



**Mwembelegeza Community Residents v County Government of Mombasa & 3 others (Environment and Land Judicial Review Case E002 of 2024) [2025] KEELC 336 (KLR) (29 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 336 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E002 OF 2024  
SM KIBUNJA, J  
JANUARY 29, 2025**

**BETWEEN**

**MWEMBELEGEZA COMMUNITY RESIDENTS ..... APPLICANT**

**AND**

**COUNTY GOVERNMENT OF MOMBASA ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 2<sup>ND</sup> RESPONDENT**

**SECRETARY, COUNTY GOVERNMENT OF MOMBASA ..... 3<sup>RD</sup> RESPONDENT**

**DIRECTOR GENERAL, NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

Notice of Motion Dated 31st January 2024

1. The applicant has moved the court through the application dated the 31<sup>st</sup> January 2024 seeking for:
  - a. An order of mandamus compelling the respondents in to satisfy the decree issued in ELC Petition No. 35 of 2020, Mwembelegeza Community Residents versus National Land Commission, County Government of Mombasa, National Environment Management Authority, National Construction Authority, Kwa Bullo Mosque Committee, Al Nubal Charity Organization, and others by demolishing the structures/developments illegally built on the public utility land plot number 1476, Mwembelegeza Scheme reserved for construction of nursery school.
  - b. Costs of this application.



c. Any other appropriate relief that the court deems fit and just to grant.

The application is premised on the fourteen (14) grounds on its face marked (1) to (14), statutory statement dated 31<sup>st</sup> January 2024 and verifying affidavit of Ainea Ragen sworn on 31<sup>st</sup> January 2024. It is the applicant's case inter alia that they sought leave to apply for the judicial review orders of mandamus on the 8<sup>th</sup> January 2024 through ELCLJR No. E001 of 2024, after the respondents in ELC PET. No. 35 of 2020 failed to comply with the order issued therein to demolish the structures on plot number 1476, Mwembelegeza Scheme. That the application for leave was heard and granted on 29<sup>th</sup> January 2024. That after the decision in ELC Pet. No. 35 of 2020 was delivered, the decree was issued and served upon the respondents but they have failed to comply, though they have the constitutional and statutory obligations and responsibilities to do so, and hence this application.

2. The 2<sup>nd</sup> and 4<sup>th</sup> respondents responded to the application through the replying affidavit of Dr. Ayub Macharia, director enforcement, sworn on the 19<sup>th</sup> September 2024, inter alia deposing that pursuant to the court's decree, they visited the suit property on the 9<sup>th</sup> October 2023 and prepared a site report dated 14<sup>th</sup> October 2023; that on the 30<sup>th</sup> November 2023, it did a letter to the 3<sup>rd</sup> respondent seeking to mobilize the 1<sup>st</sup> respondent's resources to remove the structures on the said property and ensure restoration to the state it was before the development; that they also wrote to the Principal Secretary State department for public works on 23<sup>rd</sup> February 2024 on the same issue; that they have been ready and willing to play their role as empowered by section 108(4) of EMCA on environmental restoration.
3. On their part the 1<sup>st</sup> and 3<sup>rd</sup> respondents responded to the application through the replying affidavit of Paul Manyala, director Physical Planning, sworn on the 3<sup>rd</sup> October 2024, inter alia deposing that the County Government has been grappling with the potential repercussions of implementing the court orders, and having to deal with the long term effects of religious animosity and tension, which is a real consequence of such implementation; that as the County Government is in-charge of ensuring peace and religious tolerance in Mombasa, it is placed in a precarious position, and has not been in touch with NEMA on the execution of the decree; that the County Government should be given time to identify an alternative site for the nursery school.
4. The court issued directions on filing and exchanging submissions on the 7<sup>th</sup> October 2024. The Applicant and the 1<sup>st</sup> & 3<sup>rd</sup> respondents filed their submissions dated the 10<sup>th</sup> October 2024 and 12<sup>th</sup> November 2024, respectively. The applicant inter alia submitted that the 1<sup>st</sup> & 3<sup>rd</sup> respondents had engaged him on an out of court settlement after their preliminary objection was dismissed. That however, the said respondents have not responded to its demand for an undertaking to purchase an alternative plot of similar size in the same area to be reserved for a nursery school and payment of its costs of Kshs.915,000. The applicant submitted that the fear expressed by the 1<sup>st</sup> & 3<sup>rd</sup> respondents that implementing the decree will likely lead to religious animosity is misplaced because first, Petition No. 35 of 2020 was filed by the community and not a religious body. Secondly, the suit property was grabbed by persons purporting to be a religious organization protected by the 1<sup>st</sup> to 4<sup>th</sup> respondents, and it will be an affront to the constitution and relevant statutes for the grabbers to deny the community of the nursery school facilities under the guise of potential religious animosity in case the decree is executed. That as the applicant has complied with what is required of it by section 21 of Government Proceeding Act, the order of mandamus should issue. The applicant relied on the following decisions; Republic versus Kenya National Examination Council, Exparte Gathenji & 8 Others Civil Appeal No. 234 of 1996, Republic versus The Attorney General & Another, Exparte James Alfred Koroso (2013) eKLR, and Republic versus Town Clerk of Webuye County Council and Another HCCC No. 448 of 2006.



