and reports made to them.
91. It is his deposition that their silence can only mean that they were complicit to the prohibited activities.
92. It is also his deposition that the 2nd, 3rd and 4th Respondents have not addressed the issue of the survey that was conducted around lake Naivasha from 28th February, 2022 to 25th March, 2022 by a team of field officers from the 1st, 2nd, 3rd and 9th Respondents. Therefore, the grant of prayer 4 of the application has not been contested.
93. It is further his deposition that the 6th Respondent in his replying affidavit has not refuted the Petitioners/Applicants averments that the suit properties are within the protected Lake Naivasha Riparian Zone.
94. He deposes that he has examined the 6th Respondent's averments in his replying affidavit and noted that the allocation, demarcation and subdivision of the suit properties to the 5th, 6th, 7th and 8th Respondents was illegal and un procedural.
95. He also deposes that the temporary occupation license that was allegedly issued to the 6th Respondent on 1st February, 1967 for 4.2 acres was for a period of nine months only.
96. He further deposes that there is no evidence of renewal of this license up to 1997 when the said parcel of land was allegedly allotted to him.
97. It is his deposition that the 6th Respondent did not produce any evidence to show that the alleged JM Dauson had been allocated the adjacent parcel of land measuring 234 acres and that it was physically impossible to use a single part development plan to allocate two different parcels of land as each land must have its own part development plan.
98. It is also his deposition that the 6th Respondent has failed to adduce evidence to demonstrate that there was either cessation and/or amalgamation of the different parcels of land to give rise to the 42 Ha which were allotted to the 6th Respondent through the letter dated 4th April, 1997 Ref No. 19447/XXII.
99. It is further his deposition that the purported allotment of 42 hectares of public land to the 6th Respondent through the letter dated 4th April, 1997 Ref No. 19447/XXII was un procedural, illegal



- and fraudulent as there was no evidence to show that the defunct Naivasha Municipal Council advised the Commissioner of Lands that the allotted riparian land was available for disposition.
100. He also deposes that there is no evidence that the defunct Naivasha Municipal Council carried out a fact-finding mission to confirm that the allotted riparian land was available for disposition.
 101. He further deposes that there is no evidence that the 2nd Respondent gazetted the riparian land for a period of four weeks indicating that it was available for sale through public auction, the terms of the lease and the rent payable.
 102. It is his deposition that there is no evidence that a public auction was ever done for the allotment of the riparian land, the list of bidders who participated, the bidding prices and the memorandum and certificate of sale indicating that the 6th Respondent was a successful bidder.
 103. It is also his deposition that there is no evidence of a Part Development Plan, the cadastral survey, the authentication and approval as well as the issuance of a beacon certificate by the Director of Surveys for the purported allotment of riparian land.
 104. It is further his deposition that under the law, the allotment of foreshore or riparian land around spring, river, lake and/or sea is not permitted at all and any license issued for usage does not confer ownership rights.
 105. He deposes that the various court cases referred to by the 6th Respondent in his replying affidavit are distinct and separate from the present case.
 106. He also deposes that Civil Suit No. 97/2009; *Geoffrey Muhoro v Lake Flowers Limited* involved an ownership dispute between two parties and not the parcels of land that form part of the riparian zone and that the association was not a party to the suit.
 107. He further deposes that Nbi. HC Misc. Civil Application No. 1238/1998; *Republic v The Commissioner of Lands Ex Parte Jemimah Mbugua* did not involve the riparian zone.
 108. It is his deposition that in the judicial decision of *Republic v National Land Commission; Lake Naivasha Riparian Association (Interested Party) Ex Parte Geoffrey Muhoro* [2020] eKLR, the Court at paragraph 25 stated that the Court had not made any determination on the validity of the titles.
 109. It is also his deposition that similarly, in the judicial decision of *Republic v National Land Commission; Lake Naivasha Riparian Association (Interested Party) Ex parte Duncan Kabethi Wachira* [2020] eKLR, at paragraph 27, the court held that it had not determined the validity or otherwise of the title to the suit property.
 110. It is further his deposition that the alleged allotment of LR No's 22597/1, 22597/2, 22597/3 and 22597/4 which is part of the Lake Naivasha riparian land to the 5th, 6th, 7th and 8th Respondents was marred with procedural illegalities, unlawfulness and/or fraud.
 111. He ends his deposition by stating that LR No's 22597/1, 22597/2, 22597/3 and 22597/4 should be cancelled and the land reverted back to Lake Naivasha riparian.

