



Barasa & 30 others v Anglican Church of Kenya (ACK) Lower Riverside Church & 5 others (Environment & Land Petition E003 of 2022) [2025] KEELC 4015 (KLR) (27 May 2025) (Ruling)

Neutral citation: [2025] KEELC 4015 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND PETITION E003 OF 2022**

AY KOROSS, J

MAY 27, 2025

IN THE MATTER OF ARTICLES: 1(1), 20, 21, 22, 23, 40, 42, 62 (1) (C), 162(1), 165, 174(C), AND 181(1)(C) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF SECTION 5 AND 18(9)(A) OF THE NATIONAL LAND COMMISSION ACT, ACT NO. 5 OF 2012

AND

IN THE MATTER OF LAND (ALLOCATION OF PUBLIC LAND) REGULATIONS, 2027 (LEGAL NOTICE NO.284)

AND

IN THE MATTER OF SECTIONS 3, 4 (3) AND 13 OF THE ENVIRONMENT AND LAND COURT ACT NO. 19 OF 2011

AND

IN THE MATTER OF SECTION 87 OF THE COUNTY GOVERNMENTS ACT, 2012

BETWEEN

PAUL BARASA & 30 OTHERS & 30 OTHERS & 30 OTHERS & 30 OTHERS PETITIONER

AND

ANGLICAN CHURCH OF KENYA (ACK) LOWER RIVERSIDE CHURCH 1ST RESPONDENT



**DRUMVALE FARMERS CO-OPERATIVE SOCIETY LIMITED 2ND
RESPONDENT**

LAND REGISTRAR, MACHAKOS 3RD RESPONDENT

COUNTY GOVERNMENT OF MACHAKOS 4TH RESPONDENT

NATIONAL LAND COMMISSION 5TH RESPONDENT

HON ATTORNEY GENERAL 6TH RESPONDENT

RULING

1. For determination before this court is a notice of motion by the petitioners dated 7/02/2024, in which this court has been moved within the provisions of Article 25 (c) of *the Constitution* of Kenya (“Constitution”). In it, they have sought the following reliefs from this court: -
 - a. That the court be pleased to expunge and strike out from the court record the following documents that are to be relied upon by Peter Wanjohi Kiama, allegedly as the 2nd respondent’s liquidator; his replying affidavit sworn on 6/06/2022, witness statement and letter dated 21/11/2022 contained in the 1st and 2nd respondent’s trial bundle.
 - b. The 1st and 2nd respondents be directed to file a fresh list and bundle of documents, excluding the expunged documents.
 - c. Any other order or further order that it may deem fit and just to grant.
 - d. The costs of the motion be provided for.
2. The motion was anchored on the grounds therein and the affidavits of one of the petitioners Paul Barasa, who had the authority of his co-petitioners to swear them. These affidavits were respectively deposited on diverse dates of 7/02/2024 and 4/02/2025.
3. In a nutshell, it was contended that due to recent developments in the matter, these documents were inadmissible, the gazette notice that placed the 2nd respondent under liquidation was revoked on 15/07/2022 and consequently, the appointment of Peter Wanjohi Kiama (“Peter”) as the 2nd respondent’s liquidator stood cancelled.
4. It was argued based on the termination, Peter did not have the locus to represent, swear affidavits, sign pleadings and issue any statements or adduce evidence on behalf of the 2nd respondent. It was maintained that the adduction of such evidence by Peter would lead to a breach of Article 25 (c) of *the Constitution*.
5. Additionally, Peter’s character was also disparaged, whereby it was stated in a decision of Co-operative Tribunal Case No. 720 of 2016, Peter, as the 2nd respondent’s liquidator, was by an order of injunction, restrained from dealing with the 2nd respondent’s property.
6. It was alleged that despite the existence of injunctive reliefs, Peter illegally transferred land parcels no. Mavoko Town Block 12/921 and 12/922 to the 1st respondent on diverse dates of 21/01/2019 and 18/03/2022.



Respondents' replying affidavit

7. Apart from the 1st respondent, which opposed the motion by filing a replying affidavit of Rev. Peterson Kithaka Francis, sworn on 8/05/2024, none of the others responded to the motion.
8. He stated that though the 2nd respondent's registration was cancelled on 28/08/2009, it was lifted on 6/07/2022. Furthermore, its registration status was fully restored. He averred that during this intervening period of 13 years, Peter was the 2nd respondent's liquidator.
9. He argued that it was absurd that the petitioners wanted to control and dictate the 1st respondent's evidence, including seeking an order that it files a new list of documents and trial bundle.
10. He stated that in light of the witness statement of Paul Barasa, which had torn into the operations of the office of the liquidator, which Peter had held, it was necessary for Peter to testify and rebut these pieces of evidence. He further maintained that the 1st respondent would be prejudiced if the motion were allowed.