5. The learned counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondents submitted that their inability to implement the decree is borne out of the need to maintain peace considering the delicate nature of the issue as demolishing the mosque is likely to lead to religious animosity which may even result to loss of lives. That their willingness to get alternative land for the nursery school within the same settlement scheme shows their preparedness to satisfy the decree and they should be given timelines to do so. That as the application was brought in fulfilment of public interest each party to bear their own costs.
6. The issues for determination by the court are as follows:
  - a. Whether the applicant has made a reasonable case for the order of mandamus to issue against any or all of the respondents.
  - b. Who pays the costs?
7. The court has carefully considered the grounds on the notice of motion, statutory statement, affidavit evidence, submissions, superior courts' decisions cited thereof and come to the following findings:
  - a. That it is not disputed that the respondents herein were also respondents in Mombasa ELC Petition No. 35 of 2020, which was determined through the judgement delivered on 3<sup>rd</sup> May 2023, in favour of the petitioner, who are the applicants herein. In the said judgement, the court inter alia directed the 5<sup>th</sup> and 6<sup>th</sup> respondents to remove the developments on the suit land and restore the land to the condition it was before the construction in ninety days. The court further ordered that in the event the 5<sup>th</sup> and 6<sup>th</sup> respondents failed to comply with the removal and restoration order, the County Government of Mombasa and National Environment Management Authority, who are 1<sup>st</sup> and 2<sup>nd</sup> respondents herein were ordered "to ensure the developments/structures constructed on the suit land are demolished and the land restored to the condition it was before the said construction, and the costs incurred in the exercise to be met by the 5<sup>th</sup> and 6<sup>th</sup> respondents." The applicant herein has shown that the orders in Mombasa ELC Petition No. 35 of 2020 has not been complied with by the 5<sup>th</sup> & 6<sup>th</sup> respondents, and also the County Government of Mombasa and the National Environment Management Authority.
  - b. It is also not in dispute that the judgement delivered on 3<sup>rd</sup> May 2023 in Mombasa ELC Petition No. 35 of 2020 has not been set aside, reviewed or appealed against. That as court orders are not made in vain, it was upon the parties and agencies to which it was directed to obey it. That while the 2<sup>nd</sup> and 4<sup>th</sup> respondents have shown through their replying affidavit and the correspondences done to the 1<sup>st</sup> respondent some preparedness to comply, the 1<sup>st</sup> and 3<sup>rd</sup> respondents have done nothing towards compliance. The only step reportedly taken by the 1<sup>st</sup> and 3<sup>rd</sup> respondents was briefly engaging the applicant for an out of court settlement after their preliminary objection to strike out the instant application failed. The applicant reportedly asked the 1<sup>st</sup> and 3<sup>rd</sup> respondents to meet its demand for an undertaking to purchase an alternative plot of similar size in the same area to be reserved for a nursery school and payment of its costs of Kshs.915,000, as its conditions but no response was received.
  - c. That the applicant has a legal right to expect the court orders in the judgement of 3<sup>rd</sup> May 2023 in Mombasa ELC Petition No. 35 of 2020 to be executed. It is only through the execution of the orders that the applicant as a community can ripe the fruits of the judgement that is in their favour. The 1<sup>st</sup> and 3<sup>rd</sup> respondents, as state agencies, are obligated under Article 48 of



the constitution to ensure access to justice for all persons. In the case of Republic versus The Attorney General & Another, Exparte James Alfred Koroso (2013) eKLR, the court held that:

“... access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers.”

