Ngotho & another (Suing on their Behalf, and on Behalf of 41 others, All Residents of Joseph Kang'ethe Estate Nairobi) v The Nairobi City County Government & 2 others; Africa Reit Limited & another (Interested Parties) (Environment & Land Petition E093 of 2024) [2024] KEELC 13557 (KLR) (25 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13557 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION E093 OF 2024

JO MBOYA, J

NOVEMBER 25, 2024

IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE RULES, 2006

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT CAP 7L LAWS OF KENYA

AND

IN THE MATTER OF THE CONSTITUTIONALITY OF NOTICES TO VACATE PREMISES ISSUED BY THE NAIROBI CITY COUNTY GOVERNMENT

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 43 (1), (B), AND 47 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF LOCAL AUTHORITIES [RECOVERY OF POSSESSION PROPERTY] ACT, SECTION 3

BETWEEN

JOSEPH NGOTHO ..... 1ST PETITIONER

PINTO KALI ..... 2ND PETITIONER

SUING ON THEIR BEHALF, AND ON BEHALF OF 41 OTHERS, ALL RESIDENTS OF JOSEPH KANG'ETHE ESTATE NAIROBI

AND

THE NAIROBI CITY COUNTY GOVERNMENT ..... 1ST RESPONDENT

THE HON ATTORNEY GENERAL ..... 2ND RESPONDENT

THE NATIONAL LAND COMMISSION ..... 3RD RESPONDENT

AND

AFRICA REIT LIMITED ..... INTERESTED PARTY

THE LAW SOCIETY OF KENYA ..... INTERESTED PARTY

RULING

Introduction and Background

1. The subject ruling relates to three separate Applications, namely, the Application dated 15th November 2024 filed by the Petitioners; the Application dated 22nd November 2024 and which has been filed by the 1st Respondent and the Application dated 21st November 2024, the latter which has been filed by the 1st Interested Party. Suffice it to point out that the three Applications seek diverse reliefs/remedies.

2. Given the nature of diverse reliefs/remedies sought of the various Applications, it is apposite that the reliefs be addressed seriatim.

3. Vide the Application dated 15th November 2024, brought pursuant to Articles: 1(1), 1(3), 2(4), 19(3), 23, 25, 26(1), 27(1), 28,29,50(2), 159(1),160(1), 165, 201(1) of *the Constitution* and Constitution of Kenya (Protection of Rights and Fundamental Freedoms Practice and procedure Rules 2013, and in respect of which the Petitioners have sought for the following reliefs;

    i. The Application herein be certified as urgent to be heard ex-parte at the first instance.

    ii. Pending the Hearing and determination of the petition herein, an Order of injunction do issue against the 1st Respondent, its servants, agents and/or persons acting under its title stopping any enforcement of the vacation from premises Notice dated the 19th day of August 2024, issued to the Applicants, or in any way interfering with their occupation of houses within Joseph Kang'ethe Estate (woodley Estate), LR NO 209/13539 within Nairobi County.

    iii. Costs be in cause

4. The instant Application is premised on various grounds which have been highlighted at the foot thereof. Furthermore, the Application is supported by two Affidavits, namely the Affidavit of Pinto Kali and Sammy Lui Wang'ondu both sworn on 15th November 2024.

5. Upon being served with the Application beforehand, the 1st Respondent filed a Replying Affidavit sworn by Lydia Mathia on 22nd November 2024. The Replying Affidavit contains six [6] documents including a copy of the Memorandum of Understanding which was entered into and signed between the 1st Respondent and the various tenants/residents of Woodly Estate.

6. On the other hand, the 1st Interested Party filed a Replying Affidavit sworn by one Joyce Wanjiru. The Replying Affidavit is sworn on 21st November 2024. In addition, the 1st Interested Party has also filed Grounds of Opposition of even date.

7. Suffice it to point out that the 2nd and 3rd Respondents neither filed any Grounds of Opposition nor a Replying Affidavit.

8. The second Application is the one dated 22nd November 2024 and which had been filed by the 1st Respondent. The Application seeks the following reliefs;

   i. This Honourable Court be pleased to strike out the Application and Petition dated 15th November 2024.

   ii. Costs of this Application be provided for.

9. The subject Application is anchored on a plethora of grounds contained in the body thereof. In addition, the Application is supported by the Affidavit of Lydia Mathia sworn on even date.

10. Notably, even though the Petitioners were duly served with the Application dated 22nd November 2024 same [Petitioners] neither filed grounds of opposition nor replying affidavit. Nevertheless, learned counsel for the Petitioners intimated to the court that same was going to reply on issues of law to oppose the subject Application.

11. The third Application is dated 21st November 2024 and same has been filed by the 1st Interested Party. The Application seeks the following reliefs;

   i. That this Notice of Motion Application be heard in priority to the Petitioner's Notice of Motion dated 15th November 2024 or any other Application filed in this suit.

   ii. That the Honourable Court be pleased to discharge the interim orders preserving the status quo issued on 21st November 2024.

   iii. That the Honourable Court be pleased to strike out the Petitioners' Notice of Motion Application and Petition dated 15th November 2024 for being res judicata and abuse of the court process.

   iv. That the Honourable Court does grant any further orders as it may deem fit.

   v. That costs of this Application be provided for.

12. The subject Application is premised on the various grounds which have been highlighted in the body thereof. Furthermore, the Application is supported by the Affidavit of Joice Wanjiru sworn on even date. For good measure, the Supporting Affidavit has exhibited/annexed four [4] documents.

13. Similarly, even though the Petitioners were duly served with the subject Application [Application dated 21st November 2024], same [Petitioners] did not file any response thereto.

14. The subject matter came up for hearing on 22nd November 2024, and whereupon the advocates for the respective parties covenanted to canvass and dispose of the three Applications simultaneously. Furthermore, the advocates intimated to the court that given the nature of the matters beforehand, same [advocates] were ready to proceed with the Applications.

15. Arising from the foregoing, the court ventured forward and directed that the three Applications be canvassed simultaneously. Additionally, the court also directed that the Applications be disposed of by way of oral submissions.

Parties Submissions

a. Applicant's Submissions

16. The Petitioners/Applicants herein adopted the grounds contained in the body of the Application dated 15th November 2024. Furthermore, the Applicants also reiterated the averments contained in the body of the Supporting Affidavit sworn by Pinto Kali and Sammy Lui Wang'ondu, respectively.

17. Other than the foregoing, learned counsel for the Petitioners/Applicants proceeded to and highlighted eight pertinent issues for consideration by the court. Firstly, learned counsel [Dr. Khaminwa] submitted that the dispute beforehand touches on and concerns one of the oldest residential estates which was constructed within Nairobi City. At any rate, learned counsel contended that the estate in question, namely Woodly Estate was constructed to house the Africans and thus the estate deserves to be preserved for posterity. In any event, it was contended that the estate in question has acquired cultural phenomenal and thus it is an embarrassment for the City County Government of Nairobi to proceed with the impugned demolition of the estate.

18. Secondly, learned counsel for the Petitioners/Applicants also submitted that the demolition and consequential eviction that has been undertaken by the 1st Respondent herein is not only unlawful but contrary to *the Constitution* 2010. In particular, learned counsel invited the court to take cognizance of the various positions of *the Constitution* including Articles 27, 53, 57 and 259 of *the Constitution* 2010.

19. Having cited and referenced the various provisions of *the Constitution* [details in terms of the preceding paragraph], learned counsel for the Petitioners/Applicants has thereafter contended that the question of massive eviction is frowned upon by the international community. In this regard, learned counsel contended that the court is enjoined to grant the orders sought so as to uphold human dignity and respect for the Petitioners/Applicants right to adequate housing.

20. Thirdly, learned counsel for the Petitioners/Applicants has submitted that the 1st Respondent herein proceeded to and undertook the impugned evictions without regard to the due process of the law. In particular, it has been contended that the impugned eviction was undertaken without the requisite public participation and thus same [eviction] is contrary to and in contravention of the human rights and the fundamental freedoms enshrined in the Bill of Rights.

21. Fourthly, learned counsel for the Petitioners/Applicants has submitted that the impugned eviction has created a scenario of internal displacement of the various tenants and residents of Woodley Estate. In this regard, it has been contended that the eviction violates the guiding principles of international displacement. To this end, counsel for the Petitioners/Applicants posited that the circumstances surrounding the impugned eviction behoves the court to look at the matter beforehand in a broad manner, without paying undue regard to procedural technicalities, including the plea of res judicata.

22. Fifthly, learned counsel for the Petitioners/Applicants has submitted that the Petitioners/Applicants herein have placed before the court serious and weighty issues touching on human dignity, respect for the children and the rights of the older people to live with dignity. At any rate, it has been contended that the issues that have been raised by the Petitioners/Applicants herein are issued that cannot be wished away by the court.

23. Furthermore, learned counsel for the Petitioners/Applicants has also contended that the Petition and the Affidavits filed have espoused a prima facie case with reasonable probability of success. To this end, it has been posited that the Applicants have therefore proved the existence of a prima facie case in the manner prescribed under the law.

24. Sixthly, learned counsel for the Petitioners/Applicants has also submitted that the eviction and demolition of the houses at Woodley Estate have exposed the Petitioners/Applicants and the other residents to destitution. In particular, it has been submitted that the Petitioners/Applicants herein and the rest of the residents represented by the Petitioners/Applicants have been rendered homeless. In this regard, counsel has thus contended that the Petitioners/Applicants have therefore established the nature of prejudice and grave injustice that same [Petitioners/Applicants] are bound to suffer if the orders sought are not granted.

25. Seventhly, learned counsel for the Petitioners/Applicants has submitted that the doctrine of res judicata which the 1st Respondent and the Interested Parties have highlighted does not apply. In particular, it has been contended that the doctrine of res judicata does not apply to and/or affect constitutional petitions like the one beforehand.

26. Whilst highlighting the contention that the doctrine of res judicata does not apply to constitutional petitions, learned counsel for the Petitioners/Applicants has cited and referenced the provisions of Articles 159[2][d] and 259 of *the Constitution*, 2010, respectively. In any event, the court has been implored to adopt a broad approach in interpreting the constitutional provisions which have been cited and relied upon by the Petitioners/Applicants.

27. On the other hand, learned counsel for the Petitioners/Applicants has submitted that even if the court were to find and hold that the doctrine of res judicata does apply, the court should find and hold that the doctrine is not applicable in the instant matter. In particular, learned counsel posited that the various suits, which have been referenced by the 1st Respondent and the 1st Interested Party, do not relate to the Petitioners/Applicants beforehand.

