



REPUBLIC OF KENYA



KENYA LAW
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**Kabugo & 2 others v Njihia & Mwaniki & 4 others (Constitutional
Petition E002 of 2025) [2025] KEELC 3250 (KLR) (4 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3250 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
CONSTITUTIONAL PETITION E002 OF 2025**

MD MWANGI, J

APRIL 4, 2025

**IN THE MATTER OF DEFENCE OF THE CONSTITUTION
UNDER ARTICLES 3 AND 22 OF THE CONSTITUTION**

AND

**IN THE MATTER OF VIOLATION OF ARTICLES 10, 22, 23,
40 , 42, 47, 69 AND 70 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE ENVIRONMENTAL
MANAGEMENT AND CO-ORDINATION ACT 1999**

AND

IN THE MATTER OF THE PHYSICAL AND LAND USE PLANNING ACT, 2019

**IN THE MATTER OF THE PROPOSED DEVELOPMENT ON PLOT
NO. NGONG/NGONG/63429, NGONG/NGONG/63431, NGONG/
NGONG/63424, NGONG/NGONG/52296 AND NGONG/NGONG/52295**

BETWEEN

ANTONY NJOROGI KABUGO 1ST PETITIONER

FIDELIS WAIRIMU GITHU 2ND PETITIONER

AMANI CLOSE RESIDENTS WELFARE GROUP 3RD PETITIONER

AND

MICHAEL MWANGI NJIHIA & GRACE NYAMBURA

MWANIKI 1ST RESPONDENT

KIZITO AWUORI JAOKO 2ND RESPONDENT

**SOPHIA MUNTEYIA KIPURI (ADMINISTRATIX OF THE ESTATE OF THE
LATE CLIFFORD MABELE WAFWAFWA) 3RD RESPONDENT**



COUNTY GOVERNMENT OF KAJIADO 4TH RESPONDENT
NATIONAL ENVIRONMENTAL MANAGEMENT - AUTHORITY 5TH
RESPONDENT

RULING

(In respect of the Petitioner's application dated 14th February 2025 seeking interim orders to restrain the 1st, 2nd and 3rd Respondents from continuing with construction of multi-storey buildings on the suit properties pending hearing and determination of the petition)

Background

1. The Petitioners herein initiated this matter by way of a petition dated 14th February 2025. In the petition, they aver that they present it on their own behalf and on behalf of their respective properties and members of the 3rd Respondent and in public interest to prevent a monumental injustice that threatens their constitutional rights and rule of law. They assert that they are owners of properties in the vicinity of the disputed constructions and are directly impacted on by the unlawful developments on the suit properties Ngong/Ngong/63429/63431/63424/52296 and 52295.
2. It is pleaded that the 3rd Petitioner is a collective body representing the interests of Amani Close residents who are affected by the ongoing construction. They decry the violation of rights and fundamental freedoms entrenched under Articles 10, 22, 23, 40, 42, 47, 69 and 70 of *the Constitution*.
3. The petition is supported by the affidavit of Anthony Njoroge Kabugo where the deponent sets out the factual basis of the petition.
4. The Petitioners pray for various orders including a declaration that the proposed development of multi-storey buildings on the suit properties is illegal for failure to comply with the provisions of Articles 10, 40, 42 and 69 of *the Constitution* and a permanent injunction restraining the constructions until a proper public participation is carried out and the views of members of the public taken into account amongst other prayers.
5. Alongside the petition, the Petitioners filed the Notice of Motion dated 14th February 2025 praying for
 - a. Spent.
 - b. That pending the hearing and determination of this application and the petition, there be an order of Interim Injunction restraining the 1st, 2nd and 3rd Respondents from continuing the construction of multi-story buildings on the lands registered as Ngong/Ngong/63429, Ngong/Ngong/63431, Ngong/Ngong/63424, Ngong/Ngong/52296 And Ngong/Ngong/52295 located at Amani Close, Ngong, Kajiado County, without, the requisite legal approvals, conducting and obtaining approval for environmental impact assessments, and engaging in proper public participation processes.
 - c. That the 1st, 2nd and 3rd Respondents be ordered to halt all construction activities at the site until they have complied with the 4th and 5th Respondents' directives, environmental laws, and applicable regulations.
 - d. That the 4th and 5th Respondents be directed to immediately issue a cessation order to the 1st, 2nd and 3rd Respondents, prohibiting any further development at the site located on Ngong/Ngong/63429, Ngong/Ngong/63431, Ngong/Ngong/63424, Ngong/



Ngong/52296 And Ngong/Ngong/52295 Amani Close, Ngong, Kajiado County, until, a proper Public Participation process has been followed, all necessary legal regulatory approvals have been obtained and an environmental impact assessment audit has been conducted and approved. 5. THAT the Respondents be compelled to conduct an environmental audit of the construction site on Ngong/Ngong/63429, Ngong/Ngong/63431, Ngong/Ngong/63424, Ngong/Ngong/52296 & Ngong/Ngong/52295, Amani Close, Ngong, Kajiado County, and provide a comprehensive report to both the Petitioners and this Honourable Court, addressing: all potential risks to the environment caused by the ongoing construction, Impacts on the local community's welfare, Any threats to the Petitioners' properties.