And, in the case of Republic versus Town Clerk of Webuye County Council and Another HCCC No. 448 of 2006, the court held that:

“A decree holder’s right to enjoy fruit of his judgement must not be thwarted. When faced with such scenario the court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights. My reasoning is underpinned by the values of the constitution particularized in Article 10, the obligation of the court to do justice to the parties, and to do so without delay under Article 159 (2) (a), (b) and the applicant’s right of access to justice protected under Article 48 of the constitution.”

- d. I am fully in agreement with the findings in the above superior courts decisions. I therefore find the suggestion by the 1<sup>st</sup> and 3<sup>rd</sup> respondents through their replying affidavit and submissions that the implementation of the court orders issued in Mombasa ELC Petition No. 35 of 2020 is likely to have long term effects of religious animosity and tension, and that demolishing the mosque is likely to lead to religious animosity which may even result to loss of lives, to be merely a red herring, as it is not based on any facts. In the judgement of 3<sup>rd</sup> May 2023, this court *inter alia* held that:

“.....the promoters or proponents of the construction of the mosque and shopping facilities on the suit property needed to not only have sufficient public participation on their project, but also have complied with the Physical Planning and Land Use Act No. 3 of 2019 on change of user of the said plot. The 2<sup>nd</sup> respondent [County Government of Mombasa] was obligated to confirm that the building plans for the project on the suit property presented for approval were in accordance with the reserved/authorized use for the plot before appending its approval, but it did not do so. The 2<sup>nd</sup> respondent also failed to ensure the 5<sup>th</sup> respondent had obtained and presented a written consent of the registered owner of the suit property before approving the building plans for the project, as required by section 58 (4) of the Physical Planning and Land Use Act. Indeed, there is no documentary evidence presented by the 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents to show that the proponents of the mosque and shopping facilities on the suit property held or were entitled to any registrable interests over the said plot at the time the building plans were presented for approval, or time of approval or thereafter. The approval of the building plans of the mosque project on the suit land by the 2<sup>nd</sup> respondent was therefore unprocedural.

- i. That had all the statutory approvals/permits have been obtained on the construction done on the suit land, and the only question remaining was whether the development ought to have been done on a plot reserved for a nursery school, the court would have considered directing the proponents of the project to purchase an alternative plot



in the same area, acceptable to the petitioners and other residents in the scheme for a nursery school in exchange to the suit land. That unfortunately, a development/construction that has been carried out without the prerequisite approvals/permits cannot receive the blessings of the court of law to continue in existence on a public utility plot reserved for a nursery school.”

Every person, including the applicant and all religious entities, are equal before the constitution and the law. The position pursued by the 1<sup>st</sup> and 3<sup>rd</sup> respondents appear to favour the owners of the mosque and shopping facilities on the suit property retaining it, which goes contrary to the court orders of 3<sup>rd</sup> May 2023, that is in favour of the applicant. That position is not only against the law, but seems to absolve the developers of the mosque and shopping facilities on the nursery school property, without due process, of any wrong doing, contrary to the finding of the court in the judgement delivered on 3<sup>rd</sup> May 2023, in Mombasa ELC Petition No. 35 of 2020, that has not been challenged through appeal and or review application to date. The applicant’s application for the order of mandamus therefore has merit.

- e. It is the failure by the 1<sup>st</sup> and 3<sup>rd</sup> respondents to comply with the orders of 3<sup>rd</sup> May 2023 that has necessitated the filing of the instant application. The applicant has incurred expenses as a result and it is only fair and just that they be awarded costs to be paid by the 1<sup>st</sup> respondent, in tandem with section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya.
8. Flowing from the foregoing conclusions, the court finds and orders as follows:
    - a. That the application dated 31<sup>st</sup> January 2024 has merit and an order of mandamus in terms of prayer (a) is hereby granted.
    - b. The applicant is awarded costs to be borne by the 1<sup>st</sup> respondent.

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 29<sup>TH</sup> DAY OF JANUARY 2025.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

**In the presence of:**

Applicant: Mr Ainea Ragen

Respondents : M/s Kahuria for Gitonga for 2<sup>nd</sup> and 4<sup>th</sup> Respondents.

Leakey – Court Assistant.

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

