



**Mbayaki & 4 others v Odhiambo & 2 others (Sued in their Capacity as Officials and Representatives of Githeri Rise Residents Association) & another (Environment and Land Petition E011 of 2025) [2025] KEELC 5278 (KLR) (10 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5278 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND PETITION E011 OF 2025**

**AA OMOLLO, J  
JULY 10, 2025**

**BETWEEN**

**LETISIA MBAYAKI ..... 1<sup>ST</sup> PETITIONER  
HILLARY KOIN ..... 2<sup>ND</sup> PETITIONER  
HENRY MWANIKI ..... 3<sup>RD</sup> PETITIONER  
WILSON SHOLLEI ..... 4<sup>TH</sup> PETITIONER  
NJERI WANGETHI ..... 5<sup>TH</sup> PETITIONER**

**AND**

**NICODEMUS ODHIAMBO, ELIJAH WAMBUA & ASHBELI WAROBI (SUED  
IN THEIR CAPACITY AS OFFICIALS AND REPRESENTATIVES OF GITHERI  
RISE RESIDENTS ASSOCIATION) ..... 1<sup>ST</sup> RESPONDENT  
ALAN DICK & COMPANY (EAST AFRICA)LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The present application for determination is dated 28<sup>th</sup> February, 2025 and brought under the provisions of article 10(2) of the *Constitution* and the overriding principles of the *Civil Procedure Act* 2010. The Petitioners/Applicants seeks to be granted the following orders;
  - a. Spent
  - b. Spent
  - c. That pending the hearing of determination of this Application inter-partes and the Petition filed herein, the Honourable Court do Order and direct the Respondent to provide the Petitioners with copies of the original lease agreement executed between the Respondents.



- d. That pending the hearing and determination of this Application inter-partes and the Petition filed herein, the Honourable Court do Order and direct the 2<sup>nd</sup> Respondent to cover the hole it has dug on the common property, remove materials and place the requisite and necessary signage as well take all the necessary measures to ensure security of the children and Petition herein.
  - e. That pending the hearing and determination of the Petition filed herein, the Honourable Court be pleased to issue an Order of Injunction restraining the Respondents particularly the 2<sup>nd</sup> Respondent either by themselves, their agents and or servants, Advocates, assignees and any other person acting in their name and on their behalf from constructing the Base Transceiver Station tower (the mast), on the 1<sup>st</sup> Respondent's common property or any portion thereto.
  - f. Costs of this Application be provided for.
2. The application is supported by the affidavit of Letisia Mbayaki and the grounds listed on its face *inter alia*;
    - i. Moreover, the mast is being constructed in an area meant for children to play. A deep hole has been dug in the area, constructions materials poured thereon, and both the deep hold and materials are left unattended to and the area is unrestricted thereby exposing the children and Petitioners at large to immediate health, social and security risks.
    - ii. The mast is being constructed in a common area shared by all members of the Association thereby hindering the Petitioners' rights of access and passage as well as exposing the members to serious health risk such as cancer among other diseases attributed to and associated with such telecommunication equipment and devices.
    - iii. As a result of the actions of the Respondents, the Petitioners and other members of the Association have been greatly prejudiced, affected and their legal rights violated as follows:-
      - a. Exposing the Petitioners and other members of the Association to environmental health risks due to emission of hazardous radiation which are well known to cause health problems including cancer, neurone behavioural symptoms, cognitive performance as well as sleeping problems among others thereby violating their right to a clean and health environment.
      - b. The mast is being constructed directly and in front of access roads by the Plaintiffs and other members of the Association thereby interfering with their right of access and passage;
    - iv. The conduct of the Respondents to allow and proceed to construct a mast within a residential area 5 metres from the Petitioners houses and in the common property of the Petitioners and other members of the Association while knowing very well that they emit hazardous materials that have long term health problems without participation of the Petitioners and other members of the Association is a violation of Articles 69(1) (d) and 69 (2) of the [Constitution](#).
  3. The Petition was opposed by the 1<sup>st</sup> Respondents through the replying affidavit of Nicodemus Odhiambo dated 19<sup>th</sup> March, 2025. I have not seen any response filed on behalf of the 2<sup>nd</sup> Respondent.
  4. The 1<sup>st</sup> Respondent avers that the application and the petition ought to be struck out. the grounds for striking out stated includes that the petition does not meet the threshold of a constitutional petition;



the court lacks jurisdiction and that the claimed violation are more bootstraps. It deposes that the members of the 1<sup>st</sup> Respondent are bound by its constitution and bylaws.

