



**Githongo v County Government of Meru (Environment & Land Petition  
18 of 2014) [2022] KEELC 3872 (KLR) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3872 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND PETITION 18 OF 2014**

**CK NZILI, J**

**JULY 27, 2022**

**BETWEEN**

**BIRITHIA GITHONGO ..... PLAINTIFF**

**AND**

**COUNTY GOVERNMENT OF MERU ..... DEFENDANT**

**JUDGMENT**

**A. Pleadings**

1. By a petition dated July 22, 2014 the petitioner as the owner of Parcel No Amwathi/Maua/5416 sued the respondent for marking his four storey building for demolition without justifiable reasons and an opportunity to be heard despite approved building plans its predecessor before commencement of the construction works in 2008.
2. He sought for declaratory orders that he has a right to acquire, own, utilize and develop the suit land without any interference by the respondent and in the alternative compensation for the land and the building estimated at Kshs.30million, permanent injunction restraining the respondent from interfering with his rights to own, develop and use the subject land and lastly conservatory orders restraining the respondent from carrying out the demolition exercise.
3. The petition was supported by the petitioner's witness statement dated July 24, 2018 and a list of documents dated July 19, 2018.
4. The respondent opposed the petition through its witness statements dated March 28, 2019 on the basis that in 2008 complaints were received from Amwathi plot owners that the petitioners building had allegedly blocked an access road and service lane.
5. It was averred that the respondent's officers visited the *locus in quo* and investigations established a four storey building had been built on Plot No 5416 encroaching on an access road and a service



lane at the back. The respondent averred further investigations revealed that the building had covered approximately 90% of the ground contrary to the prescribed 60% grounds coverage as provided by the law.

6. Arising out of the said findings the respondent averred it marked the building for demolition and issued, the owner with a notice to demolish it on account of going against prescribed ground coverage for a commercial development and the approved structural, architectural designs and drawings hence compromising its structural integrity.
7. The respondent averred that the petitioners building is inhabitable, unsafe and hence stood condemned.
8. With leave of court parties opted to proceed with the petition through *viva voce* evidence.

## **B. Evidence**

9. The petition adopted his witness statement dated October 13, 2021 and produced the documents in his list of documents dated July 19, 2018 & August 15, 2019 namely; copies of a title deed for Parcel No. Amwathi/Maua/5416, 7741, sketch map, photos and approved building plans as P exh 1-6 respectively.
10. In cross examination, PW 1 admitted his late father embarked on putting up his four storey building as per the approved building plans produced as P exh 6 and after acquiring all the relevant permits including from National Environment Management Agency.
11. PW 1 could not however confirm if his approved architect had availed to him a certificate of inspection.
12. As regards the issue of the ground percentage of construction, PW 1 insisted his late father put up the building in line with the building code at the time of the approval by the defunct county council. He said the building commenced before the respondent came into existence and the building was already complete by 2012. PW 1 maintained that despite the completion the respondent declined to give them any certificate of completion or occupation but instead stopped tenants from occupying the premises after withholding the letters of occupancy.
13. Concerning the allegations of hanging power lines, the PW 1 denied the same and stated they did not obtain any way leaves approval from Kenya Power & Lighting Company (KPLC) though the building was approximately two metres next to the power lines. PW 1 however admitted that he had not sought for alignment of the power lines with the building.
14. On the allegation that the building was marked for demolition, PW 1 stated the respondent's building inspector visited the site but later on claimed the marking was accidentally done on their plot instead of Plot No's 77 & 71.
15. Further PW 1 confirmed that a scene visit was done following a court order on March 31, 2016.
16. As regards the approvals, PW 1 confirmed before the works commenced approvals were sought and obtained from the physical planner, public health officer, municipal council engineer and a signage erected as required during the construction.
17. PW 2 adopted his witness statements and confirmed that his late father had obtained all the approved building plans and permits from both the municipal council of Maua, the physical planning office and the district health officer.
18. PW 2 stated his late father was alleged served with a demolition notice to which he wrote to the respondent seeking for an explanation all in vain.