28. On the contrary, it has been submitted that the other suits which have been referenced were filed by separate and distinct tenants and not the ones beforehand. In any event, it has been submitted that each and every tenant has a distinct story and relationship with the 1st Respondent and hence the dispute touching one tenant cannot be deployed to defeat and or circumvent the rights/interests of another tenant.

29. To the extent that the Petitioners/Applicants herein were not parties in any of the previous suits, learned counsel for the Petitioners/Applicants has therefore invited the court to find and hold that the plea of res judicata is irrelevant and inapplicable.

30. Additionally, learned counsel for the Petitioners/Applicants also submitted that the 1st Respondent herein had hitherto given promises to the various tenants of Woodley Estate and wherein the 1st Respondent intimated that the tenants of Woodley Estate would be availed an opportunity to purchase the housing units occupied by same. In this regard, learned counsel for the Petitioners/Applicants contended that the promises which were given by the 1st Respondent created and espoused a legitimate expectation in favour of the Petitioners/Applicants.

31. To this end, learned counsel for the Petitioners/Applicants has submitted that the various promises and representations made to the Petitioners/Applicants therefore founds a basis for legitimate expectation. In this respect, learned counsel for the Petitioners/Applicants cited and referenced the provisions of Articles 19 and 47 of *the Constitution* 2010.

32. Flowing from the doctrine of legitimate expectation, learned counsel for the Petitioners/Applicants has therefore contended that the 1st Respondent cannot now turn back and seek to evict the Petitioners/Applicants. In this regard, it was posited that the impugned evictions and demolitions are therefore unconstitutional and thus ought to be prohibited.

33. Arising from the foregoing submissions, learned counsel for the Petitioners/Applicants has therefore implored the court to find and hold that the Petitioners/Applicants have established and demonstrated the existence of a prima facie case. In any event, learned counsel has also posited that the Petitioners/Applicants have demonstrated and satisfied the request conditions espoused in the case of Gitarau Peter Munya v Dickson Mwenda Kithinji [2013] eKLR.

b. 1st Respondent's Submissions

34. The 1st Respondent herein adopted the contents of the Replying Affidavit sworn by Lydia Mathia on 22nd November 2024. Furthermore, the 1st Respondent also adverted to and highlighted the grounds contained at the foot of own Application dated 22nd November 2022 and the Supporting Affidavit thereto.

35. In addition, learned counsel for the 1st Respondent highlighted and canvassed five salient issues for consideration by the court. First and foremost, learned counsel for the 1st Respondent has submitted that the Petition beforehand has been supported by the Affidavit of one Pinto Kali sworn on 15th November 2024. In particular, it has been contended that the Affidavit contains serious falsehoods and misrepresentations.

36. Furthermore, learned counsel for the 1st Respondent has submitted that even though the deponent of the Supporting Affidavit contends that same is an advocate, the 1st Respondent has cross checked from the Law Society of Kenya website with a view of ascertaining the veracity of the said averments but there is no indication that the said deponent [Pinto Kali] is an advocate.

37. To the extent that the deponent is not an advocate and coupled with the fact that his [deponent's] name is not traceable in the website of the Law Society of Kenya, it was submitted that the Supporting Affidavit reeks of falsehoods and thus deserves to be struck out.

38. Secondly, learned counsel for the 1st Respondent has submitted that even though it is contended that the Petition has been filed for and on behalf of 41 others tenants/residents of Woodley Estate, the names of [sic] the 41 others have neither been disclosed nor enumerated. In this regard, it has been contended that in the absence of disclosure of the identities of the other 41 residents on whose behalf the Petition has been filed, then the Petition is deficient and thus incompetent.

39. Other than the foregoing, it has been contended that the 41 other residents of Woodley Estate who have been adverted to have also not executed any authority or resolution to mandate the two Petitioners to file the Petition on their behalf. To this end, it has been submitted that the failure to exhibit and/or file the authority by [sic] 41 residents vitiates the Petition and by extension the Application for temporary injunction.

40. Learned counsel for the 1st Respondent has contended that the suit property on which the intended project is being undertaken is public land. Furthermore, learned counsel for the 1st Respondent has submitted that by virtue of being public land, the 1st Respondent herein is mandated to use same [suit property] for purpose of public utility or the development of affordable housing.

41. At any rate, it was contended that to the extent that the suit property is public land, the Petitioners/Applicants herein do not have any legal rights thereto. In the absence of any legal or equitable rights to the suit property, learned counsel for the 1st Respondent contended that the Petitioners/Applicants herein had thus failed to establish a prima facie case with probability of success.

42. Thirdly, learned counsel for the 1st Respondent has also submitted that the 1st Respondent herein has since entered into and executed a Joint Venture Contract with the 1st Interested Party. In particular, it

has been contended that the contract was executed on 16th February 2024 and that the contract contains various terms and conditions, the breach of which would subject the 1st Respondent to incur colossal monies and to pay damages.

43. Furthermore, learned counsel for the 1st Respondent also submitted that arising from the foregoing, the 1st Interested Party has since taken over and taken possession of the suit property. In this regard, it has been submitted that the grant of the orders sought would therefore prejudice public interest and hence the orders sought ought not to be granted.

44. Furthermore, the learned counsel for the 1st Respondent has submitted that the Application filed by the Petitioners/Applicants herein seeks to stop and or prohibit the enforcement of the Vacation Notice dated 19th August 2024. However, it has been submitted that the Vacation Notice under reference has since ceased to exist following the vacation of the suit property by the bona fide tenants and coupled with the demolition of the houses which were standing on the suit ground. For good measure, learned counsel has submitted that the houses which were erected on the suit property were demolished on 19th November 2024.

45. To this end, learned counsel for the 1st Respondent has therefore submitted that the prayer underpinning the subject matter has been overtaken by events. In this regard, it has therefore been contended that the Application under consideration has been rendered moot by the supervening events.

46. Fifthly, learned counsel for the 1st Respondent has also submitted that the Petitioners/Applicants beforehand has neither tendered nor availed any evidence that same [Petitioners/Applicants] are truly bona fide tenants of Woodley Estate. In particular, the learned counsel contended that the Supporting Affidavit without any evidential backing, lacks probative value.

47. Arising from the foregoing, learned counsel for the 1st Respondent has submitted that in the absence of any document underpinning the tenancy between the Petitioners/Applicants and the 1st Respondents, the Petitioners/Applicants herein have therefore not demonstrated their locus standi to mount and commence the instant Petition.

48. Additionally, learned counsel for the 1st Respondent has posited that in the absence of locus standi, the Petitioners/Applicants herein have no basis to file and/or commence the subject Petition. In any event, it has been submitted that locus standi is a threshold question and hence it behoves the Petitioners/Applicants to satisfy the court that same [Petitioners/Applicants] have a stake and/or interests in the suit property and by extension, the suit beforehand.

49. Sixthly, learned counsel for the 1st Respondent have also submitted that the Petition and the Application beforehand are defeated by the doctrine of res judicata. In particular, it has been contended that the issues that colour the Petition and the Application have previously been adjudicated before courts of competent jurisdiction including the Environment and Land Court and the Court of Appeal, respectively. To this end, learned counsel for the 1st Respondent has invited the court to take cognizance of the details of the cases, which have been highlighted at the foot of paragraph 6 of the Replying Affidavit sworn by Lydia Mathia.

50. Seventhly, learned counsel for the 1st Respondent has also submitted that the process relating to urban renewal and regeneration, which is being undertaken by the 1st Respondent, was subjected to the requisite due process of the law. In particular, learned counsel for the 1st Respondent has contended that the 1st Respondent undertook extensive public participation and engagement with the bona fide

tenants of Woodley Estate. To this end, learned counsel for the 1st Respondent has cited and referenced annexures JW2 attached to the Affidavit of Joyce Wanjiru sworn on 21st November 2024.

51. Eighthly, learned counsel for the 1st Respondent has submitted that the Petitioners/Applicants herein have neither established nor demonstrated that same are disposed to suffer any irreparable loss. In any event, it has been contended that in the absence of evidence that the Applicants are bona fide tenants of Woodley Estate, the Applicants are busy bodies and cannot therefore suffer any irreparable loss.

52. Notwithstanding the foregoing, it has been submitted that even if the Applicants are bona fide tenants of Woodley Estate [which is disputed], learned counsel for the 1st Respondent has submitted that the loss if any that the Applicants may suffer is capable of quantification and compensation in monetary terms.

53. In the absence of irreparable loss, learned counsel for the 1st Respondent has therefore contended that an order of temporary injunction ought not to issue or be granted.

54. Finally, learned counsel for the 1st Respondent has submitted that the project being undertaken on the suit property namely, urban renewal and regeneration, is intended to foster the realization of the right to housing in accordance with the provisions of Article 43[1][b] of *the Constitution* 2010. In this regard, it has been pisted that the project is therefore in the interests of the public and thus public interest takes precedence over individual interest.

55. Relying on the principle of public interest, learned counsel for the 1st Respondent has submitted that the orders sought ought not to be granted. In particular, it has been contended that the orders sought will be contrary to the public interest, public good and the constitutional right to accessible and adequate housing.

56. In a nutshell, learned counsel for the 1st Respondent has therefore implored the court to find and hold that the Petition and the attendant Application are barred by the doctrine of res judicata. To this end, learned counsel has invited the court to strike out the entire Petition and the Application thereto.

57. On the other hand, learned counsel for the 1st Respondent has also contended that the Application beforehand does not meet and/or satisfy the requisite ingredients to warrant the grant of an order of temporary injunction, either in the manner sought or at all. In this regard, the court has been invited to find and hold that the Application is devoid of merit.

c. 2nd Respondent's Submissions

58. The 2nd Respondent is the Honourable Attorney General. Though the 2nd Respondent did not file any response to the Application dated 15th November 2024, same however opposed the Application on points of law.

59. Firstly, learned counsel for the 2nd Respondent submitted that the primary order being sought at the foot of the Application is an order of temporary injunction. However, it has been contended that the suit property in respect of which the orders of temporary injunction is being sought is public property.

60. Additionally, it has been contended that to the extent that the suit property is public property, no order of temporary injunction can therefore be granted to bar and/or prohibit the 1st Respondent from undertaking the intended project, namely urban renewal and regeneration.

