



**Kamau & 6 others (Suing on their behalf and on behalf of the residents and home owners of Migaa Integrated Golf Estate) v Sycamore Pine Limited & 2 others; National Environment Management Authority & another (Interested Parties) (Environment & Land Petition E003 of 2021) [2022] KEELC 2762 (KLR) (18 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2762 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND PETITION E003 OF 2021**

**BM EBOSO, J**

**JULY 18, 2022**

**BETWEEN**

**FRANCIS MUGARAMI KAMAU ..... 1<sup>ST</sup> PETITIONER  
CHRISTINE WAMBUI MWANGI ..... 2<sup>ND</sup> PETITIONER  
KIM MUTUTI MATU ..... 3<sup>RD</sup> PETITIONER  
ANNET WANJIKU MBURU ..... 4<sup>TH</sup> PETITIONER  
ISABEL ACHIENG OLWENYO ..... 5<sup>TH</sup> PETITIONER  
ROBERT ODUOR OTIENO ..... 6<sup>TH</sup> PETITIONER  
MATHEW KIMOLO NZUKI ..... 7<sup>TH</sup> PETITIONER  
SUING ON THEIR BEHALF AND ON BEHALF OF THE RESIDENTS AND  
HOME OWNERS OF MIGAA INTEGRATED GOLF ESTATE**

**AND**

**SYCAMORE PINE LIMITED ..... 1<sup>ST</sup> RESPONDENT  
HOME AFRICA COMMUNITIES LTD ..... 2<sup>ND</sup> RESPONDENT  
KIAMBU COUNTY GOVERNMENT ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... INTERESTED  
PARTY  
MIGAA GOLF ESTATE RESIDENTS ASSOCIATION ..... INTERESTED PARTY**



## RULING

### Background

1. A summary of the dispute in this petition was outlined in this court's preceding ruling rendered on 6/12/2021. For a clear perspective of the context in which the court is invited to render the present ruling, I will, once more, outline the summary.
2. The petitioners brought this petition on 27/5/2021. Their case was that they were residents and property owners within Migaa Integrated Golf Estate, a gated community-based development that was conceptualized on the tenets of environmental sustainability, with 50% open green space, translating into an acre of green for every acre of built area. They had learnt that the 1st respondent had been handed a total of 17.2 acres out of the 19.86 acres that had been planned and designated as Migaa Commercial & Office Park [the Commercial Node], and that the 1st respondent had commenced the construction of low-cost residential apartments in the name of Samara Estate on the said land, consisting of 28 high-rise apartment blocks with a total of 1,959 residential units. They contended that the construction of the 28 high-rise apartment blocks was out of character with the permitted land use in the area, and was being carried out in direct breach of the Estate's approved and registered master plan; and was being carried out in contravention of the framework in the [Physical and Land Use Planning Act](#) 2019, ("the PLUPA") and the Environmental Managements and Co-ordination Act (the EMCA).
3. The petitioners specifically contended that the said development was being carried out without the requisite environmental impact assessment licence and the physical and land use planning permission. Further, the petitioners contended that the 3rd respondent had failed to provide them with information relating to the Estate's master plan, and the circumstances under which the impugned development was being undertaken.
4. Consequently, the petitioners sought the following verbatim reliefs against the respondents:
  - a. A declaration that the 3rd respondent contravened Article 35 of [the Constitution](#) by refusing to respond to the petitioners' letters dated 17/2/2021 and 6/4/2021 and declining to supply them with the information as requested.
  - b. A declaration that the respondents have breached Articles 40 and 42 of [the Constitution](#) by allowing and/or carrying out unlawful construction in the property known as Unit No. CC01 situated on LR No. 29059 within the Migaa Integrated Golf Estate in Kiambu County.
  - c. A declaration that the 2nd and 3rd respondents breached Article 47 of [the Constitution](#) by failing to inform the petitioners and the area residents on their decision (if any) to issue change of use of the commercial zone to make way for the impugned development.
  - d. A declaration that the 3rd respondent breached Article 42 of [the Constitution](#) by failing to ensure that the subject development complies with the zoning policy and the master plan of the Migaa Integrated Golf Estate in Kiambu County.
  - e. An order of permanent injunction restraining the respondents from advertising for sale, constructing, carrying on with the impugned construction of low-cost apartments numbering 1,959 comprised in 28 high-rise blocks of apartments in the property known as Unit No CC01 situated on LR No 29059 within the Migaa Intergrated Golf Estate in Kiambu County.



