



**Kimani & 2 others (Suing as Chairman, Treasurer and Secretary of Ol Kalou Town Council Quarry Owners Association SHG) v County Government of Nyandarua (Environment & Land Petition E002 of 2023) [2025] KEELC 4932 (KLR) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4932 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA  
ENVIRONMENT & LAND PETITION E002 OF 2023**

**JM KAMAU, J**

**JUNE 26, 2025**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL  
RIGHTS AND FREEDOMS UNDER ARTICLE 2,19,201,21,22,23,40,  
AND 60 OF THE CONSTITUTION OF KENYA, 2010 OF KENYA**

**AND**

**IN THE MATTER OF SECTION 40(1) OF THE PHYSICAL AND  
LAND USE PLANNING ACT, 2019 CAP 286 LAWS OF KENYA**

**BETWEEN**

**JOSEPH MWANGI KIMANI ..... 1<sup>ST</sup> PETITIONER  
SAMUEL IKINYA ..... 2<sup>ND</sup> PETITIONER  
CHARLES MURIITHI NDEGWA ..... 3<sup>RD</sup> PETITIONER  
SUING AS CHAIRMAN, TREASURER AND SECRETARY OF OL KALOU  
TOWN COUNCIL QUARRY OWNERS ASSOCIATION SHG**

**AND**

**COUNTY GOVERNMENT OF NYANDARUA ..... RESPONDENT**

**JUDGMENT**

1. The Petitioners herein filed an Amended Petition dated 19<sup>th</sup> September 2023 and amended on 14<sup>th</sup> May 2023, describing themselves as engaging in the trade and business of extracting and selling of quarry products and/or natural resources in Muthaiga area, Ol Kalou sub-county in Nyandarua County and thereafter sell the products elsewhere in the Republic of Kenya.
2. The Petitioners aver that they are entitled to participate in the legislative and policy formulations on the extraction of natural resources and selling of quarry products by the Respondent in line with Articles



- 196 and 201 of *the Constitution* of Kenya, 2010, sections 87, 88 and 89 of the County Government Act and section 127 of the Standing orders.
3. According to the Petitioner, the Respondent has passed a resolution that is geared towards converting their mining land into private residential settlement thereby inhibiting the Petitioners from their operations and violating their rights.
  4. The suit land is now set to be used for residential purposes, when it has been commercial and utilized for stone mining activities, which will cause a health hazard to the settlers who will be exposed.
  5. That Nyandarua County is not vested with powers under Section 40(1) of the Physical and Land use Planning 2019 to undertake the sections of converting land use as enshrined in the newspaper publicized notices.
  6. Therefore, the Petitioners aver that they have been subjected to discrimination, hence exposing them to a real risk of closure of business and loss of livelihood, hence contravening their right to protection of property under Article 40 of *the Constitution* of Kenya, 2010 and their right to fair administrative action under Article 47 of *the Constitution* by refusing or failing to consult with them and failing to recognize that the suit land is under active utilization by the Petitioners.
  7. The Petitioners therefore pray for the following orders:
    - i. A Declaration do issue that the proposed regulations are unlawful, unconstitutional, void ab initio in so far as the same did not follow the rules of public participation in accordance with Articles 40(1) of the *Physical and Land Use Planning Act* 2019 and Section 127 of the Standing orders.
    - ii. A conservatory order be issued staying the enforcement or implementation of the regulations in relation to completion of County Physical and Land Use development plan in so far as the same relates to the change of user for Muthaiga plots on extraction of quarry products.
    - iii. The Respondent be restrained from enacting any legislation on completion of County Physical and Land Use Development Plan for the conversion of all that land located within Muthaiga area from Commercial to Private without following the procedure set in *the Constitution*.
    - iv. The costs of the Petition be borne by the Respondent.
  8. The Respondents filed a replying sworn by Josephine Muiru, the Chief Officer under the Department of Lands, Physical Planning and Urban Planning, County Government of Nyandarua on 28<sup>th</sup> August 2024, making no admission to the averments in the Petition, and stating that the Petitioners have not annexed documents to prove their allegations.
  9. She further deposed that upon devolution, several developments have been prepared with the aim of organizing and controlling development of Ol Kalou township, and that the approved development plan of 1997 shows that the site has been designated and or reserved as the town council quarry and thus is public land.
  10. Their case is that the Respondent embarked on stakeholder engagement with the aim of collecting opinions and proposals from members of the public to enable the same to be incorporated into its first draft plan, on the dates of 21<sup>st</sup> February 2022 and 21<sup>st</sup> June 2023 respectively. A further public baraza was conducted on 13<sup>th</sup> October 2023 for public participation on the same.
  11. That the Respondent published notice of preparation of a county physical and land use development plan in the attached Gazette notice and Newspaper notice as required by Article 40 of *the Constitution*