61. At any rate, it has been submitted that insofar as the suit property is public land, the grant of an order of temporary injunction would therefore be prejudicial to the rights and interests of the 1st

Respondent. Furthermore, it has been posited that an order of temporary injunction cannot issue against the registered owner of the suit property or at all.

62. Secondly, learned counsel for the 2nd Respondent has submitted that the vacation notices which were issued by and on behalf of the 1st Respondent have since taken effect. In particular, it has been contended that the vacation notices which were issued were acted upon by the various tenants who proceeded to and vacated the houses standing on the suit property. In any event, it was posited that the houses standing on the suit property have since been demolished and hence the prayer for an order of temporary injunction has been rendered moot.

63. Thirdly, learned counsel for the 2nd Respondent has submitted that the Petitioners/Applicants herein have neither established nor demonstrated the existence of a prima facie case with a probability of success. In any event, learned counsel contended that it was incumbent upon the Petitioners/Applicants herein to lay before the court credible material to demonstrate that same [Petitioners/Applicants] have a stake or interest in the suit property.

64. Nevertheless, learned counsel for the 2nd Respondent has submitted that the Petitioners/Applicants have neither placed before the court any tenancy agreement to underpin their claim to be tenants or such other evidence to demonstrate the nature of interests in respect of the suit property.

65. To buttress the submissions, that the Applicants have not established or demonstrated a basis for the grant of an order of temporary injunction, learned counsel for the 2nd Respondent has cited and referenced the holding of the Supreme Court in the case of Gitarau Peter Munya v Dickson Mwenda Kithinji & Others [2013] eKLR.

66. Fourthly, learned counsel for the 2nd Respondent has also submitted that the project that is complained of is contended to foster the realization of the right to housing. In this regard, it has been contended that the project in question is therefore one serving public interest and public good. To this end, it has been contended that the grant of the orders of temporary injunction would thus prejudice public interest. In any event, it was contended that where public interest conflicts with private interest, it is apposite to allow public interest to take precedence over private interest.

67. Fifthly, learned counsel for the 2nd Respondent has submitted that the issues that are being raised and canvassed at the foot of the current Petition and Application have hitherto been canvassed and determined in previous cases. In particular, learned counsel for the 2nd Respondent has cited and referenced various cases including ELC No. 2054 of 2007; Court of Appeal Civil Appeal No. E375 of 2020 and ELC No. E001 of 2024, respectively.

68. Arising from the foregoing, learned counsel for the 2nd Respondent has therefore contended that the Petition beforehand is barred and/or prohibited by the doctrine of res judicata. To this end, learned counsel for the 2nd Respondent has invoked the provisions of Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

69. Furthermore, learned counsel for the 2nd Respondent has also cited referenced the decision in the case of E.T v Attorney General [2012] eKLR and John Florence Maritime Services Ltd v the Cabinet Secretary, Transport, Infrastructure & Public Works [2021] eKLR, respectively.

70. Premised on the foregoing, learned counsel for the 2nd Respondent has therefore implored the court to find and hold that the Application dated 15th November 2024 does not meet and/or satisfy the requisite conditions to warrant the grant of an order of temporary injunction.

71. On the other hand, learned counsel for the 2nd Respondent has contended that the Petition and the Application are barred by the doctrine of res judicata. In this regard, learned counsel for the 2nd Respondent has therefore invited the court to proceed and strike out the entire Petition.

d. 1st Interested Party's Submissions

72. The 1st Interested Party herein adopted and reiterated the contents of the Replying Affidavit sworn by Joyce Wanjiru on 21st November 2024. Furthermore, the 1st Interested Party also adopted the grounds contained at the foot of the Application dated 21st November 2024. In addition, the 1st Interested Party also reiterated the contents at the foot of the Supporting Affidavit sworn on 21st November 2024.

73. Other than the foregoing, learned counsel for the 1st Interested Party has submitted that the 1st Respondent and the 1st Interested Party held various meetings and engagements with the bona fide tenants/residents of Woodley Estate. In addition, it was contended that arising from the various meetings and engagements with the tenants of Woodley Estate, a Memorandum of Understanding was arrived at/reached which contained various terms that were agreed upon between the 1st Respondent and the bona fide tenants.

74. Furthermore, learned counsel for the 1st Interested Party has submitted that arising from the Memorandum of Understanding, the 1st Respondent herein proceeded to and issued vacation notices which were addressed to each and every bona fide tenant of Woodley Estate. In any event, learned counsel for the 1st Interested Party has referenced the various vacation notices which were issued to each and every individual tenant/resident. For good measure, learned counsel for the 1st Interested Party has adverted to annexure JW2 and JW3 attached to the Replying Affidavit of Joyce Wanjiru.

75. Arising from the foregoing, learned counsel for the 1st Interested Party has therefore submitted that the 1st Respondent and the 1st Interested Party undertook extensive public consultation and participation with the bona fide tenants of Woodley Estate. To this end, it has been posited that public participation was therefore undertaken in accordance with *the Constitution*.

76. Secondly, learned counsel for the 1st Interested Party has submitted that the vacation notices which were issued to the bona fide tenants of Woodley Estate gave the designated tenants 90 days within which to vacate the suit property. Furthermore, it has been submitted that the 90 days at the foot of the vacation notices lapsed and/or ended on 19th November 2024.

77. It was the further submissions by learned counsel for the 1st Interested Party that the various tenants were issued and served with the vacation notices duly complied with the terms of the vacation notices and indeed vacated the suit property.

78. On the other hand, learned counsel for the 1st Interested Party has submitted that upon the lapse of the vacation notices and coupled with the vacation of the suit property by the bona fide tenants, the 1st Interested Party took over the suit property and demolished all the houses that were standing thereon. To this end, learned counsel for the 1st Interested Party has cited and referenced various photographs which have been annexed as JW5 to the Replying Affidavit of Joyce Wanjiru.

79. Arising from the foregoing, learned counsel for the 1st Interested Party has therefore submitted that following the taking over of the suit property and the consequential demolition of the houses that were standing on the suit property, the entire Petition and the Application for temporary injunction have been overtaken by events.

80. Thirdly, learned counsel for the 1st Interested Party has submitted that the Petitioners/Applicants herein have neither established nor demonstrated any basis to underpin the claim founded on legitimate expectation. In any event, learned counsel for the 1st Interested Party has submitted that the Petiotioners/Applicants have not placed before the court any material to demonstrate that the 1st Respondent made any promises and/or representation to the Applicants, to warrant the invocation of and reliance on the doctrine of legitimate expectation.

81. On the other hand, learned counsel of for the 1st Interested Party has also submitted that the doctrine of legitimate expectation cannot be invoked and relied upon to defeat express provisions of the law and *the Constitution*. In this regard, the court has been implored to find and hold that the claim founded on the basis of legitimate expectation is misconceived and legally untenable.

82. Fourthly, learned counsel for the 1st Interested Party has also submitted that the suit property is public land. To the extent that the suit property is public land it has been contended that the Petitioners/Applicants herein, who are not the owners of the suit property, therefore have no proprietary rights to and in respect of the suit property. In the absence of proprietary rights to the suit property, it has been contended that the Petitioners/Applicants cannot therefore partake of and benefit from an order of temporary injunction either in the manner sought or at all.

83. Fifthly, learned counsel for the 1st Interested Party has submitted that the 1st Interested Party has since entered upon and taken possession of the suit property and commenced the intended project, namely urban renewal and regeneration program, which is intended to facilitate the construction of affordable housing units. In any event, it has been submitted that the intended project involves the expenditure of colossal sums of money and that any order of injunction would therefore cause undue prejudice and grave injustice not only to the 1st Interested Party but also to the 1st Respondent herein.

84. To this end, learned counsel for the 1st Interested Party has therefore submitted that the grant of an order of temporary injunction shall prejudice the public interest and the realization of the right to affordable housing. Instructively, it has been posited that public interest militates against the grant of the orders sought.

85. Sixthly, learned counsel for the 1st Interested Party has submitted that the issues being raised at the foot of the Petition and the current Application have hitherto been raised and canvassed in previous suits. To this end, learned counsel for the 1st Interested Party has referenced the contents of paragraph 15 of the Replying Affidavit sworn by Joyce Wanjiru. For good measure, learned counsel for the 1st Interested Party has contended that the issues beforehand have been determined vide ELC No. 2054 of 2007; Court of Appeal Civil Appeal No. E375 of 2020 and ELC No. E001 of 2024, respectively.

86. Premised on the basis that the issues raised at the foot of the Petition and the Application have been determined by courts of competent jurisdiction, learned counsel for the 1st Interested Party has therefore submitted that the suit beforehand is barred by the doctrine of res judicata.

87. Furthermore, learned counsel for the 1st Interested Party has also submitted that the Petitioners/Applicants herein are the ones who filed Petition No. ELC E001 of 2024 and which Petition was struck out for being res judicata. Nevertheless, the Petitioners/Applicants herein have since returned to this court and are seeking similar orders as the ones which were sought vide Petition ELC No. E001 of 2024.

88. To this end, learned counsel for the 1st Interested Party has submitted that the Petition beforehand and the Application thereunder constitute and amount to an abuse of the due process of the court. Additionally, learned counsel has invited the court to find and hold that the Petition is therefore an abuse of the due process of the court.

89. Arising from the foregoing, learned counsel for the 1st Interested Party has therefore invited the court to find and hold that the Application dated 21st November 2024, wherein the 1st Interested Party has sought to have the Petition struck out, is merited.

Issues for Determination

90. Having reviewed the Petition, the Applications filed by the respective parties and the responses thereto and upon taking into account the oral submissions on behalf of the various parties, the following issues do crystalize and are thus worthy of determination;

    i. Whether the Petitioners/Applicants herein have the requisite locus standi to commence and maintain the Petition and the Application beforehand or otherwise.

    ii. Whether the Petition and the Application are barred and prohibited by the doctrine of res judicata and by extension the provisions of Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya or otherwise.

    iii. Whether the Petitioners/Applicants herein have established and demonstrated the existence of a prima facie case or otherwise.

    iv. Whether the Petitioners/Applicants have demonstrated that same [Petitioners/Applicants] shall be disposed to suffer irreparable loss unless the orders sought are granted.

Analysis and Determination

Issue Number 1 Whether the Petitioners/Applicants herein have the requisite locus standi to commence and maintain the Petition and the Application beforehand or otherwise.

91. The Petitioners/Applicants herein have filed the Petition beforehand contending that same are tenants and residents of Woodley Estate [Joseph Kang'ethe Estate], situate in Nairobi. In particular, the 2nd Applicant who has sworn the Supporting Affidavit to the Petition has contended that the 1st Applicant and [sic] the rest of the residents of the named estate are indeed tenants of the 1st Respondent herein.