Submissions

11. As directed by the court, the petitioners and the 1st respondent's law firms on record, M/s. Mwamuye, Kimathi & Kimani Advocates and Kibatia & Co. Advocates LLP filed their respective written submissions dated 4/02/2025 and 6/03/2025, which have been considered by the court.

Issues for determination, Analysis and Determination

12. Having carefully considered the motion, affidavits and the rival submissions, the single issue that arises for determination is whether the motion is merited.
13. The legal basis of the motion is that certain evidence of Peter will lead to an unfair trial. The concept of fair trial has been defined by Black's Law Dictionary, 11th Edition, Page 743 as trial by an impartial tribunal that follows legal procedures, especially so in criminal cases where the accused persons rights are respected.
14. The reason why the right to fair trial is usually applied to criminal cases is explained in the book edited by Sabine Gless, and Thomas Richter, *Do Exclusionary Rules Ensure a Fair Trial?: A Comparative Perspective on Evidentiary Rules*, Springer International Publishing AG, 2019, page 5 in the following manner:-

“Inherent in criminal procedure is the conflict between the state's interest in determining the facts relevant to a suspect's guilt (and potential sentence) and the interests of the other parties (i.e. the accused, witnesses, victims). The state's pursuit of “ the truth ” has led to the adoption of procedural rules that expose suspects and witnesses to coercive measures.”
15. This right to fair trial in criminal cases checks the excesses of the state in their pursuit of evidences and that is why in criminal legal processes, we have such rights as that of an accused remaining silent, prohibition against torture or illegal obtainment of evidence through coercion.
16. As stated by the Supreme Court of Kenya decision of *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2017] KESC 2 (KLR), the right to fair trial is a non derogable right and is one of the cornerstones of a just and democratic society, without which the rule of law and public faith in the justice system would inevitably collapse.



17. The European Court of Human Rights recognises that the right to a fair trial applies to both criminal and civil processes and is intended to ensure that a litigant is not denied the opportunity to present its case effectively before the court. See paragraph 87 of the decision of the Apex Court in *Mahamud v Mohamad & 3 others* [2018] KESC 62 (KLR).
18. Taking all these into account, there is, without a shadow of doubt, that the reliefs sought by the petitioners are misplaced. This court holds so because the prayers they are seeking negate the very essence of Article 25 (c) of *the Constitution*. Expressed differently, Article 25 (c) supports the 1st respondent's position and not that of the petitioners.
19. This court is convinced that disallowing these shreds of evidence by Peter will deny the 1st and 2nd respondents a right fair trial, which is a non-derogable right under *the Constitution*.
20. Additionally, as a matter of fact, and as observed by the court, the striking out of the 1st and 2nd respondents' documents goes against the tenets of the right to a fair hearing, which is underpinned in Article 50 of *the Constitution*.
21. In shedding light on this constitutional right, which is broad-based and includes the right to a fair trial, the Supreme Court of Kenya decision of *Kidero & 4 others v Waititu & 4 others* [2014] KESC 11 (KLR) recognised that this right is buttressed by the rules of natural justice, which include the concept of *audi alteram partem* (hear the other side, no one is to be condemned unheard) and *nemo iudex in causa sua* (no man shall judge his own case).
22. It is worth noting that Peter's participation in these proceedings is backed by law. At that time the petition was filed on 7/03/2022, Peter was the 2nd respondent's liquidator. Therefore, by the provisions of Section 66 of the *Co-operative Societies Act*, he had the capacity to institute and defend suits and other legal proceedings by, and on behalf of, the 2nd respondent in his own name or office.
23. It is notable that the evidence of a liquidator under this Act is so critical that paragraph 26 of the 1st Schedule thereof provides that all records of the society in this case the 2nd respondent and of the liquidator are taken as evidence of the truth of all matters purporting to be recorded in them, until the contrary is proved.
24. As to Peter's credibility, the petitioners will have an opportunity to test this during trial as envisioned by Section 154 of the *Evidence Act*, and this court finds that raising this issue at this point in the proceedings is premature.
25. As this court concludes, it has been left speculating why the petitioners are so eager and determined to ensure Peter does not testify and produce evidence, yet, at the heart of the dispute are dealings that took place when Peter held office as the 2nd respondent's liquidator.
26. In the end, this court has no difficulty in finding the petitioners' notice of motion dated 7/02/2024 is not merited and it is hereby dismissed with costs to the 1st respondent. As the other respondents did not participate in the proceedings, costs are not awarded to them.

It is so ordered.

DELIVERED AND DATED AT MACHAKOS THIS 27TH DAY OF MAY, 2025.

HON. A. Y. KOROSS

JUDGE

05.2025



Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Mr. Ogwiye holding brief for Mr Kimani for petitioners

Mr Kiruga for 1st and 2nd respondents

Ms Kanja- Court Assistant