Issues for Determination.

112. The Petitioners/Applicants and the 6th Respondent filed their submissions on 16th February, 2024.
113. The Petitioners/Applicants identify the following issues for determination;



- a. Whether this court should grant conservatory orders as prayed in prayer No. 3 of the application?
 - b. Whether this Honorable Court should compel the 1st, 2nd and 3rd Respondents to file the survey report in court as prayed in prayer 4 of the application?
114. On the first issue, the Petitioners/Applicants submit that they filed the present Petition as a public interest matter to preserve, protect and conserve the Lake Naivasha Riparian Land from encroachment.
 115. The Petitioners/Applicants rely on Articles 32 & 162(2)(b) of the Constitution of Kenya, Section 13(5) of the Environment and Land Court Act and submit that this court has the jurisdiction to hear and determine disputes of constitutional nature including granting conservatory orders.
 116. The Petitioners/Applicants rely on Patrick Musimba v National Land Commission & 4 Others [2015]eKLR, Beige Investments Limited v Kenya Forest Service & others [2020]eKLR, Gatirou Peter Munya v Dickson Mwenda Kitbinji & 2 Others [2014]eKLR, Center for Rights Education and Awareness (CREAW) & 7 Others v Attorney General [2011] eKLR and submit that for conservatory orders to be granted, they must establish a prima facie case with a likelihood of success and if the orders are not granted the substratum of the petition will be rendered nugatory, moot or academic exercise.
 117. The Petitioners/Applicants submit that the suit properties in the present matter all fall within the Lake Naivasha riparian land and they are therefore public land that was illegally allotted for private use as the procedure for allotment as provided for under the Government Land Act (now repealed) as well as Article 40 was not followed.
 118. They rely on Article 62(1)(i) and (j) of the Constitution, Section 2 of the Land Act, Regulation 116 of the Water Resources Management Rules, 2007, Milimani Splendor Management Limited v National Environment Management Authority & 4 others [2019] eKLR in support of their arguments that the suit properties fall within the Lake Naivasha riparian land which is public land.
 119. The Petitioners/Applicants rely on Ali Mohamed Dagane (granted power of attorney by Abdullahi Mubumed Dagane suing on behalf of the Estate of Mohamed Haji Dagane) v Hakar Abshir & 3 Others [2021]eKLR and reiterate that the purported allotment of 42 Ha of public land to the 6th Respondent and the subsequent subdivision and transfer to the 5th, 7th and 8th Respondent was unprocedural, illegal and/or fraudulent.
 120. The Petitioners/Applicants also reiterate their averments in their supporting and supplementary affidavits and submit that the actions of the Respondents have violated their constitutional rights to a clean and healthy environment under Article 42 and 70 of the Constitution.
 121. The Petitioners/Applicants rely on Section 10 of the Lake Naivasha Catchment Protection Order 2012 which lists prohibited activities which the Petitioners/Applicants argue that the 5th to 8th Respondents are undertaking and they therefore submit that if conservatory orders are not granted, the substratum of the appeal would be rendered nugatory, moot and a mere academic exercise.
 122. On the second issue, the Petitioners/Applicants submit that the Respondents have not disputed that they undertook survey works on various dates between 28th February, 2022, 25th March, 2022, 18th November, 2022 to locate beacons and stop all transactions on the Lake Naivasha riparian land which report they have not published.
 123. The Petitioners/Applicants also submit that they have a right to access the said report as it is a public document for purposes of enforcing constitutional rights and fundamental freedoms.