19. DW 1 adopted her witness statement dated March 28, 2019 and produced the documents listed in the notice dated March 28, 2019 namely; a letter dated July 1, 2008 to the town clerk by Amwathi plot owners, minutes of the municipal physical planning liaison committee held on September 9, 2010, map of the plots and a site inspection report as D. exh 1-4 respectively.
20. In cross examination DW 1 admitted that the petitioner's building and architectural plans were lodged and approved in 2007 but the construction was contrary to what was approved by the municipal council, public health officer and the physical planner Maua in line with the zoning guidelines at the time.
21. DW 1 testified the respondent received a letter from Amwathi plot owners complaining over the encroachment and blockage of both the service lane and the backlane by the petitioner's building as evidenced by the D. exh 4 and its recommendations. DW 1 stated a liaison committee was the alternative dispute mechanism available at the time the dispute arose.
22. DW 1 reiterated that the borne of contention was that the petitioner overbuild beyond what was approved by the respondent and its predecessor in title.
23. DW 2 adopted his witness statement dated 28.3.2019. As an inspector of buildings working with the respondent, DW 2 confirmed he prepared D exh 4 after visiting the site in 2015. DW 2 denied his presence at the time the building was constructed but from his visit he established that the petitioner had diverted from the approved drawings or plans to an extent of putting up four suspended floors instead of the approved number. Further, DW 2 said he established the building did not tally with the neighbours building hence the power lines were lying across the building. Similarly, DW 2 testified that the petitioner's approved building did not fit within the suit land. He also stated he found poor general workmanship hence the reason he had recommended the building to be condemned for its structural integrity could not be guaranteed.

### **C. Written Submissions**

24. With leave of court parties filed their written submission dated April 6, 2022 and June 2, 2022 respectively.
25. The petitioner submits that the petition was triggered by a threat to his right to own property under Article 40 of the Constitution when the property and developments thereon were marked for demolition vide a public notice which was to lapse on July 31, 2014
26. According to the petitioner the issues falling for determination are; whether the building plans were approved, if there was encroachment onto a road reserve; if the building was marked for demolition; if the petitioner is entitled to the declaratory orders sought and what is the order as to costs.
27. The petitioner submitted his building plans were prepared, submitted and approved in 2007 before the commencement of the works subsequent which construction approval and permits were issued by the government agencies namely; the Municipal council physical planning, public health, NEMA and the N C A.
28. The petitioner submitted the defunct Municipal Council Maua approved his architectural and structural drawings, acquired land rates clearance, land search documents and land ownership documents and subsequently; obtained the NEMA licence. Later on, the petitioner submitted he did not obtain the N C A licence since it did not exist at the time



29. Therefore, the petitioner submitted it complied with Section 29 of the *Physical Planning Act* as it was then and the requirement of the municipal council of Maua then hence the respondent as the successor to the defunct county council is in law bound by its acts.
30. As regards the allegedly encroachment on a road reserve, the petitioner submitted DW 1 confirmed that his architectural drawings, plans and requirements had been approved by the physical planning department as evidenced by the stamps imposed on the said plan.
31. On whether the respondent marked the suit premises for demolition, the petitioner submitted that the respondent did not classify the category and/or classification of the road the building had alleged encroached under the *Kenya Roads Act*. Further, the petitioner submitted he enquired from the physical planning officer Meru County Government why the suit premises were marked for demolition but he did not receive any response. Eventually, that DW 2 recommended the building as condemned, unsafe, its structural integrity compromised and stopped any further construction yet there was no evidence its materials were tested for quality as per the building code of Kenya and CP-114. The petitioner submitted, the demolition notices were improper since due process was not followed.
32. Regarding the notices and due process, the petitioner submitted that the respondent failed to serve him with the requisite notices under Section 38 of the Physical Planning Act. Similarly, DW 1 failed to follow the due procedure/ or process in carrying out the markings for demolitions under Article 27 (1) of the *Constitution* hence the entire process was illegal and unlawful.
33. The petitioner submitted he followed all the procedures and after obtaining approvals he went to the public health officer who was concerned with sanitation and housing standard as provided under the Public Health in terms of waste disposal and drainage. The petitioner submitted afterward he obtained construction approval from the National Environmental Management Authority in line with the *Environmental Management Coordination Act* and after initiating an environmental impact assessment and Audit report.
34. The petitioner submitted that he submitted his architectural drawings approved by both the physical planning and the public health department. The petitioner subsequently submits his contractor developed a comprehensive plan to avert any detrimental effects the construction of the project was likely to pose to the surroundings.
35. The petitioner submitted ideally, he would have proceeded to the National Construction's Authority had it been in existence then which as indicated by PW 1, it only came into existence in 2013 long after the building was erected.
36. The petitioner therefore submitted his storey building was approved by the defunct Municipal Council of Maua in 2007 and therefore it defeats logic for the respondent to purport to earmark it for demolition almost 7 years later claiming it sat on a road reserve despite the aforesaid approvals.
37. As regards the alleged encroachment on the access road and developments thereon, it was submitted the construction was done on the petitioner's parcel of land yet the same was earmarked for demolition by a notice which was to lapse on July 31, 2014. DW 1 testimony was that the petitioner had built an oversize building encroaching on a road reserve. However it was submitted by the petitioner that no county surveyor was called to demonstrate that alleged encroachment and to what extent hence the said allegations remained baseless, frivolous and contrary to the respondent's predecessors', surveyors approval who had ascertained the boundaries of the plot and ascertained a service lane at the back of the petitioners building and an access road just a block away.