5. Mr. Odhiambo deposes that whereas the other residents and members timeously contribute, Mr. Shollei, Mr. Koin and Ms. Mbayaka do not remit theirs thereby straining resources of the Estate to adequately cater for needs that arise. That in order to ensure the estate's sustainability and maintenance of social amenities, the new Management Committee embarked on identifying alternative income sources that could support the needs while maintaining the estate's prestigious status and safeguard members' interests.
6. That the only reason it is being relocated is because the property where it is currently hosted has been sold and the site will undergo excavation and as such, they received an offer 13<sup>th</sup>, November, 2024 from Safaricom plc proposing to them to host the said mast. They aver that they held meetings with its members who went ahead and appended their signatures. That the said members consented to the relocation of the mast during the Association's Annual General Meeting held on 22<sup>nd</sup> September, 2024 at the open field in question, the Chairman presented the telecommunication Mast project to members. Members deliberated exhaustively on the all aspects of the project as per their understanding. The AGM unanimously approved the project and mandated the committee to progress with negotiations of the specific contractual terms.
7. The 1<sup>st</sup> Respondent avers that there are numerous similar masts around the country some of which are in residential areas and even hospitals. That the petitions have not presented any evidence of the risk occasioned by that mast.
8. In conclusion, the 1<sup>st</sup> Respondent contended that obtaining all relevant licenses and approvals remain the responsibility of the service provided as per the agreement between the Respondents.
9. The petitioners filed submissions dated 9<sup>th</sup> May, 2025 and the 1<sup>st</sup> Respondent submissions is dated 5<sup>th</sup> June, 2025. The petitioners is stating that this court has requisite jurisdiction said their claim has raised issues touching on violation of human rights and environmental protection which calls this court to intervene under articles 165, 162 & 70 of the *Constitution*. They also placed reliance on the provisions of section 13(3) of the *Environment & Land Court Act*.
10. They also presented arguments why this petition meets the threshold of a Constitutional Petition by referring to the violation set out under paragraph C of the petition. The Petitioners submit that striking out is a draconian measure which can only be invoked in the least circumstances possible. They posit that they have pleaded with clarity and the degree of reasonableness showing article violated.
11. Under merits of the application, they argue the same is merited. That as soon as the lease was executed, the 2<sup>nd</sup> Respondent embarked on the Construction of the Mast on the suit property. Secondly that the petitioners have attached a sketch map showing the Mast is 4.2 m from the Petitioners' houses against the requirement that the same should be 10 m away from residential homes.
12. On whether they will suffer irreparable loss the Applicants rely on the report from Lakers Consultancy Ltd annexed to the Supplementary affidavit, which lists health hazards caused by the masts to human being and buildings. That the balance of convenience tilts in granting the orders.
13. The 1<sup>st</sup> Respondent itemized the following questions for determination:
  - a. Whether an alleged report by one Kevin Musiega marked as LM-5 in the petitioner's supplementary affidavit is admissible?
  - b. Whether this court has jurisdiction to hear and determine the matter?



