



Watamu Association (Suing Through Its Elected Officials Claire Taylor, Bea Anderson & Damian Davies) v Wood & 3 others (Environment & Land Petition E003 of 2023) [2025] KEELC 3771 (KLR) (12 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3771 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND PETITION E003 OF 2023
FM NJOROGE, J
MAY 12, 2025**

BETWEEN

**WATAMU ASSOCIATION (SUING THROUGH ITS ELECTED OFFICIALS
CLAIRE TAYLOR, BEA ANDERSON & DAMIAN DAVIES) PETITIONER**

AND

TARA WOOD 1ST RESPONDENT

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY 2ND
RESPONDENT**

COUNTY GOVERNMENT OF KILIFI 3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. In the application dated 13th May 2024 which is brought under Article 50(1) Of *The Constitution*, Section 19(2) of the *Environmental and Land Court Act* Section 153 of the *Evidence Act*, Section 3 and 3A of the *Civil Procedure Act*, Order 18 Rule 3 And 19 Rules 1, 2 and 3(1) *CPR* seeks the following orders:
 - a. That this honourable court be pleased to order a date for the full open court hearing of this matter;
 - b. That in the alternative, this honourable court to order the issuance of witness summons for the summoning to this Court as witnesses in open court of the following persons:
 - i. Deborah Coulson;
 - ii. Damien Davies;



- iii. Luke Omondi, surveyor, Malindi Sub-county;
 - iv. Umi Kugula, NLC Coordinator, Kilifi County;
 - c. That the costs of this application be provided for.
2. The grounds upon which the application is made are enumerated at the foot thereof. They are as follows: the respondent has a right under Article 50 to have her dispute with the petitioners resolved in a fair and public hearing; the case involves members of an association of whom the first respondent is a member, therefore it would only be fair if the hearing was held in a public setting; under Section 192 of the ELC Act, the court is bound by the *Civil Procedure Act*; Order 18 rule 3 which is an elaboration of Article 50 provides that witnesses be examined in open court; Order 19 rule 1 provides that a party can ask of court that a witness who has filed an affidavit be summoned; only in cross examination does the truth reveal itself; Damien Davies deponed to an affidavit and placed heavy reliance on what is suspected to be hearsay evidence and the issues upon which the 1st respondent desires to cross-examine him are properly raised in the reply to the Petition. Luka Omondi on his part in his letter to the court, raised issues that were addressed by the 1st respondent's reply to the petition, and he requires to be put to strict proof on the issue of "government foreshore" and its meaning, as well as what the limits of the riparian zone is, among other issues. It is intended to cross-examine Luke Omondi on his views as to whether the Minister for Lands can shorten the width of the foreshore. According to the applicant, Umi Kugula is also required in court to answer to matters relating to directions on the NLC's permissions, management and conditionality of any building on government land since the NLC is the body that normally issues such directions.
3. The application is supported by the affidavit of Timothy Bryant, advocate which elaborates on the same grounds.

Response

- The motion is opposed. Damien Davies filed her sworn affidavit dated 13th June 2024. She states that she is the vice chairperson of the petitioner. She refutes the notion on the part of the applicant to the effect that the 1st respondents' right to a fair hearing can only be achieved through a hearing to be held in a public setting and by cross-examination of witnesses. According to her, the matter can be disposed of even without witnesses being subjected to cross-examination. She avers that Rule 20(1)(a) and (b) of *the Constitution* of Kenya Protection of Rights and Fundamental Freedoms Practice and Procedure Rules 2013 famously known as the "Mutunga Rules" allows petitions to be disposed of by way of affidavit; that disposal by way of affidavit evidence does not in any way vitiate or compromise the right to fair hearing. The Mutunga Rules also recognize that though a petition may be heard through oral evidence, it is not an automatic right but an avenue to be used where there are real contested matters of fact that cannot be resolved through affidavit evidence. She avers that in the petition before court presently the questions for determination are:
- a. Whether the structure being constructed by the 1st respondent on the suit land is being constructed on riparian land;
 - b. Whether the land created and lying between the suit land and the shores of the Indian ocean is riparian zone and public land; and
 - c. Whether the construction by the 1st respondent is being undertaken outside the suit land.
4. She asserts that the questions above has been settled by the Surveyors' report which report is not contested and the evidence can be addressed through affidavit and submissions without cross-



examining the surveyor; that the issue as to whether the 1st respondent has carried out public participation in applying for the EIA License or whether the said license was issued properly is a matter that can only be proved through the true production of documentary evidence by the 1st and 2nd respondents and no amount of cross-examination of the petitioner or petitioners' member, Deborah Coulson, would add any probative value to the 1st respondent's case; that the issue of the deponent's position within the association and the capacity of the petitioner and its officials to bring the suit have previously been raised in a Notice of Preliminary Objection and they were settled by a ruling delivered by this court on 13 July 2023; that the National Land Commission is not a party to the petition and no cause of action arises against it and therefore the request to Umi Kugula has no legal basis. It is also argued that if the construction on riparian zone was authorized by NLC, it is incumbent upon the 1st respondent to adduce evidence to that effect and exhibit the appropriate approvals which the 1st respondent has failed to do. In the circumstances the 1st respondents' application has not fulfilled the threshold for the calling of viva voce evidence as seen in *Attorney General and Another Vs Uasin Gishu Memorial Hospital Limited and Another* 2021 eKLR and *Kibos Distillers Limited & Others Versus Benson Ambuti Adega & 3 Others* 2020 eKLR, and it ought to be dismissed.

Analysis and Determination

5. Rule 20 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, provides as follows:

“20.

