



REPUBLIC OF KENYA



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**Kassam & 12 others v Shah & 16 others (Environment & Land Petition
E007 of 2024) [2025] KEELC 3847 (KLR) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3847 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E007 OF 2024**

OA ANGOTE, J

MAY 15, 2025

BETWEEN

KARIM KASSAM & 12 OTHERS & 12 OTHERS PETITIONER

AND

**SHANTILAL RAYCHAND SHAH & 16 OTHERS & 16
OTHERS RESPONDENT**

RULING

Introduction

1. Before this Court for determination is the Petitioners'/Applicants' Notice of Motion application dated 24th February, 2025 brought pursuant to the provisions of Articles 35(1) (b) of *the Constitution*, 2010, Sections 1A, 1B and 3A of the *Civil Procedure Act*, 2010, Order 16 Rule 1, and Order 51 Rule 1 of the Civil Procedure Rules, 2010 seeking the following reliefs:
 - i. That this Honourable Court be pleased to compel the 4th Respondent herein to produce building plans with legible measurements in Autocard (DWG) format or legible exported PDF files of the developments being undertaken on the subject properties known as L.R No's 209/871/11 and 209/871/14-City Park Drive Parklands pending hearing and determination of the Petition herein.
 - ii. That upon production of the said plans, this Honourable Court do compel the 4th Respondent, their agents/servants to allow the Petitioners/Applicants or their agents, access to the subject properties known as L.R Nos 209/871/11 and 209/871/14-City Park Drive, Parklands for purposes of taking measurements and compiling a report on whether the developments therein comply with the drawn building plans, pending hearing and determination of the Petition herein.
 - iii. That the costs of this Application be provided for.



2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Karim Kassam, one of the 1st Petitioner of an even date, who deponed that on 28th March, 2024, they filed a Petition in which they averred inter-alia that the 1st -8th Respondents are illegally and un-procedurally undertaking development on L.R No's 209/871/11 and 209/871/14, (hereinafter the suit properties) infringing on their, and the general publics' rights to a clean and healthy environment.
3. According to Mr. Kassam, in response to their Petition, the 4th Respondent' Director swore a Replying Affidavit on 4th February, 2025 in which he stated, among others, that the ongoing developments were duly approved by the 9th Respondent and annexed copies of design drawings of the aforesaid developments, and that nonetheless, neither they, nor their surveyor and architect were able to read the entries and markings in the annexed drawings as the same were not legible.
4. As a consequence, he deponed, they instructed their Advocates to issue the 4th Respondent with a Notice to Produce legible drawing plans of the developments being undertaken on the subject properties but the same elicited no response and that as advised by their architect and surveyor, it is critical to access and enter into the suit properties to enable them take measurements and compile a report on whether the developments therein comply with the drawn building plans.
5. Mr. Kassim averred that as advised by Counsel, on the 11th February, 2025, Counsel for the 4th Respondent indicated that entry and access to the suit properties would only be allowed upon a formal application and orders from the court which necessitated the present Motion; that the documents they seek have information that is crucial and vital for the exercise and protection of their rights to life and to a clean and healthy environment and that no prejudice will be occasioned by the issuance of the orders sought.
6. In response to the Motion, the 4th Respondent, through its Director, swore a Replying Affidavit on 10th March, 2025. He deponed that as advised by Counsel, the Motion seeks to delay the hearing and disposal of the Petition and is a misguided attempt to involve the court in evidence gathering; that he indeed swore a Replying Affidavit on 4th February, 2025 wherein he annexed as LMS-03, copies of the design drawings for the developments on the suit properties and that he adduced the same in pdf format as requested by the Petitioners.
7. According to the 4th Respondent, the Petitioners, in their Notice to Produce as well as in the present Motion erroneously rely on Order 16 Rule 1 of the Civil Procedure Rules which provides for the issuance of summons to persons whose attendance is required to either give evidence or produce documents and does not contemplate its use against an adverse party in a suit to compel them to produce documents or evidence that will aid the opposing party.
8. Further, it was deposed, a holistic interrogation of Section 68(1)(a) of the Evidence Act mandates a party to seek and produce its own evidence including copies of originals where the original is shown or appears to be in the possession or power of an adverse party and the Petitioners ought to independently obtain the building plans they seek to rely upon without compelling the 4th Respondent to assist them in their case.
9. It is the 4th Respondent's case that Section 69 of the Evidence Act on Notice to Produce requires an Applicant to serve a notice demonstrating their intention to produce the said certified copies against a Respondent or in the alternative meet the requirements under Section 69(1)-(vii) should they seek to bypass the service requirement and that the notice under this section serves to inform the holder of the original evidence of the intention to adduce a copy and is not designed to compel a litigant to adduce evidence in court.