124. The Petitioners/Applicants rely on Article 35 of the *Constitution* of Kenya, Section 4 of the *Access to Information Act*, *Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission* [2016] eKLR and submit that the survey report is not a confidential document which may impact national security and it does not therefore fall within the exceptions under Section 6 of the *Access to Information Act*.
125. The Petitioners/Applicants therefore seek that their application be allowed as prayed.
126. The 6th Respondent in his submissions identifies the following issues for determination;
- a. What are the applicable principles for granting conservatory orders.
 - b. Whether there is a proper case where the interlocutory reliefs sought by the Applicant should be granted.
127. With regard to the first issue, the 6th Respondent relies on *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 Others* [2014] eKLR, *Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board and others* [2016] eKLR and submits that when a court is called upon to deal with an application for conservatory orders, it must maintain a delicate balance of ensuring that it does not deal with issues which are in the realm of the main petition.
128. It is the 6th Respondents submissions that the Petitioners/Applicants must present a prima facie case with a likelihood of success, must demonstrate that the substantive suit will be rendered nugatory if the orders sought are not granted and that whether public interest lies in granting the orders sought.
129. On whether the Petitioners/Applicants have established a prima facie case with a likelihood of success, the 6th Respondent relies on *Center for Rights Education and Awareness (CREAW) & 7 others v Attorney General* [2011] eKLR, *American Cyanamid v Ethicon Limited* (1975) AC 395 as was cited in *Naftali Ruthi Kinyua v Patrick Thuita Gachure & another* [2015]eKLR, *David Ndii & others v Attorney General & others* [2021] eKLR and submits that even though the Petitioners/Applicants argue that the suit properties were acquired illegally, the court in *Geoffrey Muboro v Lake Flowers Limited* [2011] eKLR held that the suit property was registered in the name of the 6th Respondent under Section 3 of the *Registration of Titles Act* which was conclusive evidence that the he was absolute and indefeasible owner of the suit property.
130. The 6th Respondent reiterates the averments in his replying affidavit and submits that the Petitioners/Applicants have not established a prima facie case with a chance of success to warrant the grant of the conservatory orders sought.
131. It is the 6th Respondent's submissions that the Petitioners/Applicants must prove that if the conservatory orders are not granted, the substantive petition will be rendered nugatory. The 6th Respondent argues that the Petitioners/Applicants allege trespass on his property and yet he is the registered owner and therefore they have failed to establish that they will suffer irreparable loss if the orders sought are not granted.
132. The 6th Respondent concludes his submissions by stating that the Petitioners/Applicants application lacks merit and should be dismissed.

Analysis and Determination.

133. After considering the application, the response thereto, the Petitioners/Applicants supplementary affidavit and the submissions, the issues that arise for determination are as follows;



- a. Whether the Court should issue a conservatory order restraining the 1st to 8th Respondents from interfering in any way with LR No's 22597/1, 22597/2, 22597/3 and 22597/4 pending the hearing and determination of this petition.
- b. Whether an order should be issued compelling the 1st, 2nd and 3rd Respondents to file in Court, the survey report containing the survey work carried out between 28th February, 2022, 25th March and 18th November, 2022 to establish whether the suit properties falls within the Lake Naivasha riparian land reserve.
- c. Who should bear the costs of the application?

A. Whether the Court should issue a conservatory order restraining the 1st to 8th Respondents from interfering in any way with LR No's 22597/1, 22597/2, 22597/3 and 22597/4 pending the hearing and determination of the petition.

134. The Petitioners/Applicants are seeking that a conservatory order to be issued restraining the 1st to 8th Respondents from interfering in any way with LR No's 22597/1, 22597/2, 22597/3 and 22597/4 pending the hearing and determination of the petition.
135. The Petitioners/Applicants argue that the suit properties form part of riparian land around Lake Naivasha.
136. The Petitioners/Applicants submit that the suit properties are registered in the names of the 5th, 6th, 7th and 8th Respondents who have commenced farming activities on the land.
137. The Petitioners/Applicants also allege that the suit properties are public land that was illegally alienated to the 5th, 6th, 7th and 8th Respondents and in order to protect the riparian land, a conservatory order should be granted.
138. In response, the 6th Respondent deposes that he was properly allotted LR No. 22597. It is his further deposition that after allotment, he subdivided it into four portions, remained with one portion before transferring the other portions to the 5th, 7th and 8th Respondents. He has attached a copy of his document of title i.e. Grant No.IR 76585 dated and LR. No. 22957/4 dated 1st April, 1997 and consent to transfer the same to the 5th, 7th and 8th Respondents dated 25th February, 1998.
139. He denies that the suit properties are public land and argues that since he together with the 5th, 7th and 8th Respondents are registered owners of the suit properties, they are entitled to enjoy their riparian land rights.
140. The Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR discussed 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.”



141. In *Judicial Service Commission v Speaker of the National Assembly & Another* [2013] eKLR the Court held as follows;

“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.”