- f. An order compelling the 1st respondent to demolish all offensive unlawful developments in the property known as Unit No CC01 situated on LR No. 29059 within the Migaa Integrated Golf Estate in Kiambu County and restore the site to its previous state.
  - g. An order of permanent injunction restraining the respondents from irregularly and without compliance with the due process and consultation, interfering with and/or altering the master plan of the Migaa Integrated Golf Estate in Kiambu County as registered on 23/3/2012.
  - h. A declaration that the respondents are liable to pay damages to the residents of Migaa Estate for the breaches of their constitutional rights.
    - i. Costs of this petition.
    - j. Any other reliefs the honourable court may deem fit and just to grant.
5. Together with the petition, the petitioners brought a notice of motion dated 20/5/2021, through which they sought a conservatory order restraining the 1st respondent against selling, advertising for sale or constructing low cost apartments in the property known as Unit No.CC01, situated on LR No. 29059, within the Migaa Integrated Golf Estate in Kiambu County, pending the hearing and determination of this petition. Further, the petitioners sought an order compelling the respondents to supply to the petitioners all information and documents sought vide their letter dated 17/2/2021. The said application is the subject of this ruling.
  6. The application was supported by the affidavit of Francis Mugarami Kamau sworn on 20/5/2021, in which he outlined the petitioners' case as summarized above. He further deposed that, together with his co-petitioners, they were home-owners in Migaa Integrated Golf Estate in Kiambu County.
  7. Despite being granted the opportunity to respond to the application through replying affidavits, none of the respondents filed a response. Consequently, the facts set out in the supporting affidavit remain uncontroverted. The 2nd Interested Party filed a replying affidavit in support of the application.
  8. The application was canvassed orally in the Virtual Court on 25/5/2022. Mr Agwara, counsel for the petitioners, submitted that the impugned construction was proceeding without any approval, contending that there was no environmental impact assessment licence and that there was no development approval by the County Government. Counsel added that the development was being undertaken in an area designated for commercial development.
  9. In response, Mr Kenneth Wilson, counsel for the 1st respondent, submitted that the petitioners did not have the locus standi to bring the petition and/or swear the supporting affidavit. Counsel submitted that there was no evidence that the 1st respondent was a home owner in the estate. Counsel added that there was no certificate under Section 106B of the Evidence Act in relation to the exhibited photographs.
  10. Ms Waweru, counsel for the 2nd respondent, adopted the submissions of the 1st respondent and added that the 2nd respondent was a vendor.
  11. Ms Mbugua, counsel for the 3rd respondent, opposed grant of prayer (e) of the application on the ground that Section 7 of the Access to Information Act designates the officer authorized to give information relating to a public entity and that the letter dated 17/2/2021 was addressed to an authorised officer who did not have the mandate to give the information. Counsel contended that Section 68 of the Physical and Land Use Planning Act 2019 gave powers to the County Executive Committee Member responsible for physical and land use planning to give information. It was the position of counsel for the 3rd respondent that the petitioners ought to address their request



- to the authorized officer. Mr Nyanyuki, counsel for the interested party supported the petitioners' application.
12. I have considered the application together with the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. No replying affidavits were filed to controvert the applicants' evidence. Two questions fall for determination in the application. The first question is whether the applicants have satisfied the criteria for grant of an interlocutory conservatory order. The second question is whether the applicants have established a proper basis for grant of an order compelling the County Government of Kiambu to provide the applicants with information relating to the impugned development. I will make brief sequential pronouncements on the two questions in the above order.
  13. principles that guide our courts when exercising jurisdiction to grant conservatory orders was outlined by the Supreme Court of Kenya in *Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & 2 Others* [2014] eKLR 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 applicants 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”
  14. The petitioners contend that the impugned development is out of character with the permitted land use in the area and is being carried out in direct breach of the estate's approved and registered master plan. They further contend that the developments are being carried out without the requisite development approvals under the *Physical and Land Use Planning Act* [the PLUPA] and the requisite environmental impact assessment reports and licences under the Environmental Management & Coordination Act [the EMCA]. The above contentions have not been controverted by the respondents. It is not lost to the court that in December 2021, the court observed in its preceding ruling that the respondents were at liberty to file any relevant approvals or licences relating to the impugned development. None was filed.
  15. Counsel for the 1st respondent submitted from the bar that the 1st petitioner was not a home owner. In his affidavit in support of the application, the 1st petitioner deposed that he was a home owner in Migaa Integrated Golf Estate. That deposition was not controverted. In my view, if the 1st respondent wanted to controvert that deposition, they ought to have filed a replying affidavit.
  16. Counsel for the 1st respondent relied on Section 106B of the *Evidence Act* and contended that the application should not be granted because there was no certificate under Section 106B of the *Evidence Act*. Counsel did not, however, specify which electronic evidence the 1st respondent was objecting to at this interlocutory stage. No proper basis was laid to enable the court consider the objection. The objection only came during counsel's oral submissions in response to the application. In my view, without laying a proper basis and without a proper application for rejection of the evidence, this ground of objection to the application has no basis.
  17. The result is that the court is satisfied that the petitioners have made out a proper basis for grant of a conservatory order.



18. The second question to be answered in this ruling is whether the applicants have established a proper basis for grant of an order compelling the County Government of Kiambu to provide them with information relating to the impugned development. The basis upon which the County Government is objecting to the prayer is that the applicants addressed their preceding request to the wrong officer. At this point, the County Government is the respondent in this petition. It is not a specific officer of the County Government who is the respondent. The County Government did not tell the court what prejudice it would suffer if it availed the information sought through the letter dated 17/2/2021. First, the petitioners sought a confirmation as to whether the County Government had issued a development approval relating to the impugned development [apartments]. Second, the applicants want to know if the master plan for the area had been revised within the framework of the *Physical and Land Use Planning Act* 2019.
19. The above request is a legitimate and reasonable request which the County Government should, in my view avail to the applicants, bearing in mind that physical developments affect the environment and it behoves every citizen to be concerned about the impact of any one development on the environment. I see no proper reason why the above information should not be availed by the County Government.
20. Consequently my finding on the second question is that there is a proper basis for compelling the County Government of Kiambu to supply the petitioners with information sought in their letter dated 17/2/2021.
21. In the end, the petitioners' application dated 20/5/2021 is granted in terms of prayers (d) and (e). Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 18TH DAY OF JULY 2022**

**B M EBOSO**

**JUDGE**

**In the Presence of:**

Mr Kamande for the Petitioners

Mr Kenneth Wilson for the 1st Respondent

Mr Waweru for the 2nd Respondent

Court Assistant: Ms Lucy Muthoni