10. He deponed that the Petitioners having instituted the Petition against them claiming constitutional violations, it is absurd for them to engage in a fishing expedition by seeking to access the subject property for purposes of collecting evidence; that any documents should have been sought prior to the institution of the suit and not now and asserted that the Petitioners attempts aforesaid are prejudicial to the 4th Respondent. He urged that the court, being a neutral arbiter should not be misused as a tool to assist a party in evidence gathering in a bid to substantiating its case.
11. The 4th Respondent's Director urged that the fact that the Petitioners now allege that the information they seek is extremely crucial and vital for their case raises serious questions about the very basis of their Petition.
12. The Petitioners through the 1st Petitioner, filed a Further Supporting Affidavit on 26th March, 2025, in which he deposed that contrary to the 4th Respondent's contention, they do not, vide the Motion, seek to delay the matter. On 13th March, 2025, he stated, they were served with copies of architectural/building drawing plans in respect to the proposed development on Plot 209/871/11 in A3 paper drawn by J.W Archplans, Architects on behalf of Xeonics Limited setting out a typical floor with a proposed site plan on the left hand side, ground floor, together with E-01 and E-02 elevation, basement parking with S-01 Section, E-03 and E-04 elevation.
13. He stated that their Counsel was also served with copies of the architectural/building drawing/ plans in respect to the proposed development on Plot L.R No 209/871/14 in A3 paper setting out the typical floor layout, ground floor layout, sub-basement 1 layout and sub-basement 2 layout as well as architectural/building drawing plans in respect to the proposed Greenview II Apartments Parklands in A3 size paper which set out a typical floor layout, ground floor layout and basement floor layout.
14. According to Mr Kassim, the building plans with respect to Greenview II Apartments were not among those marked as LMS-03 in the Replying Affidavit sworn by the 4th Respondent on 4th February, 2025 and that what they were served with relate to different sites and not the subject properties.
15. He stated that their Counsel informed them he had forwarded the building plans relating to the suit properties to their architect, one Samson Kahinga, for expert analysis and opinion and that the purpose of this was to determine whether the ongoing development and construction on the two properties was in compliance with the building plans allegedly submitted to the 9th, 10th, and 11th Respondents for approval.
16. It was deposed by the 1st Petitioner that their architect drafted a preliminary report which states that construction on L.R 208/871/11 is not in accordance with the approved plan and/or the 1968 building bylaws; that the report recommends that the 9th and 11th Respondents and/or the developer provides copies of site plans and deed plan for L.R 209/871/14 and also access to the two properties to enable him establish the true and correct nature and extent of the development and that as such, the orders sought are merited.
17. No other party participated in the Motion.

Submissions

18. The Petitioners filed submissions on the 27th March, 2025. Counsel submitted that the Motion is filed under Article 35(1)(b) of *the Constitution* which guarantees the right to access information and is in line with Order 11 of the Civil Procedure Rules on Pre-trial directions and conferences providing for the production of documents, discovery and request for particulars prior to hearing of the case so as to aid the parties in appraising the strengths and weakness of their respective positions.