142. As was held in the above cited judicial decisions, conservatory orders are meant to preserve the subject matter pending the determination of the main issues in dispute. These orders are distinguished from injunctive orders which are private in nature. Conservatory orders, on the other hand, have a public outlook. They are meant to preserve the subject matter of the dispute in the interest of the public.

143. In *Muslim for Human Rights (Milimani) & 2 Others v Attorney General & 2 Others* [2011] eKLR the Court held 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 conclusivity 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.”[Emphasis is mine]

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

- “(a) An Applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the Court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.
- (b) Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
- (c) The public interest must be considered before grant of a conservatory order.”[Emphasis is mine]

145. The first principle requires the Petitioners/Applicants to demonstrate that they have a prima facie case. In *Damour Florian Emmeric v Director of Immigration Services* [2022] eKLR a prima facie case was defined as follows;

“56. In sum, therefore, in determining whether a matter discloses a prima-facie case, a Court must look at the case as a whole. It must weigh, albeit preliminarily, the pleadings, the factual basis, the respective parties’ positions, the remedies sought and the law. In so doing, a Constitutional Court must be guided by Articles 22 (1) and 258(1) of the *Constitution* which provisions are on the



right to institute Court proceedings whenever a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened or the when the *Constitution* has been contravened, or is threatened with contravention.”

146. As aforementioned, the Petitioners/Applicants contention is that the suit properties fall within Lake Naivasha Riparian reserve, forms part of Lake Naivasha Riparian Land and is therefore, public land and further that the alienation, demarcation and allocation to the 5th, 6th, 7th and 8th Respondents was therefore illegal, unlawful, unprocedural, irregular and contrary to the *Constitution* of Kenya, 2010 hence null and void *ab initio*. In the petition, the petitioners seek orders of eviction, permanent injunction against the 5th, 6th, 7th and 8th Respondents.
147. The Petitioners/Applicants allege that after the 5th, 6th, 7th and 8th Respondents were allocated the suit properties, they took possession, cleared bushes and cultivated the land thereby endangering flora and fauna and they, in the petition, also seek orders of restoration against them.
148. The petition also seeks orders of mandamus against the 1st, 2nd, 3rd and 4th Respondents, compelling them to publish and/or issue a gazette notice declaring that all the suit parcels as public land.
149. Pending the hearing and determination of the petition, the Petitioners/Applicants seek that a conservatory order be issued restraining the Respondents from dealing or interfering in any way with the suit properties.
150. Among the documents annexed to the Petitioners/Applicants affidavit in support of their application are ownership documents for LR No. 22597/1, LR No. 22597/2, LR No. 22597/3 and LR No. 22597/4, correspondence between the Petitioners/Applicants, their members and the District Surveyor, Naivasha.
151. In response, the 6th Respondent argues that he was lawfully allotted LR No. 22597 and that he acquired the necessary approvals before subdividing and transferring the land to the 5th, 7th and 8th Respondents.
152. He argues that the 5th, 7th and 8th Respondents and himself are lawfully enjoying the suit properties and therefore the orders sought should not be granted.
153. It is not disputed that the suit properties are registered in the names of the 5th, 6th, 7th and 8th Respondents. It is further not disputed that the 5th, 6th, 7th and 8th Respondents are undertaking various activities on the suit properties.
154. What is disputed is whether the suit properties form part of Lake Naivasha riparian land, whether the suit properties were lawfully alienated to the 5th, 6th, 7th & 8th Respondents and whether the Respondents’ activities on the suit properties have endangered flora and fauna so much so that restoration orders should be issued against them.
155. From the depositions and documents attached to the affidavit in support of the application and further the response of 6th, Respondent I am required to establish whether the Petitioner/Applicants have made a prima facie case. In other words, whether the Petitioners/applicants have availed sufficient evidence to demonstrate that the suit parcels fall within Lake Naivasha Riparian reserve, forms part of Lake Naivasha Riparian Land and is therefore public land and that consequently, this court is required, in the public interest, to issue conservatory orders.
156. No such evidence has been availed. In fact, the other prayer in the application is for this court to issue orders compelling the 2nd and 3rd Respondents to file in court a survey report containing the survey work carried out between 28th February, 2022, 25th March and 18th November, 2022, which survey



work is intended to answer the question whether the suit parcels form part of Lake Naivasha Riparian Land and is therefore public land. I shall deal further with this issue in subsequent paragraphs.