92. Nevertheless, even though the deponent of the Supporting Affidavit has adverted to and contended that the 1st Petitioner/Applicant and himself are tenants at Joseph Kang'ethe Estate [Woodley Estate] same [deponent] has however failed to annex a copy of the tenancy agreement, if any. Furthermore, the deponent has also failed to exhibit and/or attach any document or material underpinning the contention that the Petitioners/Applicants are truly tenants at the said Estate or at all.

93. Relevantly, it is the Petitioners/Applicants herein who have approached the court contending that same are tenants of Joseph Kang'ethe Estate. In this regard, there is no gainsaying that the Petitioners/Applicants were obligated to place before the court some material or evidence to found the contention that same are indeed tenants at Joseph Kang'ethe Estate.

94. On the other hand, it is imperative to state and underscore that the 1st Respondent [City County Government of Nairobi] has stated that the Petitioners/Applicants herein are not the bona fide tenants of Joseph Kang'ethe Estate. In any event, the 1st Respondent has ventured forward and adverted to a Memorandum of Understanding that was entered into and executed between the bona fide tenants of Joseph Kang'ethe Estate and the 1st Respondent.

95. On the other hand, it is also important to recall that the 1st Respondent has posited that out of the agreement whose terms were reduced into the Memorandum of Understanding, the 1st Respondent

proceeded to and issued the vacation notices to each and every bona fide tenant of Joseph Kang'ethe Estate. To this end, the 1st Respondent has availed the various vacation notices that were issued to and served upon the bona fide tenants of Joseph Kang'ethe Estate.

96. Other than the foregoing, the 1st Interested Party has also filed an elaborate Replying Affidavit and wherein the deponent of the Replying Affidavit [Joyce Wanjiru] has exhibited the minutes of the meetings that were held between the 1st Respondent and the bona fide residents of Joseph Kang'ethe Estate. Furthermore, the deponent of the Replying Affidavit has also annexed copies of the individual notices to vacate that were addressed to individual tenants of Joseph Kang'ethe Estate. [See annexure JW3 and JW4, respectively].

97. What is discernible from the contents of the Replying Affidavit on behalf of the 1st Respondent and the 1st Interested Party is to the effect that the Petitioners/Applicants herein are contended not to be bona fide tenants/residents of Joseph Kang'ethe Estate. In particular, what I hear the 1st Respondent and the 1st Interested Party to be saying is that the Petitioners/Applicants herein are busy bodies and thus devoid of the requisite locus standi to commence and maintain the Petition beforehand.

98. Suffice it to point out that the Petitioners/Applicants herein had the requisite opportunity to seek for and obtain leave of the court to file a further/supplementary affidavit to respond to the averments contained at the foot of the Replying Affidavits by the 1st Respondent and the 1st Interested Party, respectively. However, no leave was ever sought and no further affidavits was ever filed.

99. To the extent that no further/supplementary affidavit was ever filed to controvert the positive averments contained at the foot of the Replying Affidavit by the 1st Respondent and the 1st Interested Party, respectively, the legal implication arising is to the effect that the positive averments are deemed to be admitted.

100. For good measure, where an applicant fails to respond to positive averments contained in the Replying Affidavit filed by the adverse party, it is deemed that the applicant has conceded and admitted the averments at the foot of the Replying Affidavit. This position has received judicial interpretation and elaboration in a number of decisions.

101. To buttress the foregoing exposition of the law, it suffices to cite and reference the holding in the case of Mohammed & Another vs. Haidara [1972] E.A 166 [at page 167 paragraph F-H], where Spry V.P expressed himself as follows;

> " The respondent made no attempt to reply to these allegations and they therefore remain unrebutted...Here, the respondent's affidavit gives no material facts and the only real evidence of facts is that contained in the appellant's affidavit. In these circumstances, it seems to me that a replying affidavit was essential. There was no need for it to be prolix but it should have made clear which of the facts alleged by the appellants were denied..."

102. Arising from the fact that the Petitioners/Applicants herein did not controvert the positive averments contained at the foot of the Replying Affidavits filed by the 1st Respondent and the 1st Interested Party, respectively, and coupled with the fact that the Petitioners/Applicants did not exhibit any evidence to underpin their contention of being tenants/residents of Joseph Kang'ethe Estate, the obvious implication to the effect that the Petitioners/Applicants herein have failed to prove a critical component in respect of the instant Petition. The critical component under reference relates to the question of locus standi.

103. Locus standi denotes the right of a party to approach the court with a view to ventilating a claim and/or course of action. It is a fundamental issue insofar as it determines the right of that party to appear and to be heard by a court of law.

104. Where a party is devoid and/or divested of the requisite locus standi [legal capacity], then such a party cannot appear and cannot be heard. It is immaterial and irrelevant whether such a person has a reasonable cause of action or otherwise. For good measure, the absence of locus standi militates against the right of such a party to invoke the due process of the court. In this regard, it suffices to posit that the Petitioners/Applicants have not discharged their obligation to satisfy that same are seized of the requisite locus standi to mount and maintain the instant Petition and by extension, the Application thereunder.

105. As pertains to the significance of locus standi, it suffices to cite and reference the holding of the Court of Appeal in the case of Alfred Njau & Others v City Council of Nairobi [1982-88] IKAR 229, where the court stated and observed as hereunder;

> " Lack of locus standi and a cause of action are two different things. Cause of action is the fact or combination of facts which give rise to a right to sue whereas locus standi is the right to appear or be heard, in court or other proceedings; ..."
>
> The court proceeded to state:
>
> "To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to."

106. One may want to argue that what is before the court is a constitutional petition and therefore the question of locus standi is irrelevant and immaterial. Better still, it may be contended that the strict application of the principles of locus standi has since been ousted by the provisions of Articles 22 and 258 of *the Constitution*, 2010. Nevertheless, there is no gainsaying that even in constitutional petitions, the Applicants is obligated to demonstrate some scintilla of stake, interest and/or nexus to the dispute beforehand. Such demonstration of the nexus between the Applicant and the dispute establishes the right of the Petitioner/Applicant to appear and thus the locus standi.

107. To my mind, locus standi [legal capacity] still applies to constitutional petitions. However, it is not lost on this court that the strictures that were hitherto applied under the common law have since been relaxed.

108. To underpin the foregoing finding, it suffices to adopt and reiterate the holding of the court in the case of Ms. Priscilla Nyokabi Kanyua vs. Attorney General & Interim Independent Electoral Commission Nairobi HCCP No. 1 of 2010 [Unreported], where the court stated as hereunder:

> " Over time, the English Courts started to deviate and depart from their contextual application of the law and adopted a more liberal and purposeful approach. They held that it would be a grave lacuna in the system of public law if a pressure group or even a single spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. The strict rule of locus standi applicable to private litigation is relaxed and a broad rule is evolved which gives locus standi to any member of public acting bona fide and having sufficient interest in instituting an action for redressal of public wrong or public injury by a person who is not a mere busybody or a meddlesome interloper; since the

dominant object of Public Interest Litigation is to ensure observation of the provision of *the constitution* or the law which can be best achieved to advance the cause of the Community or public interest by permitting any person, having no personal gain or private motivation or any other oblique consideration, but acting, bona fide and having sufficient interest in maintaining an action for judicial redress for public injury to put the judicial machinery in motion like action popularis of Roman Law whereby any citizen could bring such an action in respect of public delict. Standing will be granted on the basis of public interest litigation where the petition is bona fide and evidently for the public good and where the Court can provide an effective remedy...In Kenya the Court has emphatically stated that what gives locus stand is a minimal personal interest and such interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population. The court equally has recognised that organisations have rights similar to that of individual private member of the public. A new dawn was the ushered in and the dominion of Private Law and its restrictive approach was dealt a final blow. A new window of opportunity emerged in the area of Public Law and shackles of inhibition in the name of locus standi were broken and the law was liberalised and a purposeful approach took the driving seat in the area of Public Law. In human rights cases, public interest litigation, including lawsuits challenging the constitutionality of an Act of Parliament, the procedural trappings and restrictions, the preconditions of being an aggrieved person and other similar technical objections, cannot bar the jurisdiction of the court, or let justice bleed at the altar of technicality. The court has vast powers under section 60 of *the Constitution* of Kenya, to do justice without technical restrictions and restraints; and procedures and reliefs have to be moulded according to the facts and circumstances of each case and each situation. It is the fitness of things and in the interest of justice and the public good that litigation on constitutionality, entrenched fundamental rights, and broad public interest protection, has to be viewed. Narrow pure legalism for the sake of legalism will not do. We cannot uphold technicality only to allow a clandestine activity through the net of judicial vigilance in the garb of legality. Our legal system is intended to give effective remedies and reliefs whenever *the Constitution* of Kenya is threatened with violation. If an authority which is expected to move to protect *the Constitution* drags its feet, any person acting in good faith may approach the court to seek judicial intervention to ensure that the sanctity of *the Constitution* of Kenya is protected and not violated. As part of reasonable, fair and just procedure to uphold the Constitutional guarantees, the right to access to justice entails a liberal approach to the question of locus standi. Accordingly in constitutional questions, human right cases, public interest litigation and class actions, the ordinary rules of Anglo-Saxon jurisprudence, that an action can be brought only by a person to whom legal injury is caused, must be departed from. In these types of cases, any person or social action groups, acting in good faith, can approach the court seeking judicial redress for a legal injury caused or threatened to be caused or to a defined class of persons represented, or for a contravention of *the Constitution*, or injury to the nation. In such cases the court will not assist such a public-spirited individual or social action group espousing their cause, to show his or their standing to sue in the original Anglo-Saxon conception..."

109. Furthermore, the Court continued and stated thus:

> "In the interest of the realisation of effective and meaningful human rights, the common law position in regard to locus standi has to change in public interest litigation. Many people whose fundamental rights are violated may not actually be in a position to approach the Court for relief, for instance, because they are unsophisticated and indigent, which in

effect means that they are incapable of enforcing their fundamental rights, which remain merely on paper. Bearing this in mind, where large numbers of persons are affected in this way, there is merit in one person or organisation being able to approach the court on behalf of all those persons whose rights are allegedly infringed. This means that human rights become accessible to the metaphorical man or woman in the street. Accessibility to justice is fundamental to rendering *the Constitution* legitimate. In this sense, a broad approach to locus standi is required to fulfil the Constitutional court's mandate to uphold *the Constitution* as this would ensure that Constitutional rights enjoy the full measure of protection to which they are entitled."