19. Counsel submitted that as stated in *Kimalit vs Laikipia University* (Cause 44 of 2019[2023] KEELRC 30(KLR)), the purpose of discovery is mainly to ensure that all documents and information necessary for the just determination of the suit are made available to the parties as well as to the court. Reliance was also placed on the case of *Nyanza Management Limited and Anor vs National Bank of Kenya Limited & 3 Others*(Commercial Case 68 of 2018)[2023]KEHC 19329(KLR)(27th June, 2023).
20. It was submitted that the court in *Lustman & Co (1990) Limited vs Corporate Business Centre & 4 Others*, [2022] KEHC 42(KLR) noted that as can be seen from Section 22 of the Civil Procedure Rules, the scope of discovery is quite broad; that a party may seek to discover any fact that is not privileged but is relevant to the subject matter in the suit and that where a party refuses and/or fails to make available to the other party documents that are relevant and necessary in ongoing litigation, the court has the power and authority to exercise discretion and order production of the documents identified by the other party as stated in Section 22 of the *Civil Procedure Act*.
21. Counsel submitted that the 4th Respondent admitted to having in their possession, copies of documents marked as LMS-03 in the Replying Affidavit to the Petition. However, in their response to the Motion, the deponent added new and other copies of drawings for a proposed ‘Greenview II Apartments, Parklands,’ which documents have no reference to the land reference numbers, and are likely for a different property and not the two subject properties.
22. Further, it was submitted, the 4th Respondent did not provide the site plan for the property known as L.R 209/871/14 which made it impossible for the architects to undertake a desktop analysis and also to undertake measurements on the said properties to enable him file a report.
23. The 4th Respondent’s Counsel submitted that having already adduced copies of the drawing plans sought, the sole issue for determination is whether or not the court can compel them to grant the Petitioners access to the suit properties to gather evidence.
24. Counsel contended that the Petitioners reliance on Article 35 of *the Constitution* is misinformed and erroneous because what they seek is not information but the opportunity to fish for information by entering and surveying private property to discover whether or not there are any violations of law and/or planning regulations which is not what is contemplated by the provision.
25. Reliance was placed on the case of *Jack Mukhongo Munialo 7 12 Others vs Attorney General & 2 Others* [2017] eKLR and *Communication Commission of Kenya vs Royal Media Services and 5 Others* [2014] eKLR.
26. It was submitted that nonetheless even if the court finds that the request falls within the ambit of Article 35, it would still be subject to limitation under Article 24 of *the Constitution* as stated by Section 6 of the *Access to Information Act*.
27. In particular, it was submitted, Section 6(1)(g) of the *Access to Information Act* provides that the access cannot be used to inter-alia, significantly undermine a public or private entity’s ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration.
28. This limitation, it was urged, falls within the present circumstances as the matter is ongoing in court. Reliance was placed on the case of *Rinascimento Global Limited & 12 Others vs Kenya Deposit Insurance Corporation and another: Chase Bank Kenya Limited* in liquidation) (Interested Party) [2022] KEHC.



29. Counsel submitted that Sections 107 and 109 of the *Evidence Act* set out the burden of proof and that it is a cardinal rule that it is the responsibility of the party alleging a fact to prove it. It was urged that having alleged, inter-alia, that the developments are illegal and irregular having been undertaken without the relevant permissions, the Petitioners should have the relevant proof thereof and cannot after alleging, seek to collect evidence to prove their allegations.
30. This, it was contended, amounts to a fishing expedition that the court ought not countenance. Counsel urged the court to reject this plea and pointed the court to the decision in *Nguma & 77 Others vs Katelembo Athiani Muputi Farming & Ranching Co-operative Society & 5 Others* [2021] eKLR.

Analysis and determination

31. Having canvassed the Motion, Affidavits and submissions, the issues that arise for determination are:
- i. Whether the 4th Respondent should be compelled to provide the Petitioners with the information sought?
 - ii. Whether the 4th Respondent should be compelled to grant the Petitioners access to the suit properties?
32. The Petitioners have moved this court under Article 35 of *the Constitution* which provides for the right to access information. Article 35 provides thus:
- “ 1. Every citizen has the right of access to—
- a. information held by the State; and
 - b. information held by another person and required for the exercise or protection of any right or fundamental freedom.”
33. This Article is given effect by the *Access to Information Act* No.31 of 2016 which provides under Section 4 as follows:
- “ 1. Subject to this Act and any other written law, every citizen has the right of access to information held by-a. the State; and b. another person and where that information is required for the exercise or protection of any right or fundamental freedom.”
34. While the right to access information is inviolable, this right is not absolute and is subject to limitations expressed in Section 6 of the *Access to Information Act*.
- 3.5 It is also apparent that this right bind not only public bodies but private entities such as the 4th Respondent herein. Speaking to this, the court in *Edwin Harold Dayan Dande & 3 Others vs British American Investments Co (K) Ltd & Another* [2019] eKLR persuasively stated as follows:
- “The information sought by the petitioner is not held by the state but by a private entity. That does not, however, mean the right of access does not bind private persons or entities at least from the spirit of both Article 35(1) and section 4 of the *Access to Information Act*. The petitioners say they want information for the exercise or protection of a right. In that case all they are to show is that they seek information from the respondents the purposes of exercising or protecting a right or fundamental freedom.”