157. As things remain, the 5th, 6th, 7th and 8th Respondents are the registered owners of the suit properties. Registration of a person as a proprietor of land is prima facie evidence of ownership. A registered proprietor is deserving of protection of the law until his title is found to have been acquired fraudulently, illegally or unprocedurally. The question of unprocedural allocation forms the substance of the petition and until a finding is made any attempts to interfere with their proprietary rights should be shunned.
158. Given the said circumstances, it is my view that the Petitioners/Applicants have not demonstrated that they have a prima facie case to warrant grant of conservatory orders.
159. In *Damour Florian Emmeric v Director of Immigration Services* (*supra*) the Court held as follows;

“ 55. The Court of Appeal in *Nairobi Civil Appeal No. 44 of 2014 Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another* (2015) eKLR while dealing with what a prima facie case is, made reference to Lord Diplock in *American Cyanamid v Ethicon Limited* (1975) AC 396, when the Judge stated thus: -

“If there is no prima facie case on the point essential to entitle the Plaintiff to complain of the Defendant’s proposed activities, that is the end of any claim to interlocutory relief.” [Emphasis mine]

160. Having found that the Petitioners/Applicants have not established a prima facie case, I will not consider whether the other principles for granting conservatory orders have been met.

B. Whether an order should be issued compelling the 1st, 2nd and 3rd Respondents to file in Court the survey report containing the survey work carried out between 28th February, 2022, 25th March and 18th November, 2022 to establish whether the suit properties falls within the Lake Naivasha riparian land reserve.

161. The Petitioners/Applicants are seeking for an order to compel the 1st, 2nd and 3rd Respondents to file in Court a survey report containing the survey work carried out between 28th February, 2022, 25th March and 18th November, 2022.
162. The Petitioners/Applicants argue that that the said report will establish whether the suit properties fall within the Lake Naivasha riparian land reserve.
163. None of the Respondents addressed this issue in their responses and submissions.
164. Article 35 of the *Constitution* of Kenya provides as follows;

“ 35.

- (1) Every citizen has the right of access to—
 - (a) information held by the State; and
 - (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.
- (2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.



- (3) The State shall publish and publicise any important information affecting the nation.”

165. The long title of the *Access to Information Act* is as follows;

“An Act of Parliament to give effect to Article 35 of the *Constitution*; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes.”

166. Section 4 of the *Access to Information Act* provides as follows;

“4.

- (1) Subject to this Act and any other written law, every citizen has the right of access to information held by —
 - (a) the State; and
 - (b) another person and where that information is required for the exercise or protection of any right or fundamental freedom.
- (2) Subject to this Act, every citizen's right to access information is not affected by —
 - (a) any reason the person gives for seeking access; or
 - (b) the public entity's belief as to what are the person's reasons for seeking access.
- (3) Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.
- (4) This Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6.
- (5) Nothing in this Act shall limit the requirement imposed under this Act or any other written law on a public entity or a private body to disclose information.”

167. In the judicial decision of *Kitundu v Sheik* (Environment & Land Case E327 of 2021) [2022] KEELC 3163 (KLR) (3 August 2022) (Ruling) the Court held as follows;

- “31. From the nature of orders and/or reliefs sought, there is no gainsaying that what the Applicant is seeking for is an order to compel the designated offices/department, to supply and/or avail unto her documents and/or information, which are held by the said offices/Departments.
32. In the premises, the bottom-line of the Plaintiff's/Applicant's Application, is that the Plaintiff/Applicant is seeking to exercise her Constitutional Right to Access to Information as enshrined vide article 35 of the *Constitution* 2010.