- (1) The hearing of the petition shall, unless the Court otherwise directs, be by way of—
 - (a) affidavits;
 - (b) written submissions; or
 - (c) oral evidence.
- (2) The Court may limit the time for oral submissions by the parties.
- (3) The Court may upon application or on its own motion direct that the petition or part thereof be heard by oral evidence.”

6. Under Rule 20 therefore, the hearing of constitutional petitions is either by way of affidavits, written submissions or oral evidence. However, the Court may upon application, or on its own motion direct that a petition or part thereof be heard by oral evidence.
7. It thus needs not be gainsaid that in practice here in Kenya the default setting is that in petitions hearing is by way of affidavit evidence and written submissions unless a party applies or the court makes an order for the adducing of viva voce evidence. The default setting for the disposal of ordinary suits on the other hand is the calling of viva voce evidence unless the court otherwise orders or parties consent on some other method for example, affidavit evidence or admission of statements without cross examination.



8. In *Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others* [2020] KECA 875 (KLR) the Court of Appeal stated as follows:

“If a party applies to court for viva voce evidence to be taken, the court ought to carefully consider the application and if persuaded to conduct the hearing by way of viva voce evidence unless for reasons to be recorded the court direct otherwise.”

9. The 1st Respondent implores the Court to hear the Petition by way of viva voce evidence for the reasons that Article 50 (1) guarantees her a right to a fair and public hearing; and that Order 18 rule 3 and Order 19 rule 1 grants the court authority to call a witness to be examined in court. Those specific provisions read as follows: -

Witnesses to be examined in open court [Order 18, rule 3]

The evidence of the witnesses in attendance shall be taken orally in open court in the presence of and under the personal direction and superintendence of the judge.

Power to order any point to be proved by affidavit [Order 19, rule 1]

Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable:

Provided that where it appears to the court that either party bona fide desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.

10. Ordinarily, a constitutional petition, in which oral evidence is rarely called, is not an ideal forum for investigating and determining contentious issues of fact. A constitutional petition is usually premised on an established factual matrix that mostly calls for the interpretation of whether in the context provided any constitutional provisions or rights have been infringed. See: *Petro Oil Kenya Limited v Kenya Urban Roads Authority* [2018] eKLR; *Sanghani Investments Ltd -vs- Officer in Charge Nairobi Remand and Allocation Prison* [2007] 1 E.A 354. It is solely on the basis of that established factual matrix that the court will issue its decision.
11. Thus it is clear from earlier decisions that the default manner of disposal of petitions is by way of affidavit evidence and written submissions, and though it is within the right of a petitioner to apply for leave of court to have a petition be disposed of by way of viva voce evidence, the Court’s choice regarding the mode of hearing to be applied to any petition is, in my view, purely a discretionary issue, and should be exercised on a case by case basis.
12. In *Kibos Distillers Limited* (supra) the Court of Appeal stated as follows:
- “The three appellants have not indicated the nature and type of witnesses and evidence that they would have called for the trial court to consider if viva voce evidence was necessary. The three appellants have not demonstrated what prejudice they have suffered as a result of the trial court not taking viva voce evidence.”
13. That the court’s discretion must be exercised judiciously is to be emphasized as judicial time is a valuable resource and orders should not be made which unnecessarily risk protracting the delay of litigation before court.



14. I have keenly perused the reasons given by the 1st Respondent, under paragraph 8-13 of the supporting affidavit and I must thus delve into them substantively. Whether the building can be described as a huge multi-storey structure can be clarified by evidence from the respondents and in this court's view it matters not what is contained in the affidavit of paragraphs 4,5,6,7 and 8 of Damien Davies' affidavit of 30th January 2023. Damien Davies, being an official and having the mandate of the association to receive complaints, and the respondents being in a position to address comprehensively by their own witnesses the nature of the construction they are undertaking, it is a matter of secondary consequence that such report appears to be hearsay; the notable thing is that it was made to an official of the association. Whether that person who made it is still alive is irrelevant for the purpose of the hearing and disposal of the petition if the facts he or she made a report of can be verified by other means. I am not convinced that Deborah Coulson needs to be called to testify about such an issue that can be so clearly established by the evidence of the 1st respondent.
15. Regarding the evidence of Luke Omondi, I am also of the view that to have him summoned in order for her to hear his view regarding the ability of the minister to enlarge or reduce the foreshore, or to determine whether the mentioned EMCA Regulations are a valid source of law in Kenya, is superfluous as that is a matter within the realm of the interpretation of law, regardless of the training Luke Omondi has; this court is certain that the legal expertise of the respondents counsel is capable of handling those issues.
16. Lastly, it is for the 1st respondent to establish that the project is not situate on government land. Summoning of Umi Kugula from the NLC while NLC is not a party may not help the 1st respondent as each party's case rises or falls on the strength of their evidence as presented before court.
17. Consequently, I am satisfied that the issues raised by the applicant in the present application can satisfactorily be addressed or established by way of affidavit evidence which the court will have the opportunity to scrutinize thoroughly before giving its verdict. Therefore, I do not find any plausible explanation warranting the court to order that the Petition be heard by way of viva voce evidence or the named persons be summoned.
18. The upshot of the foregoing is that the application dated 13th May 2024 lacks merit and the same is hereby dismissed with costs to the respondents. As this matter is scheduled for hearing on 3/6/2025, all parties shall file and serve their comprehensive written submissions, the petitioner within 10 days of this order and the respondent within 10 days of service. The parties shall be allocated a limited time for highlighting the same on 3/6/2025.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 12TH DAY OF MAY 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