- e. Costs of this application.
6. The application is premised on the grounds on the face of it and on the affidavit of Anthony Njoroge Kabugo. The application was filed under certificate of urgency and the court at the first instance granted interim orders ex parte pending the inter partes hearing.

Response by the Respondents.

7. The 1st, 2nd and 3rd Respondents jointly filed a replying affidavit in response to the application by the Petitioners. The 5th Respondent too responded to the application by way of a replying affidavit sworn by one Mark Angwenyi, the County Director of Environment Kajiado County sworn on 11th March 2025. The 4th Respondent did not file any response to the application despite service.

Response by the 1st, 2nd and 3rd Respondents.

8. In their joint affidavit, the Respondents state that the application as fled by the Petitioners is vexatious, frivolous and an abuse of the court process. They assert that instead of rushing to court, the applicants should have first issued a demand notice to them and launched an inquiry to establish whether the Respondents had the necessary approvals from the 4th and 5th Respondents.
9. It is deposed that the 3rd Respondent Clifford Mabele Wafwafwa is deceased. The deponent of the affidavit on his behalf is Sophia Mutenyai Kipuri, the administratrix of his estate.
10. The Respondents assert that the Applicants' arguments/complaints are in the nature of breach of the *Physical and Land Use Planning Act* (PLUPA) and the *Environmental Management and Co-ordination Act* (EMCA) which can be canvassed either before the National Physical and Land Use Planning Liaison Committee or the National Environmental Tribunal (NET) to protest the approvals or an by way of ordinary civil suit as there are no Constitutional questions and or viable remedies available from this court.
11. The Respondents challenge the capacity of the Petitioners to institute the petition. For the 1st and 2nd Petitioners, the Respondents argue that they are neither officials nor representatives of the 3rd Petitioners nor have they provided signed authorities mandating them to institute the petition. In regard to the 3rd Petitioner, the Respondents argue that the 3rd Respondent is not a body corporate nor a legal entity thus lacks the capacity to sue or be sued in their own name. The general principle is that such an unincorporated body can only bring proceedings through its registered officials or representatives.



Response by the 5th Respondent

12. The 5th Respondent as earlier on pointed out responded to the application by way of a replying affidavit sworn by one Mark Angwenyi, the County Director of Environment Kajiado County sworn on 11th March 2025.
13. The deponent stated that with respect to construction activities on properties Ngong/Ngong/63429, 63431, 52296 and 52295, no approvals had been issued by the authority. Further there were no records of any applications made in respect to the ongoing projects within the said properties.
14. However, an Environmental Impact Assessment license had been issued to the 2nd Respondent after due consideration of all factors including the project design and the environmental management plan, the existing land use and environmental characteristics of the project site which was verified through a project site visit, comments from lead agencies, public participation findings and technical decision-making principles outlined in the EIA framework.
15. The deponent affirmed that NEMA was satisfied from the EIA report submitted by the 2nd Respondent that adequate public participation had been conducted prior to the submission of the EIA report. The report further comprehensively identified the environmental impacts and outlined the mitigation measures and monitoring programs to be put in place to address the identified impacts. It further detailed the environment management plan and NEMA was fully satisfied that the proposed measures were adequate to address all the concerns.

Court's directions

16. The court's directions were that the application be canvassed by way of oral submissions with the option of the parties skeleton written submissions. The Petitioners did indeed file their written submissions which they highlighted before the court. The Respondents presented their respective arguments orally. The proceedings of the day form part of the record of the court and I need not replicate them in this ruling verbatim.

Issues for determination

17. Undoubtedly, the application before me is an interlocutory application. In the English Case of Gilbert –vs- Eden (1878) 9 Ch. D, Cotton L.J defined interlocutory applications as those applications;

“Which do not decide the rights of parties, but are made for purposes of keeping things in status quo till the rights (of parties) can be decided or for purpose of obtaining some directions of the court as to how the cause is to be conducted as to what is to be done in the progress of the cause for the purpose of enabling the court ultimately to decide upon the rights of the parties.”
18. Closer home, Ringera J, (as he then was) in the case of Airland Tours and Travel Limited –vs- National Industrial Credit Bank, Nairobi (Milimani) HCCC 1234 of 2002, stated that in an interlocutory application, the court is not required to make any conclusive or definite findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of the law.
19. The other caution that a court must observe in handling an interlocutory application is that it must not express opinions that may end prejudicing the fair trial of the matter by restricting the freedom of the trial Judge in disposing of the matter. I will therefore be deliberately economical with my words in this ruling.