110. The significance of locus standi in constitutional petitions and public interest litigation was also elaborated upon by the Court of Appeal in the case of Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others Civil Appeal No. 290 of 2012 [2013] eKLR, where the court stated as follows:

> "Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of *the Constitution* by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the argument of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus standi to file the petition. Apart from this, we agree with the superior court below that the standard guide for locus standi must remain the command in Article 258 of *the Constitution*."

111. In the case of *Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & Judicial Service Commission (Petition 167 of 2016)* [2016] KEHC 7697 (KLR) (Constitutional and Human Rights) (31 May 2016) (Ruling), the court highlighted the place of locus standi in constitutional petitions and stated as hereunder:

> 61. It is therefore clear that over time the issue of standing, particularly in public law litigation has been greatly relaxed and in our case *the Constitution* has opened the doors of the Courts very wide to welcome any person who has bona fide grounds that *the Constitution* has been or is threatened with contravention to approach the Court for an appropriate relief. In fact, since Article 3(1) of *the Constitution* places an obligation on every person to respect, uphold and defend *the Constitution*, the invitation to approach the Court for redress as long as the person hold bona fide grounds for believing that *the Constitution* is under threat ought to be welcome. I must however hasten to add that the liberal interpretation does not mean that the rule on locus standi is no longer relevant in constitutional petitions. Where it is clear that the Petitioner has completely no business in bringing the matter to Court to permit such proceedings to be litigated would amount to the Court itself abetting abuse of its process.

112. In my humble view, it was incumbent upon the Petitioners/Applicants to place before the court some semblance of material or evidence to demonstrate that same [Petitioners/Applicants] are indeed bona fide tenants/residents of Joseph Kang'ethe Estate to warrant same approaching the court with a view to procuring orders pertaining to issues and matters in respect of the impugned developments.

113. Furthermore, it is not lost on this court that the gravamen/substratum is to the effect that same [Petitioners/Applicants] were not consulted by the 1st Respondent and the 1st Interested Party as pertains to the intended project, namely Urban Renewal and Re-generation Program, which affects tenants/residents of Joseph Kang'ethe Estate. Pertinently, the foundation of the claim beforehand was/is dependent on preliminary proof of the Petitioners/Applicants being tenants of the named estate.

114. I am afraid that this threshold question/issue was neither met nor established by the Petitioners/Applicants. Consequently, I come to the conclusion that the Petitioners/Applicants herein have neither proved nor established that same [Petitioners/Applicants] are seized of the requisite locus standi to maintain the Petition and by extension the Application thereto.

115. Before departing from the subject issue, there is also the aspect that touches on the contention that the Petition herein has been filed on behalf of other 41 residents of Joseph Kang'ethe Estate. To this end, what merits mention is to the effect that the alleged 41 residents, have neither been identified nor enumerated. For good measure, the identifies of other 41 residents, if any, remains mysterious.

116. Notwithstanding the foregoing, it is important to underscore that where an applicant, the Petitioners/Applicants herein not excepted, is desirous to mount a suit [Petition] on behalf of others, it behoves the applicant to clearly identify the other claimants and thereafter to procure the authority of the other persons on whose behalf the Petition is filed. In addition, there is no gainsaying that the law requires that such authority be in writing and must be signed by the concerned parties.

117. Better still, it suffices to underscore that the authority under reference must be filed with the Petition. Instructively, the position of the law which underpins the necessity to file such authority is highlighted by the provisions of Order 1 Rule 13 [2] of the Civil Procedure Rules 2010.

118. For ease of appreciation, the provisions of Order 1 Rule 13[2] of the Civil Procedure Rules 2010, provides as hereunder;

> 13. Appearance of one of several plaintiffs or defendants for others [Order 1, rule 13]
>
> 1. Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.
>
> 2. The authority shall be in writing signed by the party giving it and shall be filed in the case.

119. Flowing from the above, my answer to issue number one is threefold. Firstly, the Petitioners/Applicants herein have neither demonstrated and/or established their stake, interests in or nexus to the suit property and by extension Joseph Kang'ethe Estate. In this regard, it is common ground that the Petitioners/Applicants have not established the foundation of their capacity to sue. Simply put, the Petitioners/Applicants are divested of the locus standi to commence and maintain the Petition.

120. Secondly, the Petitioners/Applicants herein failed to response to pertinent averments contained in the body of the Replying Affidavit by the 1st Respondent and the 1st Interested Party. Having failed to respond to the said positive averments, the obvious legal inference is that the averments which contended that the Petitioners/Applicants were not bona fide tenants of Joseph Kang'ethe Estate remained uncontroverted.

121. Thirdly, even though the Petitioners/Applicants contended that the Petition was filed on behalf of [sic] 41 other residents, the details/identities of the said others were not availed. In this regard, the purported 41 others relate to [sic] mysterious persons whose identities was not authenticated. To this end, the provisions of Order 1 Rule 13 of the Civil Procedure Rules 2010, were violated.

Issue Number 2 Whether the Petition and the Application are barred and prohibited by the doctrine of res judicata and by extension the provisions of Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya or otherwise.

122. Having found and held that the Petitioners/Applicants herein have neither established nor demonstrated that same are seized of the requisite locus standi, it would have been apposite to strike out the entire Petition and to bring the ruling to a close. However, there are many other pertinent issues worthy of consideration. In this regard, it is imperative to address all the issues.

123. The second issue that merits consideration is the doctrine of res judicata. Suffice it to point out, that the 1st Respondent and the 1st Interested Party filed two Applications and wherein both [1st Respondent and 1st Interested Party] contended that the Petition beforehand is barred by the doctrine of res judicata.

124. Firstly, it was contended that the issues which have been raised at the foot of the Petition and in particular the contention that Nairobi City Council [now defunct] passed a resolution to allow the tenants of Joseph Kang'ethe Estate to buy the houses wherein same are residing was canvassed and determined vide ELC No. 2054 of 2007 wherein the validity or otherwise of minute number 3C of 4th August 1992 was canvassed and addressed.

125. Similarly, the 1st Respondent and 1st Interested Party also cited and referenced Court of Appeal Civil Appeal Number E375 of 2020 and wherein the Court of Appeal also addressed the legal import of the said minutes. For coherence, it is the said minutes that have been variously deployed to found the contention that a resolution was passed by Nairobi City Council [now defunct] to have the various houses at Joseph Kang'ethe Estate sold to the tenants.

126. To my mind, it is the said resolution that the Petitioners/Applicants herein are relying upon to underpin their contention that Nairobi City Council [now defunct] and Nairobi City County Government [1st Respondent] should be compelled to afford the Petitioners/Applicants the opportunity to purchase the houses they have always occupied within Joseph Kang'ethe Estate.

127. Other than the foregoing cases, the 1st Respondent and the 1st Interested Party have also highlighted ELC E001 of 2024 which was filed by and on behalf of Woodley Residents Welfare Association & 4 Others v The County Government of Nairobi & 7 Others. For good measure, the ruling arising from ELC Petition No. E001 of 2024 has been exhibited as annexure JW3.

128. Suffice it to point out that the Petitioner in ELC Petition No. 1 of 2024 is Woodley Residents Welfare Association. In this regard, if the Petitioners/Applicants herein are truly tenants/residents of Woodley Estate [Joseph Kang'ethe Estate], then same [Petitioners/Applicants] were no doubt parties to the named Petition.

129. It is worth recalling that though the Petitioners/Applicants herein were served with the Applications by the 1st Respondent and 1st Interested Party, respectively, the Petitioners herein neither filed Grounds of Opposition nor a Replying Affidavit. Instructively, the deposition that the Petition namely ELC Petition No. 1 of 2024, was filed by the Woodley Residents Welfare Association has therefore not been controverted.

130. Notably, the issues that were adverted to and highlighted at the foot of Petition namely ELC Petition No. 1 of 2024, touched on and concerned the notices to vacate the suit property, comprising of Joseph Kang'ethe Estate. Furthermore, the said Petition also touched on the legitimate expectation of the tenants/residents to purchase the housing unit occupied by same [tenants]. In addition, the other issues that was adverted to was the question of public participation.

131. Other than the issues that were adverted to and highlighted vide Petition ELC No. 1 of 2024, it is also instructive to underscore that the parties to the said Petition were substantially the same as the parties herein. For good measure, I want to procced on the assumption that the Applicants are truly residents of Woodley Estate [Joseph Kang'ethe Estate].

132. Instructively, Petition ELC No. 1 of 2024 was filed by Woodley Residents Welfare Association. In this regard, the supposition is and remains that the Petitioners/Applicants herein were therefore duly represented in the said Petition. At any rate, there is no gainsaying that Petition was determined vide a ruling rendered on 7th October 2024, whereupon the court found and held that the issues thereunder were res judicata.

133. Assuming that the Petitioners at the foot of ELC No. 1 of 2024, including Woodley Residents Welfare Association, were aggrieved by the said decision, then same [Petitioners] ought to have filed an appeal to the Court of Appeal.

134. Be that as it may, the issue that concerns this court relates to whether the Petition beforehand raises similar issues like the ones which had hitherto been dealt with and determined at the foot of the previous decisions.

135. I beg to start with the question relating to whether or not the 1st Respondent ought to be compelled to afford the Petitioners/Applicants the opportunity to purchase the houses they have always occupied at Woodley Estate [Joseph Kang'ethe Estate]. However, it is imperative to underscore that this aspect of the dispute has been variously determined by courts of competent jurisdiction including the Court of Appeal.

136. For good measure, the claim by the Petitioners herein that the 1st Respondent should be compelled to allow the Petitioners to purchase the various houses occupied by same is underpinned by minute 3C which is said to have been passed by Nairobi City Council [now defunct].

137. To this end, it is imperative to reproduce paragraph 31 of the Petition. Same states as hereunder

> 31. The 1st Respondent a public Authority, its predecessors and other relevant Government institutions made express and unambiguous promises to the Applicants that it will sell the houses they currently occupy within Joseph Kang'ethe Estate (Woodley Estate) Nairobi on Lr No. 209/13539 exclusively to them:
>
> 1). 1992- Nairobi City Council passed a resolution (minute 3c) seeking to sell all unserviceable assets, including Joseph Kangethe (Woodley) Estate.
>
> 2). 1994- The then Nairobi City County Town Clerk Madam Ziporah Wandera informed the applicants herein that the City Council had resolved to sell Joseph Kangethe Estate Houses because it couldn't afford to maintain them, she advised the tenants to make Applications to purchase the houses that they were occupying. Unfortunately, the whole exercise failed because houses were sold to people who were not tenants, leading to its cancellation.