33. Suffice it to point out that the plaintiff/applicant herein, as one of the citizens of the republic of Kenya, is indeed entitled to partake of and or benefit from the rights articulated vide article 35 of the *Constitution*,2010.
34. Towards and in the course of seeking to appropriate and or benefit from the foregoing Rights, it behoves the applicant to approach the concerned offices/ departments holding the said information required and/or sought for.
35. For the avoidance of doubt, the manner in which the Applicant is required to apply for the requisite documents and or information, is stipulated and/or provided for under the *Access to Information Act*, 2016.
36. Be that as it may, it is worthy to note that any Applicant, the current Plaintiff/Applicant, not excepted is obliged to write to the concerned Office/ Department, enumerating the Documents and/or information required and thereafter to avail the request to the concerned Office/Department, for purposes of consideration and action.
37. Where an Applicant, including the current Plaintiff/Applicant, has complied with the provisions of *Access to Information Act*, but the request has been declined, refused and/or neglected, then such Applicant has a right to apply to the Court contending that his/her fundamental of access to information under article 35 of the *Constitution* 2010, have been breached, violated and or infringed upon.
38. However, the question that needs to be addressed is; which Court does such an Applicant approach to address and/or remedy the breach and/or violation of the Applicant's Fundamental Rights of Access to documents or information.
39. To my mind, where a Party contends that his/her rights as pertains to Access to Information held by a Government Department/Office, has been breached and/or infringed upon, such a Party is obliged to file the requisite Constitution Petition before the High Court, impleading the Government Department and or Officers, chargeable with the Documents in question and who are contended to have deprived the Applicant of the Right of Access to such information/documents.
40. Without belabouring the point, such a Petition would be mounted against the person holding the information and shall contain the requisite particulars of the Documents/Information required, when same were applied for and reasons, if any, why such information was withheld.
41. Once the Constitutional Petition is filed, the High Court in exercise of its Constitutional mandate vide article 165 (3) of the *Constitution*, 2010, would thereafter address the Complaint and the infringement alluded to and thereafter render a determination and make an appropriate Orders...
47. Premised on the foregoing, the grant of the orders sought at the foot of the subject Application would be tantamount to usurping and/or appropriating a Jurisdiction that does not lie with this Court.
48. Consequently, I must state that the application herein, whose import and tenor relates to breach, violation and/or infringement of (sic) the Right of



access to information under article 35 of the *Constitution* 2010, has been laid and/ or placed before the wrong Court. ”

168. As stated in the preceding paragraphs, the Petitioners/Applicants are seeking for an order to compel the 1st, 2nd and 3rd Respondents to file in Court a survey report for a survey carried out between 28th February 2022, 25th March and 18th November 2022 to establish whether the suit properties fall within the Lake Naivasha riparian land reserve.
169. Essentially, the Petitioners/Applicants are seeking to exercise their right of access to information as provided for under Article 35 of the *Constitution*.
170. As was held in *Kitundu v Sheik* (Environment & Land Case E327 of 2021) (*supra*) cited above, parties seeking to exercise their right to access to information have to first follow the procedure set at in the *Access to information Act*. In the event the request for information is declined, they have a right to approach the High Court contending infringement of their right to access to information. Needless to say, that the High Court would then issue appropriate orders.
171. That being the case, it is evident that Petitioners/Applicants have not exhausted the procedure set out in the *Access to Information Act* in requesting 1st, 2nd and 3rd Respondents to avail the said report. Presuming that the request was declined, the Petitioners/Applicants would have been at liberty to apply to the High Court alleging infringement of their right of access to information.
172. The Petitioners/Applicants herein have not demonstrated that they complied with the provisions of the *Access to Information Act*. Further this court has no jurisdiction to determine infringement of rights provided for under Article 35 of the *Constitution* of Kenya, 2010.
173. Consequently, the order compelling the 1st, 2nd and 3rd Respondents to file in Court a survey report for a survey carried out between 28th February 2022, 25th March and 18th November 2022 to establish whether the suit properties fall within the Lake Naivasha riparian land reserve cannot be granted by this court.

C. Who should bear the costs of the application?

174. It is now settled that costs shall follow the event. This is in accordance with the provisions of 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.

Disposition.

175. In the result, I find that the Notice of Motion application dated 20th December, 2022 lacks merit and is hereby dismissed with costs.
176. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 25TH DAY OF JULY, 2024.

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Rotich for the Petitioners

Mr. Gilbert Rotich for the 2nd, 3rd and 4th. Absent



Miss Litunda for 9th Respondent. Absent

Mr. Lempaa and Jaoko for 6th Respondent. Absent

Mr. Kibet for 1st Interested Party.

Miss Mukiri for 2nd Interested Party.

No appearance for the 5th, 6th, 7th and 8th Respondents

No appearance for the 1st Respondent (National Land Commission).

Court Assistant; Mr. Joseph Makori.