36. Also referenced is Order 16 Rule 1 of the Civil Procedure Rules which provides as follows:
- “At any time before the trial conference under Order 11 the parties may obtain, on application to the court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents.”
37. A plain reading of the above provision reveals that it is limited to the issuance of summons for the attendance of persons required either to testify as witnesses or to produce specific documents. No person is sought to be summoned herein and the reliance on this provision is erroneous.
38. Nonetheless, the courts have stated time and again that reliance on a wrong provision does not in itself render a Motion incompetent. [See Supreme Court decision in *Hermanus Phillipus Steyn vs Giovanni Gnechchi-Ruscione* [2013]eKLR]
39. Sections 1A, 1B, and 3A of the *Civil Procedure Act* emphasize the court’s duty to facilitate the just, efficient, and affordable resolution of disputes and affirm the inherent power of the court to issue appropriate orders to ensure justice and prevent abuse of its process, even in the absence of express procedural provisions.
40. Vide the present Motion, the Petitioners are asking this court to compel the 4th Respondent to submit to them building plans with legible measurements in Autocard (DWG) format or legible exported pdf files. They state that in response to their Petition, the 4th Respondent vide its response of 4th February, 2025 adduced into evidence, inter-alia, design drawings of the developments being undertaken on the suit property[LMS-03]. The entries and markings thereon were however ineligible.
41. Subsequently, they contend, they served the 4th Respondent with a Notice to Produce legible drawings which notice elicited no response necessitating the plea before the court in this respect.
42. Vide his response, the 4th Respondent’s deponent acknowledged that they had indeed presented copies of the design drawings for the developments being undertaken on the suit properties in PDF format, as requested, being Exhibit LMS-01.
43. Upon careful examination of the annexures in issue, the court confirms that the 4th Respondent indeed re-submitted, in pdf format the drawings and plans provided in their Replying Affidavit of 4th February, 2025 save for the drawings pertaining to the "proposed Greenview Apartments, Parklands" which were not included in their initial Affidavit of 4th February 2025. The said drawings now form part of the record.
44. It is also noted that in their Further Supporting Affidavit sworn on 26th March 2025, the Petitioners explicitly admitted to having received the building plans in question, as well as those with respect to the proposed Greenview Apartments, Parklands, albeit on A3 paper. Nonetheless, they stated that the relevant drawings were forwarded to their architect for a professional assessment, and that this analysis formed the basis of the report dated 24th March, 2025. By virtue of the architect’s reliance thereon, it is apparent that the Petitioners’ assertions on legibility are now moot.
45. The court further observes that in their submissions, the Petitioners have made reference to the production of site plans and deed plans relating to Plot No. 209/871/14. However, their prayer in the application is for the re-submission of the documents initially submitted and marked as LMS-03 in the 4th Respondent’s Replying Affidavit of 4th February, 2025. Indeed, these are the documents referenced in the Notice to Produce dated the 13th February, 2025.



46. It is a well-established principle of law that parties are bound by their pleadings and are not permitted to depart from them without leave of the court. Allowing the plea for introduction of new documents at this stage is not permissible and the court will not consider the same.
47. In view of the foregoing, the court finds the plea herein has been rendered moot and is subsequently unmerited.
48. The Petitioners have also sought for orders compelling the 4th Respondent to grant them access to the suit properties to enable them take measurements and prepare a report on the developments' compliance with the building plans.
49. They assert that, on the advice of their architect and surveyor, accessing the site and the impugned development is essential for them to accurately determine the nature and extent of the construction and assess whether it conforms to the submitted plans and the applicable by-laws.
50. The 4th Respondent is opposed to this plea contending that the same constitutes an attempt to delay the hearing and disposal of the Petition and is a misguided attempt to improperly involve the court in evidence gathering.
51. Considering the nature of this plea, the court does not consider that the same strictly falls within the ambit of Article 35 of *the Constitution*. The Petitioners do not seek access to pre-existing information or records held by the 4th Respondent, rather, they want this court to compel the 4th Respondent to facilitate entry into private property for the purpose of taking measurements and compiling a report to determine whether the same is in compliance with the drawn plans.
52. The Petitioners, having voluntarily instituted the present proceedings and alleged various violations of their rights, including non-compliance with building regulations and planning laws, bear the legal obligation to substantiate these claims. This principle is firmly anchored in Sections 107 and 109 of the Evidence. Section 107 provides thus:
 - “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist;
 - (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”
53. Similarly, Section 109 reinforces that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless the law provides otherwise.
54. In the circumstances, the court is not persuaded that allowing the Petitioners access to the suit property, ostensibly to verify claims they have already pleaded as facts, is consistent with the rules of fair trial. The objection raised by the 4th Respondent is therefore well-founded, and the court must guard against being drawn into fishing expeditions by parties.
55. In light of the foregoing, the court declines the Petitioners' request to access the suit premises for the proposed purposes. Indeed, when the Petitioners moved the court, the presumption was that they had gathered enough documents to use in the prosecution of their case. This court cannot therefore allow the Petitioners to prosecute the Petition in piece meal, and moreso, in the proposed manner.
56. For those reasons, the Notice of Motion dated 24th February, 2025 is found to be unmerited and is dismissed without costs.



DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 15TH DAY OF MAY, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Ndambiri for Petitioners

Ms Asli for 4th Respondent

Mr. Ndungu holding brief for Juma for 9th, 10th and 11th Respondent

Court Assistant: Tracy