38. On the issue of marking the building for demolition, the petitioner submitted there was no basis for the respondent to do so for lack of an expert report from the road agencies under the *Kenya Roads Act*, or explanation offered on the basis for the report dated January 8, 2015, the alleged investigation despite a request through a letter marked as annexures M9 “5”.
39. Again, the petitioner submitted the respondent did not demonstrate if the quality of materials used for construction fell below the threshold set out in the building code and CP – 114.
40. As regards the demolition notice and compliance with due process, the petitioner submitted the same violated the tenets of the rules of natural justice, for lack of service upon him with the notice before marking the building for demolition as required under Section 38 of the *Physical Planning Act*.
41. The petitioner therefore submitted in the absence of issuance and service upon him with an enforcement notice the respondent could not turn around and allege he should have appealed the decision to the National Liaison Committee under Section 13 & 15 of the Physical Planning Act and since DW 1 & DW 2 did not observe due process in carrying out the markings, he was denied equal protection and benefits of the law, contrary to Article 27 (1) & (2) of the *Constitution*.
42. Regarding the prayers sought, the petitioner submitted since he absolutely owns the land where the building is situated, obtained all the approvals and permits, his legitimate expectation that his development were lawful and legal was thwarted by the actions of the respondents by condemning his building which nearing completion for demolition hence was entitled to the prayer sought. Reliance was placed on *Virendra Ramji Guoka & 3 others vs Hon A G* ELC No 480 of 2011 on sanctity of a title deed.
43. The petitioner submitted there was no warning given to him over any alleged deviation from the original plans or a notice to show cause issued by the National Construction Authority in line with its Regulations 2014 or as per Section 49(1) of the *Kenya Roads Act* 2007 by both KeNHA and KURA hence the actions by the respondent were illegal, arbitrary, void, null and unconstitutional. Reliance was placed on *Kiluwa Ltd & another vs Commissioner of Land & 3 others* (2015) eKLR, *Patrick Musimba vs National Lands Commission & 4 others* (2015) eKLR, *Christopher Nguru Mulwa & 28 others vs The County Government of Kitui & 2 others* (2017) eKLR and Section 27 *Civil Procedure Act* for the award of cost with interests.
44. On the other hand, the respondent submitted there was no dispute that the petitioner owned L R No Amwathi/Maua/5416 measuring 0.251 Ha and was granted approval to initiate the project which developments were earmarked by it for demolition in 2014.
45. It was submitted that while PW 1 produced documents listed in the documents list dated August 15, 2015 and July 19, 2018, in cross examination he could not confirm if he had any plans from the county survey department, NEMA report, structural plans and building. Similarly, it was submitted PW 1 confirmed that he had no certificate of inspection from the respondent before occupation which inconsistencies were not addressed in the re-examination.
46. Similarly, it was submitted PW 2 gave evidence which was also inconsistent especially on the approval for a two storey building as opposed to a four storey building.
47. It was submitted the evidence of DW 1 & DW 2 and the exhibits produced as D. exhibits (1) – 4 were consistent with the response to the petition and a defence that what was approved was different from what was constructed on the ground.
48. The respondent submitted the petitioner disregarded the resolutions of the liaison committee and continued with the developments as shown by the inspector’s report produced as D exh (4).