- of Kenya, 2010 of Kenya. The said notice stipulated that the plan was available at the respondent's offices for public inspection, free of charge and any person who wished to make any representation or objection was to make such within sixty days in writing, and that the said notice.
12. Further, that the said notices published do not in any way imply allocation but are a communique of an ongoing planning process.
  13. The Respondent stated that it is their responsibility to regulate land use and prepare local physical and land use development plans as envisaged under Article 66(1) and Section 46 of *the Constitution* and the Physical Land Use and Planning Act respectively, stating that they have followed due procedure as per the law.
  14. The Respondent denies that they intend to reallocate the area, stating that the Petitioners' dispositions are misguided and misinformed, and that the Petitioners have not annexed any evidence of the same, praying that the Petition be dismissed with costs.
  15. For Counsel for the Petitioners, one of the main contentions raised is that the public participation done by the Respondent did not follow the law as required by Article 10, 196(1) and (2) of *the Constitution*.
  16. Counsel relied on the case of British American Tobacco Kenya PLC v. Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (interested parties); Mastermind Tobacco Kenya Limited (Affected Party) (Petition 5 of 2017) (2019) KESC 15 (KLR) (26<sup>th</sup> November 2019) (Judgment).
  17. The Petitioners claim that the form of the notice posted on the Daily Nation on 3<sup>rd</sup> November 2021 alleging the intention to plan is not very clear and does not disclose which property within the town would be affected by the said plan.
  18. Further, they submit that it cannot be presumed that all members of the public have access to the newspapers, averring that there is no evidence that the affected stakeholders were informed by the plan in the letter dated 21<sup>st</sup> February 2022, which was addressed by the government officials to the members of the public, residents or business owners to attend the same meeting to be sensitized, who do not represent the majority of stakeholders.
  19. The Petitioners therefore concluded that there is no sufficient evidence that public participation was conducted as according to Section 40(2) of the *Physical and Land Use Planning Act*, contending that the said proposed regulations are therefore unlawful, unconstitutional and void ab initio.
  20. The Petitioners aver that the Respondent cannot represent the interests of the quarry community and then again change their mind to convert public land for private purposes and it cannot be said that the Petitioners do not have any interests and rights to protect.
  21. It is Counsel for the Respondent's submission that the suit area was designated and reserved as a town council quarry in the 1997 development plan and that the Petitioners have not produced any documents i.e. allotment/allocation letters, title deeds to prove ownership.
  22. Submitting that it is trite law that he who alleges must prove, Counsel quoted Sections 107, 109 and 112 of the *Evidence Act*. They also relied on the authority of the case of John Mukora Wachuhi v. Minister for Lands & 6 others (2013) KEHC 5938 (KLR).
  23. The Respondent states that it is mandated to regulate land use under Article 66(1) of *the Constitution* and the 4<sup>th</sup> Schedule thereof and that Section 46 of the *Physical and Land Use Planning Act*, 2019 provides that a county government can prepare a local physical and land use development plan for regulating land use and development as well as the provisions of Section 36 and 37 of the said Act.