138. From the excerpts that have been reproduced in the preceding paragraph, it is apparent that the Petitioners/Applicants' claim anchored on the right to purchase the housing units, is underpinned by minute 3C of 4th August 1992. Nevertheless, it is important to posit that the legitimacy and validity of the impugned minutes was the subject of the decision by the Court of Appeal in Civil Appeal No. E375 of 2020.

139. For coherence, Civil Appeal No. E375 of 2020 was between Paul Moses Ngethe v Kenya Anti-Corruption Commission; Sam N Gachago, George Muli Mwalabu and Alexander John Ogutu [suing on behalf of Woodley Residents Welfare Society].

140. Whilst dealing with the issue of minute 3C, which colours the current Petition, the Court of Appeal found and held that the minute under reference did not sanction any sale or disposal of the houses at Joseph Kang'ethe Estate or at all. In particular, the issue pertaining to minute 3C was dealt with at paragraphs 52 and 53 of the judgment of the Court of Appeal.

141. For ease of appreciation, the named paragraphs are reproduced as hereunder;

> 52. Regarding the Resolution, it was the appellant's contention that the Council passed a Resolution on 4th August, 1992. We have gone through the Minutes of the Council on the given day. The Resolution of the Council that the appellant relied on is Minute 3 (c) of 4th August 1992 which provides thus:
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> "Minute 3 (c) stated:
>
> "The Chairman of the Commission reported that in pursuance with the Government's current policy of reducing the number of unprofitable non-strategic establishments and public assets, it would be pertinently imperative for the Commission to similarly employ such prudent financial Page 23 of 31 management technics. He proposed that the Chief Officers be authorized to identify and dispose of such unprofitable non-essential services properties and assets with a view to improving Commission's financial position. The same proceeds would also be utilized for redevelopment and rehabilitation of such old estates as Ziwani, Kaloleni, Shauri Mayo, Bahati, Gorofani, etc."
>
> 53. The Minute 3(c) is not a resolution for the sale of Woodley/Joseph Kangethe Estate. It clearly states that the Chairman of the Commission (as the Nairobi Council was under the management of a Commission at the time) who was chairing that meeting made a proposal 'that the Chief Officers be authorized to identify and dispose of such unprofitable non-essential services, properties and assets with a view to improving Commission's financial position.' It is clear that the Chairman of the meeting made a proposal to the Commission. This implies that a process had to be started with the Chief Officers being given authorization, after which they would proceed to identify Council's properties and then disposal. We have considered the evidence adduced before the ELC, as well as the exhibits adduced before it. There was no evidence to show that the process of authorization of Chief Officers ever took place.

142. There is no gainsaying that Woodley Residents Welfare Society [which apparently represents the tenants and residents of Woodley Estate] was the 2nd Respondent in the appeal before the Court of Appeal. To this end, the determination pertaining to and concerning the validity of the impugned minute 3C of 4th August 1992, therefore binds same.

143. To my mind, the issue turning on and concerning whether the 1st Respondent should be compelled to allow the Petitioners/Applicants to purchase the various housing units wherein same [tenants] were/

are residing is determined. In this respect, the question turning on minute 3C of 4th August 1992 and the resolutions arising therefrom is res judicata.

144. Secondly, the residents of Woodley Estate [Joseph Kang'ethe Estate] filed ELC Petition No. 1 of 2024. For good measure, this time round, the organization described itself as Woodley Residents Welfare Association and not Society. Nevertheless, the gist of the complaint which was propagated before the court touched on the issue of the notice to vacate; entitlement of the tenants to purchase the various housing units and the question of public participation or otherwise.

145. Having raised various contention in the body of the Petition, the Petitioners at the foot of Petition ELC No. 1 of 2024 thereafter sought a plethora of reliefs. For coherence, the reliefs that were sought for at the foot of the Petition are as hereunder;

    a. A declaration that the constitutional rights of the Petitioners have been threatened by the 2nd Respondent singularly and jointly.

    b. A declaration that the 2nd Respondent failed in its constitutional duty to carry out public participation under Article 10 of *the Constitution*.

    c. A declaration that evicting the Petitioners and their families without clear resettlement plans or compensation will be against their right to housing

    d. An order do hereby issue allowing continued enforcement of the resolution by the Nairobi City Council (now County Government of Nairobi) to allow tenants to buy Council houses at Woodley Estate.

    e. A Judicial Review (order) of mandamus compelling the Respondents to cry out a procedural public participation exercise in Woodley before they embark on any ground-breaking exercise/ construction project.

    f. General damages for mental stress and torture caused by the Respondent's secretive and uncertain plans to hurriedly unsettle the Petitioners and their members/families.

    g. Any other order the court will be pleased to issue for purposes of justice in the circumstances.,

    h. Costs in favour of the Petitioners.

146. The reliefs which were sought at the foot of Petition ELC No. 1 of 2024 are more elaborate and expansive. However, there is no gainsaying that the primary reliefs being sought at the foot of the current Petition relate to and resembles various reliefs that were sought in the previous Petition.

147. Other than the reliefs, there is no gainsaying that the factual contention underpinning the previous, namely, Petition ELC No. 1 of 2024 and the current Petition are the same. In this respect, the question that comes to the fore is whether the Petitioners/Applicants herein who contend to be residents of Woodley Estate [Joseph Kang'ethe Estate] can now revert to court in a separate Petition and seek to re-litigate same issues.

148. I have pointed out elsewhere herein before that if Woodley Residents Welfare Association and by extension the Petitioners herein, were not happy with the decision rendered in ELC No. 1 of 2024, then same [Applicants] were obligated to file an appeal to the Court of Appeal. Same were not at liberty to revert to the same court under a different Petition and by sidewind seek to pursue that which has been dismissed.

149. In my humble view, the issues that are being litigated herein replicate and resemble the issues that were canvassed vide Petition ELC No. 1 of 2024. To this end, there is no gainsaying that the issues at the foot of the current Petition are barred and prohibited by the doctrine of res judicata.

150. Suffice it to underscore, that res judicata is a doctrine of public policy and same is intended to ensure that issues that have hitherto been litigated and determined by a court of competent jurisdiction are not re-litigated a fresh. Instructively, it is a doctrine that underpins the finality in litigation. Furthermore, it is a doctrine that is calculated to mitigate and avert abuse of court process by parties re-clothing suits/ issues that have hitherto been determined and bringing same back to court.

151. Notably, the import and tenor of the doctrine of res judicata was elaborated by the Supreme Court in the case of John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), where the court stated as hereunder;

> 57. The essence of the res judicata doctrine is further explicated by Wigram, V-C in Henderson v Henderson (1843) 67 ER 313, as follows:
>
> > ... where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time" [emphasis supplied].
>
> 58. Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in Bernard Mugo Ndegwa v James Nderitu Githae & 2 others, [2010] eKLR, under five distinct heads:
>
> (i) the matter in issue is identical in both suits;
>
> (ii) the parties in the suit are the same;
>
> (iii) sameness of the title/claim;
>
> (iv) concurrence of jurisdiction; and
>
> (v) finality of the previous decision.

59. That courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in ET v Attorney-General & another, [2012] eKLR, thus:

> The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi v National Bank of Kenya Limited and others, [2001] EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J, in the case of Njangu v Wambugu and another Nairobi HCCC No 2340 of 1991 (unreported) where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face-lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata..."

152. The place and importance of res judicata was also considered by the Court of Appeal in the case of Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR, where the court stated and held thus:

> The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.
>
> There is no dearth of learning or authority surrounding this issue, and this Court has expressed itself on it endless times. In one recent decision, William Koross v. Hezekiah Kiptoo Komen & 4 Others [2015] eKLR, it was stated;
>
> "The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all-too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.
>
> Speaking for the bench on the principles that underlie res judicata, Y.V. Chandrachud J in the Indian Supreme Court case of Lal Chand v Radha Kishan, AIR 1977 SC 789 stated, and we agree;
>
> > 'The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party

which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue."

The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties –because it is the court itself that is debarred by a jurisdictional injunct, from entertaining such suit.

153. Without belabouring the point, I come to the conclusion that the primary issues that have been raised and canvassed at the foot of the instant Petition as well as the Application thereunder, replicate the issues that have hitherto been canvassed and determined by courts of competent jurisdictions. Furthermore, there is a limb of the instant Petition that seeks to invite this court to impugn the decision/judgment of the Court of Appeal. Such an invitation smacks of absurdity.

154. Before departing from this issue, it is apposite to revert to and consider one aspect of the argument that was ventilated by Dr. Khaminwa, learned counsel for the Petitioners/Applicants. Instructively, learned counsel posited that res judicata does not affect and/or impact upon constitutional petitions. In any event, learned counsel added that res judicata is a procedural technicality that is negated by the provisions of Article 159[2][d] of *the Constitution* 2010.

155. Additionally, learned counsel also invited the court to invoke and rely on the provisions of Article 259 of *the Constitution* 2010. To this end, learned counsel implored the court to take a broad interpretation of the matter beforehand and thereafter to find and hold that the issues at the foot of the Petition merit proper consideration without invocation and application of the technical rules.

156. In my humble view, the submissions by learned counsel Dr. Khaminwa are misconceived. To start with, the doctrine of res judicata is not a procedural technicality, but a substantive question of law which goes to the jurisdiction of the court. Instructively, the doctrine of res judicata is one of the critical pillars that can be relied upon to strike out a suit including a constitutional petition. [See Mukisa Biscuits Ltd v West End Distributors Ltd [1969] EA page 701].

157. As concerns the contention that the doctrine of res judicata does not apply to and or impact upon constitutional petitions, my answer is simple. The doctrine of res judicata affects all cadres of civil suits, including constitutional petitions.