49. The respondent submitted the petition did not meet the threshold of a constitutional petition since it was a civil claim over building approvals yet the mandate of the respondent was to maintain building standards so as to ensure they did not pose any risk to the public and a different forum existed to handle such a dispute. Reliance is placed on *Grays Jepkemoi Kiplagat vs Zakayo Chepkoga Cheruiyot* (2021) eKLR, *Abraham Kaisua Kanzika vs Gouverneur CBK & another* (2006) eKLR, *Godfrey Paul Okutoyi & others vs Habil Olaka & another* (2018) eKLR, *Bernard Murage vs Fine Serve Africa Ltd & others* (2015) eKLR and *Patrick Mbau Karanja vs Kenyatta University* (2012) eKLR.
50. As regards the prayers sought, the respondent submitted minutes produced as exhibits for the meeting held on September 9, 2010 indicated a primary organ existed under Section 15 of the *Physical Planning Act* which the petitioner had failed to exhaust or invoke. Reliance was placed on *Immaculate Gicuku Mugo vs Kiambu County Government* (2021) eKLR.
51. Lastly the respondent submitted whereas the petitioner had a right to own land its mandate was to control developments under Physical & Land Use Act 2019 hence in doing so it did not infringe on the rights of land ownership by the petitioner especially where the said developments were unapproved or posed a public hazard and were unsafe for habitation.
52. The respondent urged the court to find the petition not meeting the constitutional test and lacking merits.

#### **D. Issues for Determination**

53. The court has gone through the pleadings, list of documents filed, witness statements filed, evidence, tendered written submissions and the authorities attached.
54. The issues for determination are:
  - i. If the petition discloses a constitutional question.
  - ii. If the petitioner should have exhausted the internal mechanism before filing the petition.
  - iii. If the notice to mark for demolition and declare the petitioner's building condemned was wrongful, unlawful and infringed on the petitioners guaranteed right to property and the legitimate expectation after acquiring building approvals, permits and consents from the respondent.
  - iv. If the petitioner proved breach of his constitutional rights and
  - v. If the respondent was justified in issuing the demolition notice.
  - vi. What is the order as to costs.
55. The *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013* require a petitioner to disclose the, name, address, facts relied upon, constitutional provisions violated, nature of the injury caused or likely to be caused, details regarding any existing civil or criminal litigations related to the issues raised in the petition and the reliefs sought.
56. The petitioner herein filed the petition dated July 22, 2014 alongside a certificate of urgency and a notice of motion of the even date seeking for conservatory orders of injunction. He attached copies of the title deed, photos of the developments, certified building plans, demolition notice, complaint letter to the county secretary and a NEMA report marked as MG 1- 6 respectively.
57. The petition invoked his right to land ownership under Article 40 of the *Constitution*. He stated that the respondent had approved his building plans in 2007 and subsequently obtained other relevant



government permits before embarking on the construction, mobilized for resources and while at the final stage of finalization, the respondent issued a demolition notice with no justification and or without affording him a chance to be heard in July 2014 contrary to his constitutional rights and freedoms as to the right to property, fair hearing and protection of the law.

58. The petitioner sought for declaratory orders that his right to acquire, own, utilize and develop the suit property was violated and in the alternative compensation thereof; permanent injunction from interference with his rights and conservatory orders restricting the respondent from carrying out demolition of his developments and interfering with his rights to occupation.
59. The respondent filed a replying affidavit sworn by Elizabeth Mburu on November 12, 2014 stating the only building marked for demolition was on Plot No 7741 neighbouring the petitioner's plot and not his building. The respondent invited the court to undertake a scene visit to ascertain the facts.
60. An order was made to that effect and a scene visit report was prepared on May 3, 2016 which established that the building was uncomplete with four floors and 80 rooms out of the approved plans by the District Health Officer Meru North on April 11, 2007, Town Clerk Municipal council of Maua on April April 12, 2007 and through payment of approval fees receipts No 14404 of Kshs 4000 paid on April 11, 2007.
61. The scene visit report established that no demolition mark was on the building.
62. In compliance with Order 11 *Civil Procedure Rules*, the petitioner filed a case summary, issues for determination, pre-trial questionnaires, list of witnesses, witness statement dated July 24, 2018 by the deceased and a list of documents dated July 19, 2018, August 15, 2019 and further list of witnesses of October 14, 2021.
63. On its part, the respondent filed a list of witnesses, witness statement and list of documents dated March 28, 2018 among them a letter dated July 1, 2008 to the Town clerk from Amwathi plot owners, minutes of the Municipal Physical Planning Liaison Committee meeting held on September 9, 2010, sectional plan and a report of the site inspection on commercial development on Plot No. 5416.