24. Their submissions are guided by the above-mentioned laws and the need to revise the plan, the Respondent through the Department of Lands, Physical Planning and Urban Development embarked on the preparation of the Ol'Kalou Municipality Integrated & Strategic Urban Development and published their intention on the plan in the Daily Nation of 3<sup>rd</sup> November 2021, inviting stakeholders' engagement to collect opinions and proposals.
25. That in accordance with Article 40 of *the Constitution* of Kenya, 2010, the Respondent published the draft plans in the local dailies and in the Kenya Gazette, specifying where the public could access them for inspection.
26. Thereafter, the Respondent submits that she conducted a public baraza on 13<sup>th</sup> October 2023 to address the representations that had been made by the public.
27. The Respondent concluded that she has proved that public participation has been done and they also submit that the process of the proposed re-planning is not yet finalized, that the Petitioners were given adequate opportunity to participate in the planning process and this is evidence of public/stakeholder participation. Further, that the said plan does not in any way implicate allocation and change of user of any parcel of land as alleged by the Petitioners.
28. On the matter of costs of the Petition, the Respondent submits that the Petitioners have not proved their case on a balance of probability and that they should bear the Respondent's costs thereof.
29. The Petition herein challenges the development plan prepared by the Respondent to control the development of the suit property, which the Petitioners state is a mining area for quarry materials and their source of livelihood. They claim that their right to protection of property under Article 40 of *the Constitution* of Kenya, 2010 and their right to fair administrative action under Article 47 of the, 2010 have been infringed by refusing or failing to protect their property and failing to consult with them.
30. On the other hand, the Respondent contends that the suit property is public land, and that public participation was duly conducted.
31. The following issues call for determination:
  1. Has the Petition met the threshold for a constitutional Petition?
  2. Did the Respondents have a duty to conduct public participation before preparing the impugned development plan?
  3. Are the Petitioners entitled to the prayers sought?

### **1) Has the Petition met the threshold for a constitutional Petition?**

32. The Respondents contend that the Petition has not met the threshold of a constitutional Petition. constitutional Petitions are premised on Article 22, 23 and 165 of *the Constitution* of Kenya, 2010 of Kenya. Article 22(1) provides as follows:

Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”
33. In order to receive the legal relief afforded by a constitutional Petition, it is trite law that anyone seeking Declaration from the High Court that their rights have been infringed must specifically state which



rights have been infringed and how they have been infringed. In the case of: Anarita Karimi Njeru v Republic [1979] eKLR the Court held that:

We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution* of Kenya, 2010, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

34. The Petitioners have clearly listed violations of their rights under Articles 40 and 47 and violations against the principle of public participation in Articles 196 and 201, this is a reasonable degree of precision.

35. In the Court of Appeal case of Mohamed Fugicha v Methodist church in Kenya (suing through its registered trustees) & 3 others [2016] eKLR it was stated that:

We are quite clear in our minds that whereas the Hon. the Chief Justice in making the Rules did set out what a petition ought to contain, it cannot have been his intention, and nor could it be, in the face of express constitutional pronouncement, to invest those rules with a stone cast rigidity they cannot possibly possess. It seems to us unacceptable in principle that a creeping formalism should be allowed to claw back and constrict the door to access to justice flung open by *the Constitution* when it removed the strictures of standing and formality that formerly held sway. We apprehend that the primary purpose of pleadings is to communicate with an appreciable degree of certainty and clarity the complaints that a pleader brings before the court and to serve as sufficient notice to the party impleaded to enable him to know what case to answer. Within that general rubric of notification to court and respondent, *the Constitution*, if it says anything at all on this subject, clearly does not lionize form over substance.

36. Thus, while ANARITA and other cases decided prior to *the Constitution* of Kenya, 2010 were decided correctly in their context with their insistence on specificity, the constitutional text now doubtless presents an epochal shift that would preserve informal pleadings that would otherwise have been struck out in former times. We are satisfied that there was no doubt at all as to what Fugicha’s complaints were, against whom they were, and the provision of *the Constitution* he alleged had been violated or contravened.”

37. This Petition therefore passes the threshold of being a constitutional Petition for laying its basis on constitutional provisions.

## **2) Did the Respondents have a duty to conduct public participation before preparing the impugned development plan?**

38. Public participation is premised on Article 10(2) of *the Constitution* of Kenya, 2010 of Kenya (2010), which is one of the constitutional reliance of the Petitioners and it provides that;

“The National values and principles of governance include:

(a) Patriotism, national unity sharing and devolution of power, the rule of law democracy and participation of the people...”