- c. Whether the constitutional avenue is available to the petitioner/applicants?
  - d. Whether there has been a violation of the petitioner/applicant's constitutional rights?
  - e. Whether public participation was conducted?
  - f. Whether there was a breach of article 42 of the *Constitution*?
  - g. Whether the court should issue an order of injunction pending the hearing of the application?
14. On item (a) they relied on the provisions of section 48 of the *Evidence Act* which states thus:
- “(1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identify or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons especially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.”
15. On questioning the jurisdiction of this court, the 1<sup>st</sup> Respondent avers it is the National Environment Tribunal to deal with the dispute as envisaged in section 125 (1) and 129 of *EMCA*. They cited article 159 of the *Constitution* providing for ADR.
16. On whether the Constitutional avenue is available to the Applicants, the 1<sup>st</sup> Respondent submitted that the Association has a Constitution which clearly dictates how disputes within the association should be solved and further the issues raised in this petition are issues which were deliberated during several meetings where the Petitioners were in attendance and the majority of the members from Githeri Rise Residents Association consented to the relocation of the Mast to proceed as planned from its current location which is 10 metres away to this current proposed location.
17. On whether the applicants have a prima facie case the 1<sup>st</sup> Respondent submits no case has been demonstrated. They argued that likelihood of irreparable loss has not been shown. They cited the case of *Pius Kipchirchir Kogo Vs Frank Kimeli Tenai* (2018) eKLR which defined what constitutes irreparable loss. The 1<sup>st</sup> Respondent urged this court to dismiss the application.

**Analysis & Determination:**

18. This court takes cognizance of the fact that what is for determination is an interlocutory application and not the petition. Therefore, I will not analyse some of the points raised by the 1<sup>st</sup> Respondent as they are prematurely submitted on. These include the admissibility of the report annexed in the supplementary affidavit of the petitioners. The same is only to shine light at this stage on existence of a prima facie case.
19. The 1<sup>st</sup> Respondent also submitted extensively on the heading of public participation. Again, each party will get opportunity to demonstrate whether or not public participation was conducted.
20. Thus, for purposes of determining this application, I raise two questions;
- a. Whether this court has jurisdiction
  - b. Whether the Applicants have demonstrated a prima facie case
21. The 1<sup>st</sup> Respondent argues this court lacks jurisdiction under the doctrine of exhaustion. That the Petitioners ought to have moved the NET as provided under Section 125 & 129 of *EMCA*. In



answering this question, the answer lies in the 1<sup>st</sup> Respondent replying affidavit at paragraph 40 where it is deposed that the mandate to obtain licenses and approvals was with the 2<sup>nd</sup> Respondent.

22. The 2<sup>nd</sup> Respondent did not file any response to the application so as to annex the decision of NEMA (EIA License). Neither did the 1<sup>st</sup> Respondent annex any such decision emanating from NEMA. Hence there was nothing to appeal before the NET. Where there is no decision that invokes the powers of alternative dispute resolution body, a party cannot be accused of violating the doctrine of exhaustion.
23. On merits, of the application, the 1<sup>st</sup> Respondent does not deny the following facts;
  - i. The proposed mast location is 4.2 – 5 m from the houses of the Petitioners.
  - ii. There is no evidence of license for re-location of the mast to the present location.
24. The Petitioners have presented an expert report listing likely negative impacts of the Mast to the Petitioners. Whether or not the consequences alleged are true, can only be determined during the hearing of the petition on merits. The 1<sup>st</sup> Respondent avers that its membership agreed to the installation of the Mast to raise income for good of the estate. However, in the replying affidavit, no mention is made on the environmental concerns.
25. In the circumstances of the case, I find that the Petitioners have demonstrated a prima facie case with a probability of succeeding. In the case of *Mrao Ltd Vs. First American Bank of Kenya Ltd. & 2 Others* (2003) eKLR it was held that;

“...All that court is to see is that on the face of it, a person applying for an injunction has a right which has been or is threatened with violation.”
26. On the balance of convenience, the grant of the interim orders will only cause a delay in the implementation of the project. From the lease agreement, its term is for a period of 15 years. Therefore, balance of convenience tilts in the grant of the orders of temporary injunction for a limited period of time to enable the petitioners argue their case.
27. In conclusion, the application is allowed in terms of prayers 4 and 5 for a period of 12 months or determination of the petition whichever is earlier. Costs of the application in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10<sup>TH</sup> DAY OF JULY 2025**

**A. OMOLLO**

**JUDGE**