## E. Determination

64. In Godfrey Paul Okutoyi (*supra*) and Grays Jepkemoi Kiplagat (*supra*) the courts held that a party should only file a constitutional petition for redress of a breach of the *the constitution* or denial or violation or infringement or a threat to a right or fundamental freedom.
65. In this petition, the petitioner pleaded his right to acquire develop and utilize the suit land was under threat of demolition. He attached the said notice issued by the respondent's county executive committee member lands, economic and physical planning issued pursuant to Article 66 of the *Constitution*, Section 38 (1), (2), (7) and (4) of the Physical Planning Act which was to expire on July 31, 2014, requiring the petitioner to vacate the road reserve, failure of which the development herein risked demolition and costs of the exercised to be surcharged.
66. The notice required all the affected property owners to comply. The petitioner wrote a demand letter dated April 8, 2014 in which he made it clear that his building had been approved before construction started and sought for reasons such a drastic decision since he had right to be protected by law.
67. A constitutional question has been defined as one seeking for an interpretation of the *Constitution's*, roles, powers, directions and decisions of state organs and departments as they exercise powers which affect the rights and freedoms of citizens. See *Gabriel Mutava & 2 others vs Managing Director Kenya Ports Authority & another* (2016) eKLR.



68. In this petition it is quite apparent the petitioner's right to own property and to develop his property was under threat by the respondent's notice of demolition due to expire in July 2014.
69. Therefore, my finding is that the petition disclosed a constitutional question seeking the courts intervention. As to whether the petitioner ought to have exhausted the internal dispute mechanism under the Physical Planning Act. D. Exh 1 is dated July 1, 2018 but received by the respondent on August 18, 2014. D. exh No. 2 does not specifically address itself to the petitioner's property. D. exh 4 relates to an inspection report on January 8, 2015 which was after the petition herein was filed and conservatory orders issued.
70. There was no properly constituted liaison committee in which a decision was made over the issue. Further it has not been averred by the respondent that the said committee had powers to issue conservatory orders. It did not determine if there had been legally approved building plans and or compliance with the approved plans. Its recommendations were inter alia for the physical department to ascertain the extent of the alleged encroachment on the road reserve vis a vis the main Meru-Maua Highway. See *Speaker of the National Assembly vs James Njenga Karume* (1992) eKLR, *NM vs WM G* (2018) eKLR.
71. Turning to the constitutionality of the notice, the respondent invoked Article 66 in the notice on the regulation of land use and property. This article provides the state may regulate the use of any land or any interest in or right over any land in the interest of defence, public safety, public order, public morality, public health or land use planning. Sub rule (2) therefore provides parliament has the power of enacting laws, which ensures investments in property benefit local communities and their economies.
72. Parliament has enacted the *Land Act*, the *Land Registration Act*, *National Land Commission Act* and the *Land Act* repealed the way leaves Act and the Land Acquisition Act. The role of regulating and overseeing land use, planning is donated to the National Land Commission under Article 67 of the *Constitution*.
73. The respondent has not denied the existence of the notice to demolish and condemning the petitioner's building. The respondent has not stated if they ever consulted the petitioner or granted him a fair hearing before the notice was issued and thereafter after he sought for the reasons through his letter dated April 8, 2014.
74. The requirement to observe rules of natural justice are not only statutory but also a constitutional imperative. The essential components of fairness in any administrative action are reasonable notice, reasonable opportunity to be heard by an impartial, competent and independent decision maker.
75. This is in line with Article 47 of the *Constitution* as read together with the *Fair Administrative Action Act*.
76. In my considered view the failure to notify, give reasons and engage the petitioner before the demolition notice could be effected and or condemning his building amounted to a breach of the rules of natural justice and contravention of his right to land ownership. See *Gladys Shollei vs Judicial Service Commission (J.S.C)* (2018) eKLR.
77. The respondent invoked Article 66 on the concept of public interest, public health and public safety. There are no expert reports tendered that the Kenya Urban-Roads Authority (KURA) & Kenya National Highways Authority (KeNHA), the Land Registrar and surveyor, Public Health officer, National Environment Management Authority (NEMA) officers and the housing department had