39. Article 196 of *the Constitution* of Kenya, 2010 provides that:

A county assembly shall—



- (a) conduct its business in an open manner, and hold its sittings and those of its committees, in public; and
- (b) facilitate public participation and involvement in the legislative and other business of the assembly and its committees”

40. Section 40 of the *Physical and Land Use Planning Act* CAP 303 provides that:

Within thirty days of the preparation of a county physical and land use development plan, the county planning authority shall publish a notice in the Gazette, in at least two newspapers of national circulation and through electronic media informing the public that the draft county physical and land use development plan is available at the places and times specified in the notice.”

41. The Petitioners relied on the authority in the Supreme Court case of *British American Tobacco Kenya, PLC formerly British American Tobacco Kenya Limited v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (Affected Party) (Petition 5 of 2017) [2019] KESC 15 (KLR)* where the Learned Judges held that:

.....we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments.”

42. The Respondent contends that the suit property is public land, and that they put out Notices in the Kenya Gazette and the Daily Nation of on 3<sup>rd</sup> November 2021, elaborating the draft plan and inviting the public for stakeholder engagement, with the aim of collecting opinions and proposals from members of the public to enable the same to be incorporated into its first draft plan. Stakeholder engagement meetings were held on the dates of 21<sup>st</sup> February 2022 and 21<sup>st</sup> June 2023 respectively. A further public baraza was conducted on 13<sup>th</sup> October 2023 for public participation on the same.

43. In the Supreme Court case of *British American Tobacco Kenya (Supra)* cited above, the criteria to test whether public participation was sufficiently conducted was given as follows:

...in line with this Court’s mandate under section 3 of the *Supreme Court Act*, we would like to delimit the following framework for public participation:

“Guiding Principles for public participation

- (i) As a Constitutional principle under Article 10(2) of *the Constitution* of Kenya, 2010, public participation applies to all aspects of governance.
- (ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
- (iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this Constitutional principle using reasonable means.
- (iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to ‘fulfill’ a



constitutional requirement. There is need for both quantitative and qualitative components in public participation.

- (v) Public participation is not an abstract notion; it must be purposive and meaningful.
- (vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.
- (vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.
- (viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.
- (ix) Components of meaningful public participation include the following:
  - a. clarity of the subject matter for the public to understand;
  - b. structures and processes (medium of engagement) of participation that are clear and simple;
  - c. opportunity for balanced influence from the public in general;
  - d. commitment to the process;
  - e. inclusive and effective representation;
  - f. integrity and transparency of the process;
  - g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.”

44. After assessing the above criteria, it is my considered opinion that public participation was sufficiently conducted. The Petitioners, as members of the public, were given reasonable notice in a newspaper with wide national circulation and reasonable opportunity to participate in the impugned development plan.

### **3)Are the Petitioners entitled to the prayers sought?**

45. The Petitioners pray for a Declaration that the proposed regulations by the Respondent are unlawful, unconstitutional and void as well as a conservatory order staying the implementation thereof. They also seek that the Respondent be restrained from enacting any legislation on the County and Land Use Development Plan for the conversion of all that land located within Muthaiga area from commercial to private use.

46. The Respondent is mandated under Section 36 of the *Physical and Land Use Planning Act* CAP 303 Laws of Kenya as follows:

Once in every ten years, a county government shall prepare a county physical and land use development plan for that county.”

47. Further, Section 46 provides that:

A county government shall prepare a local physical and land use development plan for—

- (a) zoning, urban renewal, or redevelopment;



- (b) guiding and coordinating the development of infrastructure;
- (c) regulating the land use and land development;
- (d) providing a framework for coordinating various sectoral agencies; and
- (e) providing a framework and guidelines on building and works development in the city, municipality, urban area, or other smaller urban centres including local centres, and market cent.”

48. The Respondent acted well within her mandate in preparing the physical and land use development plan and in drafting regulations pertaining to the same. There is also no proof adduced by the Petitioners that the Respondent wishes to convert public land into private use as alleged. Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya provides as follows: -

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.”

49. This Petition therefore lacks merit and is hereby dismissed. Each party to bear its own costs.

**JUDGMENT DATED AND DELIVERED AT NYANDARUA THIS 26TH DAY OF JUNE 2025.**

**MUGO KAMAU**

**JUDGE**

In the presence of: -

Court Assistant –Samson.

Applicants’ Counsel -

Respondent’s Counsel –