20. Having considered the application by the Petitioners, the responses by the Respondents and the oral submissions by the parties, the court identifies two issues for determination, namely;
- i. Whether the Petitioners have the capacity to file the petition; and
 - ii. Whether the application is merited.

Determination

a. Whether the Petitioners have the capacity to bring the petition.

21. In the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR, the Court of Appeal settled the issue of locus standi emphasizing that any person had the right to petition the court. The court was emphatic that,

“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 arguments 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 stand 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*, which provides that:

- “258. Every person has the right to institute court proceedings, claiming
- (1) that this Constitution has been contravened, or is threatened with contravention.
 - (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
 - a. a person acting on behalf of another person who cannot act in their own name;
 - b. a person acting as a member of, or in the interest of, a group or class of persons;
 - (c) a person acting in the public interest; or
 - (d) an association acting in the interest of one or more of its members.”

It still remains to reiterate that the landscape of locus standi has been fundamentally transformed by the enactment of *the Constitution* in 2010 by the people themselves. In our view, the hitherto stringent locus standi requirements of consent of the Attorney General or demonstration of some special interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today, by dint of Articles 22 and 258 of *the Constitution*, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest. Pursuant to Article 22 (3) aforesaid, the Chief Justice has made rules contained in Legal Notice No. 117 of 28th June 2013 – *The Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure



Rules, 2013—which, in view of its long title, we take the liberty to baptize, the “Mutunga Rules”, to inter alia, facilitate the application of the right of standing. Like Article 48, the overriding objective of those rules is to facilitate access to justice for all persons. The rules also reiterate that any person other than a person whose right or fundamental freedom under the Constitution is allegedly denied, violated or infringed or threatened has a right of standing and can institute proceedings as envisaged under Articles 22 (2) and 258 of the Constitution.

22. Article 70 of the Constitution too is clear that a person who alleges that a right to a clean and healthy environment under Article 42 has been or is likely to be denied, violated, infringed or threatened may apply to the court for redress. Such a person does not have to demonstrate that any person has incurred loss or suffered injury. The Petitioners have the locus to file this petition as they have done.

b. Whether the application is merited.

23. The 5th Respondent’s response to the Petitioners’ application was through a replying affidavit by one Mark Angwenyi, its County Director of Environment Kajiado County sworn on 11th March 2025. The deponent asserted that the 5th Respondent is the principal institution of government established under Section 7 of the Environmental Management and Co-ordination Act (EMCA) with the mandate to exercise general supervision and co-ordination over all matters relating to the environment. In executing the mandate, the 5th Respondent in consultation with lead agencies and relevant stakeholders has prescribed rules and guidelines to enable it receive, review and approve Environment Impact Assessment (EIA) reports in accordance with the provisions of section 58 of EMCA and the relevant regulations.
24. The purpose of carrying out an Environment Impact Assessment before undertaking any project is to identify the possible environmental effects and identifying ways of mitigating those effects.
25. The director was categorical that with respect to construction activities on properties Ngong/Ngong/63429, 63431, 52296 and 52295 no approvals had been issued by the authority. There were no records of applications made in respect to the ongoing projects within the said properties.
26. However, an Environmental Impact Assessment license had been issued to the 2nd Respondent after due consideration of all relevant factors including the project design and the environmental management plan, the existing land use and environmental characteristics of the project site which was verified through a project site visit, comments from lead agencies, public participation findings and technical decision-making principles outlined in the EIA framework.
27. The Authority was satisfied that the 2nd Respondent’s report that adequate public participation had been conducted prior to the submission of the EIA report.
28. The import of averments by the director is that the projects by the 1st and 3rd Respondents are not licensed, they are unlawful. The 1st and 3rd Respondents are constructing without the requisite Environmental Impact Assessment license.
29. This court is obligated under the law and constitution to make appropriate orders or give directions to prevent, stop or discontinue any act or omission harmful to the environment as well as compel any public officer to take measures to prevent or discontinue any such act or omission. Article 23 of the Constitution on the other hand empowers this court, in proceedings brought under Article 22 (to enforce the bill of rights), to grant appropriate relief including a conservatory order. The threshold for



the grant of conservatory orders was stated by the Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR Application No. 5 OF 2014 as follows:

“‘Conservatory orders’ bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

30. Looking at the Petitioners’ application even from the perspective of the established principles for the grant of an order of temporary injunction, I am persuaded that the Petitioners’ case is a proper case for the grant of temporary injunction orders as against the 1st and 3rd Respondents.
31. The law is well settled since the *Giella –vs- Cassman Brown & Co. Ltd* (1973) EA 358 case. The conditions for the grant of orders of temporary injunction are:
 - a. The Applicant must show a prima facie case;
 - b. An interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which might not be adequately compensated by an award of damages; and
 - c. If the Court is in doubt, it will decide the application on a balance of convenience.
32. In the case of *Nguruman Ltd –vs- John Bonde Nielsen & 2 others* [2014] eKLR, the Court of Appeal stated that the three conditions (stipulated in the *Giella* case) are to be applied as separate, distinct and logical hurdles which are to be surmounted sequentially. Meaning that, the Applicant must establish all the conditions one after the other.
33. In the case of *Nicholas Njeru Muturi -vs- Thome Dynamics Limited & another* [2022] eKLR, this court analyzed the import of the holding in the *Nguruman* case and found that;

‘...if a prima facie case is not established, the Court need not go farther to consider if the Applicant has established the irreparable injury that he would suffer, if an order of temporary injunction is not granted.’
34. On a prima facie case, the Court of Appeal in *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* (2014) eKLR, stated that:

“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. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation.

Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title; it is enough if he can



show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.”

35. Consequently, considering the affidavit evidence presented before the court and guided by the above provisions, and further considering the unique circumstances of this case, the court issues an order of interim injunction restraining the 1st and 3rd Respondents from continuing the construction of multi-storey buildings on the lands registered as Ngong/Ngong/63429, 63431, 52296 and 52295 located at Amani Close, Ngong, Kajiado County.
36. The court further directs and orders the 1st and 3rd Respondents to halt all construction activities at the sites until they have complied with the 4th and 5th Respondents' directives, environmental laws, and applicable regulations. The 4th and 5th Respondents are directed to ensure compliance of the above orders by issuing appropriate cessation orders.
37. Counsel for the 1st, 2nd and 3rd Respondents informed the court that the suspension of the constructions upon issuance of the interim ex parte orders had left gaping manholes that may cause harm or accidents. It would be irresponsible for this court to fail to take remedial action on the manholes to avoid accidents and collection of storm water. The court authorizes the 1st and 3rd Respondents to fill the manholes in the next 7 days under the supervision of the Director NEMA - Kajiado County.
38. As for the 2nd Respondent, I do not see the basis for issuing any restraining order at this point of these proceedings considering that they have the approval of the 4th Respondent as well as the EIA license issued by the 5th Respondent. The Petitioners have not established a prima facie case as against the 2nd Respondent - a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained. The Petitioners' main concerns as explained in their petition and elaborated in the skeleton and oral submissions were that the developments were illegal or unauthorized by the 4th and 5th Respondents. If the Petitioners are dissatisfied with the issuance of the NEMA license, they are at liberty to appeal to the relevant statutory body created under section 125 of EMCA.
39. As regards the costs of this application, the court directs that the same shall abide the outcome of the main petition; they shall be in the cause.

Final disposition

40. The final disposition therefore is that the Petitioners' application is allowed as regards the 1st and 3rd Respondents only in the following terms;
 - a. An order of interim injunction be and is hereby issued pending the hearing and determination of this petition restraining the 1st and 3rd Respondents from continuing the construction of multi-storey buildings on the lands registered as Ngong/Ngong/63429, 63431, 52296 and 52295 located at Amani Close, Ngong, Kajiado County.
 - b. The 1st and 3rd Respondents are hereby directed and ordered to halt all construction activities at the sites until they have complied with the 4th and 5th Respondents' directives, environmental laws, and applicable regulations.
 - c. The 4th and 5th Respondents are directed to ensure compliance with the above orders by issuing appropriate cessation orders.



- d. The court authorizes the 1st and 3rd Respondents to fill the manholes in their respective compounds in the next 7 days under the supervision of the Director NEMA - Kajiado County.
- e. The costs of the application shall abide the outcome of the main petition; they shall be in the cause.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 4TH DAY OF APRIL 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Karanja for the Petitioners/Applicants

Ms. Achieng h/b for Ms. Mong'are for the 1st, 2nd and 3rd Respondents

Ms. Kahuria for the 5th Respondent

N/A by the 4th Respondent

Court Assistant: Mpoye

M.D. MWANGI

JUDGE