- made definite findings that the petitioner's developments encroached on a road reserve and was a threat to public health and public safety.
78. The alleged Amwathi plot owners were not interested parties to this petition and neither were the other relevant government agencies to support the respondent's contention that the building posed a danger to the public and its occupants and or flouted the law while being erected.
  79. The respondent invoked Section 38 of the Physical Planning Act. See [\*Ibrahim Khalif Mohamed & 6 others vs Minister of State for Provincial Administration & Internal Security & 4 others\*](#) (2021) eKLR.
  80. That section required the issuance of an enforcement notice. In [\*Lilian Wambui Kuria vs Ole Kejuado County Council\*](#) (2019) eKLR, the court held the plaintiff was a legal owner who had enjoyed quiet possession of the same with the knowledge and acquiescence of the defendant requiring the protection of the law by way of a perpetual injunction.
  81. In [\*Geoffrey Muturi vs Kenya National Highway Authority & 2 others\*](#) (2020) eKLR, the court issued an injunction since the road had passed to forestall demolition of the building until the issue of whether or not the same was on a road reserve was resolved.
  82. In this matter the Highway of Meru-Maua Highway has been in existence. There is no report from either KURA or KENHA that the petitioner's building had encroached on the access road or road reserve. The environmental impact assessment report made prior to the construction was clear on the impact the building was to pose on both the environment and other land users. The said reports and approvals by the other relevant officers have not been challenged by way of other expert reports.
  83. DW 1 & DW 2 were not experts in public health, road safety and Human habitation. In [\*Joseph Kaberia Kumari vs County Government of Meru\*](#) (2018) eKLR, the court held a survey map from a land surveyor or registrar showing the building on paper and on the ground was a conclusive proof of an encroachment on a road reserve. The court cited with approval the [\*Kenya National Highways Authority vs Shalien Mughal & 5 others\*](#) (2017) eKLR, on the proposition that such a report was the scientific proof of encroachment on a road reserve.
  84. Similarly, the court cited with approval [\*Cynad Properties Ltd & another vs AG and 4 others\*](#) (2013) eKLR, where it was held a petitioner had a right to own property so long as the said property did not encroach upon land belonging to the public and could only exercise their rights within the and in accordance with the framework of the land.
  85. In this petition the onus was on the petitioner to prove the breach or infringement of rights to his land and development therein. He has produced ownership documents and approved development plans by the predecessor of the respondent.
  86. Once the approvals were made and construction works started there no evidence that the respondent raised any concerns as to the safety and health of the buildings which was coming up or so soon after it came into existence after the 2013 general election.
  87. There is no evidence of issuance of an enforcement or compliance notice. There is no evidence that there was a stop order issued against the petitioner and or a complaint from the National construction Authority, or a protest by the respondent or its officers to the relevant government agencies. See [\*Justus Kathenge vs ODPP\*](#) (2019) eKLR.
  88. In my view the respondent acted outside the law and without giving the petition an opportunity to be heard before the notice to demolish and or condemn his development as unsafe for habitation. The petitioner had legitimate expectation after his building was approved in 2007 that his investments would not be in vain. See [\*CCCK vs Royal Media Services\*](#) (2014).



89. In the premises, I find the petitioner has proved its claim to the required standards hence entitled to the prayers sought save for the alternative prayer since no valuation report was produced or other materials to support the said claim which is in the nature of special damages. Costs to the petitioner.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 27<sup>TH</sup> DAY OF JULY, 2022**

**In presence of:**

**C/A: Kananu**

**Waswani for petitioner**

**Kiruai for respondent**

**HON C K NZILI**

**ELC JUDGE**