158. To buttress the foregoing position, it suffices to adopt and reiterate the decision in E.T. v Attorney General & another [2012] eKLR, where the court stated and observed as hereunder:

> 64. In the case of Thomas v The Attorney General of Trinidad & Tobago [1991] LRC(Const) 1001, the Privy Council stated that it was, 'satisfied that the existence of a constitutional remedy as that upon which the appellant relies does not affect the Application of the principle of res judicata.' The Board referred to a decision of the Supreme Court of India, Daryao and others v The State of UP and Others (1961) 1 SCR 574, 582-3 where Gajendragkar J stated, 'But, is the rule of res judicata merely a technical rule or is it based on high public policy? If the rule of res judicata itself embodies a principle of public policy which in turn is an essential part of the rule of law then the objection that the rule cannot be invoked where fundamental rights are in question may lose much of its validity. Now, the rule of res judicata as indicated in s. 11 of the Code of Civil Procedure has no doubt some technical aspects, for instance the rule of constructive res judicata may be said to be technical; but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to be binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over

with the same kind of litigation. If these two principles form the foundation of the general rule of res judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Art. 32'.

159. Furthermore, the position highlighted in the decision supra was revisited and elaborated upon by the Supreme Court of Kenya in the case of John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment) at paragraph 82 thereof where the court stated as hereunder:

> 82. If we were to find that the doctrine does not apply to constitutional litigation, the doctrine may very well lose much of its legitimacy and validity. We say this in light of the fact that constitutional tenets permeate all litigation starting with the application of article 159 of *the Constitution* in both civil and criminal litigation, and its application now embedded in all procedural statutes. Further article 50 on right to fair hearing and article 48 on access to justice are fundamental rights which every litigant is entitled to. Such a holding may very well lead to parties, that whenever they need to circumscribe the doctrine of res judicata, they only need to invoke some constitutional provision or other.

160. My answer to issue number two is therefore threefold. Firstly, the issue turning on the validity and legality of minute 3C of 4th August 1992 which underpins the claim by the Petitioners to have the 1st Respondent compelled to allow the Petitioners to purchase [sic] the units which same occupy or occupied, was canvassed and dealt with vide Court of Appeal Civil Appeal Number E375 of 2020. In this regard, the aspect under reference is res judicata.

161. Secondly, the question pertaining to the validity of the notice to vacate dated the 19th August 2024, the right of the tenants to purchase the units and the question of public participation, were all addressed and considered in petition No. 1 of 2024. Instructively, the findings of the judge vide ELC Petition No. 1 of 2024, are final insofar as same have not been appealed against. [See Wakhungu & 2 others v Republic (Criminal Appeal E039 of 2022 & 077 & 078 of 2023 (Consolidated)) [2024] KECA 1426 (KLR) (11 October 2024) (Judgment) at paragraph 52 thereof].

162. Thirdly, the doctrine of res judicata is not a procedural technicality. Same is a substantive question of law. Furthermore, the doctrine of res judicata applies to constitutional petitions like the one beforehand.

Issue Number 3 Whether the Petitioners/Applicants herein have established and demonstrated the existence of a prima facie case or otherwise

163. Turning away from the question of law which have been discussed in the preceding paragraphs, it is now appropriate to venture forward and deal with the merits [if any] of the Application for temporary injunction. Instructively, the Application beforehand seeks an order of temporary injunction to bar the 1st Respondent from enforcing and/or acting upon the notice to vacate dated 19th August 2024.

164. To the extent that the Application beforehand seeks an order of temporary injunction, it behoves the Applicants to establish and demonstrate that same have a prima facie case with a probability of success. Suffice it to posit, that the existence of a prima facie case with probability of success is the launchpad or precursor to partake of an order of injunction.

165. Given the significance of a prima facie case in an application for temporary injunction, it is therefore imperative to discern and appreciate what a prima facie case means. In this regard, it suffices to cite and reference the holding in the case of Mrao Ltd v First American Bank of Kenya Ltd & 2 others (Civil Appeal 39 of 2002) [2003] KECA 175 (KLR) (7 March 2003) (Judgment).

166. For good measure, the court stated thus:

> 4. A prima facie case 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 latter.

167. Furthermore, what constitutes a prima facie case was revisited by the Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielson (Environment & Land Case 120 of 2010)* [2014] KEHC 1718 (KLR) (10 October 2014) (Ruling).

168. For ease of appreciation, the Honourable Court of Appeal stated as hereunder

> An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.
>
> "Prima facie" is a Latin phrase for "at first sight", whose legal meaning and Application has been the subject of varying interpretation by courts in many jurisdictions. Phrases like "a serious question to be tried", "a question which is not vexatious or frivolous", "an arguable case" have been adopted to describe the burden imposed on the applicant to demonstrate the existence of prima facie case. The leading English House of Lords case of the American Cyanamid Co. Ethicon Ltd [1975] AC 396 is a case in point. The meaning of "prima facie case", in our view, should not be too much stretched to land in the loss of real purpose. The standard of prima facie case has been applied in this jurisdiction for over 55 years, at least in criminal cases, since the decision in Ramanlal Trambaklal Hatt V. Republic [1957] E.A. 332.
>
> Recently, this court in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for "prima facie case" in civil cases in the following words:
>
> "In civil cases, a prima facie case is a case in 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case.
>
> It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."
>
> We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.
>
> We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely.

169. Having reproduced the meaning and import of what constitutes a prima facie case, it is now apposite to return to the matter beforehand and ascertain whether the Applicants have indeed established a prima facie case or otherwise.

170. To start with, the Petitioners/Applicants claim before the court and which underpins their desires to procure an order of temporary injunction is anchored on the contention that same [Petitioners/Applicants] are tenants/residents of Woodley Estate [Joseph Kang'ethe Estate].

171. Nevertheless, even though the Petitioners/Applicants contended that same are tenants/residents of Joseph Kang'ethe Estate, same [Petitioners/Applicants] failed to tender and/or place before the court any evidence or documents to demonstrate such tenancy.

172. It is not lost on the court that the burden of demonstrating the existence of such tenancy relationship, if any fell on the shoulders of the Petitioners/Applicants. I am aware that what is before the court is an Interlocutory Application. However, there is no gainsaying that the Petitioners/Applicants are still chargeable with the burden of proof on a prima facie basis, the existence of a genuine and arguable issue.

173. On account of whether or not the Petitioners/Applicants are tenants/residents of Joseph Kang'ethe Estate, I am afraid that no material has been placed before the court to discern on a prima facie basis issue of tenancy.

174. The other perspective that has been adverted to by the Petitioners/Applicants relates to the principal of legitimate expectation. In this regard, the Petitioners/Applicants have contended that Nairobi City Council [now defunct] and by extension the City County Government of Nairobi passed a resolution in 1992 and wherein it was resolved that the housing units at Joseph Kang'ethe Estate were to be sold to the tenants.

175. According to the Applicants, the said minutes and resolution therefore constitute a promise and/or representation to found the principle of legitimate expectation.

176. Nevertheless, it is instructive to recall that the meaning and import of minute number 3C of 4th August 1992 [the impugned resolution] was deliberated upon by the Court of Appeal Vide Civil Appeal Number E375 of 2020. [See paragraphs 52 and 53 of the said decision].

177. Without belabouring the holding of the Court of Appeal, which captured in paragraphs 52 and 53 of the said decision, it suffice to underscore that the Court of Appeal found and held that there was no valid resolution to the effect that the housing units were to be sold to the tenants of Joseph Kang'ethe Estate.

178. Taking into account the finding and holding by the Court of Appeal in Civil Appeal Number E375 of 2020, it is apparent that there was neither a promise nor unequivocal resolution/representation made by Nairobi City Council [now defunct] capable of anchoring a plea of legitimate expectation.

179. The ingredients to be proved and established before one can invoke and relied on the principle of legitimate expectation were enunciated by the supreme court in the case of *Kenya Revenue Authority v Export Trading Company Limited (Petition 20 of 2020)* [2022] KESC 31 (KLR) (17 June 2022) (Judgment), where the court discussed the import, tenor and scope of the principle of legitimate expectation.

180. For coherence, the Supreme Court [the Apex Court] stated thus;

> 50. In the 4th Edition, Vol 1 (1) At page 151, paragraph 81 of the Halsbury's Laws of England, legitimate expectation is described as follows: "A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation

or promise made by authority, including an implied representation, or from consistent past practice".

51. Further according to De Smith Woolf & Jowell, "Judicial Review of Administrative Action" 6th Edn Sweet & Maxwell page 609; "A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage."

52. As can be discerned from these two definitions, legitimate expectation may take many forms. It may take the form of an expectation to succeed in a request placed before the decision maker or it may take the objective form that a party may legitimately expect that, before a decision that may be prejudicial is taken, one shall be afforded a hearing.

53. Respectfully, we take the view that the question of whether a legitimate expectation arose is more than a factual question. It is not merely confined to whether an expectation exists in the mind of an aggrieved party, but whether viewed objectively, such expectation is in a legal sense, legitimate.

54. This is the position taken by this court in the CCK Case where it was held that legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. For an expectation to be legitimate therefore, it must be founded upon a promise or practice by a public authority that is expected to fulfil the expectation. We then went on to find the emerging principles on legitimate expectation to be that;

    "a. there must be an express, clear and unambiguous promise given by a public authority;

    b. the expectation itself must be reasonable;

    c. the representation must be one which it was competent and lawful for the decision-maker to make; and

    d. there cannot be a legitimate expectation against clear provisions of the law or *the Constitution*."

181. In respect of the limb/perspective touching on the principle of legitimate expectation, it is my finding that the Petitioners/Applicants have not met the requisite threshold. Suffice it to posit, that no promise or unequivocal representation has been proven.

182. The third perspective touches on and concerns whether the Petitioners/Applicants herein have any title [whether legal or equitable] to the suit property. Instructively, it is conceded that the suit property and the houses that were standing thereon form public land in accordance with the provisions of Article 62 of *the Constitution* 2010.

183. To the extent that the suit property which underpins the subject claim is public land, there is no gainsaying that same is to be put to public use. Furthermore, the administration and management of public land is bestowed upon the National Land Commission. [See Article 67[2] of *the Constitution* 2010].

184. It is worth recalling that the intended project that is being carried out and undertaken on the suit property, namely urban renewal and regeneration, is a public project. For good measure, the project is being undertaken in furtherance of Article 43[1][b] of *the Constitution* 2010, which underpins the right to accessible and adequate housing.

185. Notably, the suit property is being deployed for public purposes. In any event, there is no gainsaying that once the affordable housing units which are being constructed thereon are complete, same [affordable housing units] shall be available to all Kenyans including the Petitioners.

186. Notwithstanding the foregoing, the critical point that touches on existence of a prima facie case relate to whether the Petitioners/Applicants have any lawful stake and right to the suit property. Sadly, the Petitioners/Applicants have no legal or equitable rights to the suit property. If anything, same has tenancy rights [subject to proof] and which rights can be determined in accordance with the law.

187. Other than the foregoing, there is also the related question as to whether an order of temporary injunction can be issued against the 1st Respondent who is the lawful owner of the suit property. For good measure, there is no debate that the land in question belongs to the City County Government of Nairobi. Furthermore, there is no gainsaying that the City County Government of Nairobi is deploying the suit property in an endeavour to fulfil its obligation on the right to housing in accordance with the Second Schedule of *the Constitution*, 2010.

188. Can an order of temporary injunction issue or be issued against the registered/lawful owner of the land. To my mind, the answer is in the negative.

189. To this end, it suffices to cite and reference the holding of the Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen, Herman Philipus Steyn Also Known as Hermannus Phillipus Steyn & Hedda Steyn (Civil Appeal 77 of 2012*) [2014] KECA 606 (KLR) (Civ) (4 April 2014) (Judgment), where the court stated and held thus:

> It must also be remembered that it is a serious thing to restrain a registered proprietor of a property over what is undeniably his unless there are justifiable grounds to do so.

190. The fourth perspective that was deployed by the Petitioners/Applicants in an endeavour to demonstrate the existence of a prima facie case touches on and concerns the question of lack of public participation. In particular, the Petitioners/Applicants contended that the 1st Respondent and the 1st Interested Party proceeded to and issued the impugned notices to vacate the houses sitting on the suit property without affording the tenants/residents of Joseph Kang'ethe Estate [Woodley Estate] an opportunity to participate and air their views.

191. Owing to lack or inadequate public participation, the Petitioners/Applicants have contended that the intended project is therefore contrary to and in contravention of the provisions of Article 10(2) of *the Constitution*, 2010 and more particularly, the limb touching on public participation.

192. On the other hand, the 1st Respondent and the 1st Interested Party contended that the bona fide tenants and residents of Joseph Kang'ethe Estate [Woodley Estate] were duly engaged and consulted. Indeed, it has been posited that out of the engagements and consultations with the bona fide tenants/residents of Joseph Kang'ethe Estate [Woodley Estate], a Memorandum of Understanding was reached and thereafter signed. To this end, learned counsel for the 1st Respondent and 1st Interested Party referenced the Memorandum of Understanding annexed to the Replying Affidavit of Joyce Wanjiru sworn on 21st November 2024.

193. Additionally, it was contended that the various engagements and consultations which were held with the bona fide tenants/residents of Joseph Kang'ethe Estate [Woodley Estate] were duly minuted. At any rate, the various minutes and documentation underpinning the engagements and consultations have been tendered to the court.

194. According to the 1st Respondent and 1st Interested Party, public participation was undertaken and the views of the bona fide tenants/residents of Joseph Kang'ethe Estate [Woodley Estate] were duly taken into account. Furthermore, it was posited that arising from the public participation, it was agreed that the 1st Respondent would top-up rents for the bona fide tenants/residents of Joseph Kang'ethe Estate [Woodley Estate] by Kes 25,000/- per month for a duration of 36 months. For good measure, the 1st Respondent thereafter proceeded to and paid out cheques of Kes 900,000/- only per bona fide tenants/residents of Joseph Kang'ethe Estate [Woodley Estate].

195. Suffice it to reiterate that the deposition contained at the foot of the Replying Affidavit of Lydiah Mathia sworn on 22nd November 2024 and the Replying Affidavit of Joyce Wanjiru sworn on 21st November 2024 pertaining to public participation have not been controverted. In this regard, there is evidence of public participation. This evidence has not been challenged.

196. Flowing from the contents of the Replying Affidavits [details highlighted in paragraph *193*], the court comes to the conclusion on a prima facie basis that public participation was indeed undertaken. Instructively, public participation does not mean that each and every one must be consulted and be afforded opportunity to participate. It suffices that the bona fide persons to be affected have been engaged, consulted and afforded the opportunity to participate.

197. To this end, it is imperative to take cognizance of the guidelines governing public participation which were enunciated by the Supreme Court of Kenya in the case of British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party) [2019] KESC 15 (KLR).

> 96. From the foregoing analysis, we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments. Consequently, while Courts have pronounced themselves on this issue, in line with this Court's mandate under section 3 of the *Supreme Court Act*, we would like to delimit the following framework for public participation:
>
> Guiding Principles for public participation:
>
> i. a constitutional principle under article 10(2) of *the Constitution*, public participation applies to all aspects of governance.
>
> ii. The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
>
> iii. The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.
>
> iv. Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfil' a constitutional requirement. There is need for both quantitative and qualitative components in public participation.
>
> v. Public participation is not an abstract notion; it must be purposive and meaningful.

vi. Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case-to-case basis.

vii. Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.

viii. Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.

ix. Components of meaningful public participation include the following:

a. clarity of the subject matter for the public to understand;

b. structures and processes (medium of engagement) of participation that are clear and simple;

c. opportunity for balanced influence from the public in general;

d. commitment to the process;

e. inclusive and effective representation;

f. integrity and transparency of the process;

g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.

(Emphasis supplied)

198. Taking into consideration the guidelines which were enunciated and elaborated upon by the Supreme Court and coupled with the evidence placed before the court by the 1st Respondent and the 1st Interested Party, respectively, I am satisfied on a prima facie basis that there was public participation. In this regard, the perspective touching on lack of public participation has equally not been established by the Petitioners/Applicants.

199. Arising from the foregoing analysis, my answer to issue number three is to the effect that the Petitioners/Applicants herein have neither established nor demonstrated the existence of a prima facie case with probability of success. In the absence of a prima facie case with probability of success, the Petitioners/Applicants cannot partake of or benefit from the equitable orders of temporary injunction. [See Kenya Commercial Finance Co. Ltd v. Afraha Education Society [2001] Vol. 1 EA 86].

Issue Number 4 Whether the Petitioners/Applicants have demonstrated that same [Petitioners/Applicants] shall be disposed to suffer irreparable loss unless the orders sought are granted

200. Other than the requirement to establish and demonstrate a prima facie case with probability of success, an applicant seeking an order of temporary injunction is also called upon to demonstrate the likelihood of irreparable loss arising in the event that the orders are not granted.

201. Notably it is the irreparable loss, if any, that must be averted by the grant/issuance of an order of temporary injunction. If there is no proof of irreparable loss, then an order of temporary injunction cannot issue.

202. The significance of irreparable loss was highlighted and amplified in the case of *Nguruman Limited v Jan Bonde Nielsen, Herman Philipus Steyn Also Known as Hermannus Phillipus Steyn & Hedda Steyn (Civil Appeal 77 of 2012)* [2014] KECA 606 (KLR) (Civ) (4 April 2014) (Judgment), where the court stated thus:

> In conclusion, we stress that it must always be borne in mind that the very foundation of the jurisdiction to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of the multiplicity of suits and where facts are not shown to bring the case within these conditions the relief of injunction is not available.

203. Bearing in mind the ratio decidendi [supra] it is now appropriate to revert to the matter and to consider whether the Petitioners/Applicants herein have demonstrated a likelihood of irreparable loss arising and/or accruing.

204. To start with, it is worth recalling that the Petitioners/Applicants herein did not tender and/or produce before the court any document to underpin their claim to be tenants/residents of James Kang'ethe Estate. In this regard, the court is not satisfied that same are tenants. In the absence of such proof the question that remains lingering is what loss will same [Petitioners/Applicants] suffer.

205. Secondly, the grant of an order of temporary injunction is to avert the irreparable loss. In this regard, my view is to the effect that the act complained of is to be averted before same [act] has occurred.

206. Nevertheless, in respect of the instant matter, the demolition that is sought to be averted and/or prohibited has since been undertaken. Instructively, the 1st Interested Party tendered in evidence various photographs demonstrating that the housing units were indeed demolished and that the 1st Interested Party has since taken possession of the suit property. [See annexures JW5 attached to the Replying Affidavit of Joyce Wanjiru].

207. At any rate, it is worth recalling that the issue of demolition of the housing units was acknowledged and conceded by the Petitioners/Applicants. In this regard, there is no gainsaying that what was sought to be restrained has since accrued. Simply put, if there were any irreparable loss, same has happened and thus cannot be restrained.

208. Additionally, if by any chance the Petitioners/Applicants and the rest of the residents on whose behalf the Petition was filed [but whose identities remains mysterious], have suffered any loss, such loss can be attorned for in damages.

209. In a nutshell, my answer to issue number four is to the effect that the Petitioners/Applicants herein have also failed to establish and demonstrate the likelihood of irreparable loss arising. For good measure, irreparable loss does not relate to some remote and speculative loss. To the contrary, it must relate to actual and real loss that is likely to arise and/or accrue. [See Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others [2015] eKLR].

Final Disposition

210. Flowing from the discourse [details highlighted in the body of the ruling], it must have become apparent that the Petition filed by the Petitioners herein relates to issue which have variously been canvassed and determined in previous proceedings. Instructively, an aspect of the Petition herein touching on the import and tenor of minute 3C of 4th August 1992 was determined vide Court of Appeal Civil Appeal No. E375 of 2020.

211. Other than the foregoing, it is also worth recalling that the court came to the conclusion that the Petitioners/Applicants did not demonstrate and/or established any nexus to the suit property. In short, the Petitioners/Applicants did not prove that same are seized of the requisite locus standi.

212. In the premises, the final orders that commend themselves to the court are as hereunder;

i. The Notice of Motion Application dated 15th November 2024 be and is hereby dismissed.

ii. The Notice of Motion Application dated 21st November 2024 and filed by the 1st Interested Party be and is hereby allowed.

iii. The Notice of Motion Application dated 22nd November 2024 and filed by the 1st Respondent be and is hereby allowed.

iv. The Petition dated 15th November 2024 be and is hereby struck out.

v. The costs of the Petition and the various Applications be and are hereby awarded to the 1st and 2nd Respondents; and the 1st Interested Party, respectively.

vi. The costs in terms clause [v] shall be agreed upon and in default to be taxed in the conventional manner.

vii. The orders of status quo which were granted on 21st November 2024 and thereafter extended on 22nd November 2024 be and are hereby discharged.

213. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF NOVEMBER 2024

HON. JUSTICE OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – court Assistant.

Dr. Khaminwa SC and Ms. Jacinta Ndalo for the Petitioners/Applicants

Dr. Adrian Kamotho for the 1st Respondent

Mr. Allan Kamau for the 2nd Respondent

Mr. Waithaka for the 1st Interested Party

N/A for the 3rd Respondent

N/A for the 2nd Interested Party

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