



Center for Litigation on Environment and Governance (CLEG) (Suing on Behalf of Fulgence Nwanyalo Kisomba) v County Government of Mombasa & 2 others; Attorney General of the Republic Of Kenya & another (Interested Parties) (Environment and Land Petition E004 of 2005) [2025] KEELC 6752 (KLR) (8 October 2025) (Ruling)

Neutral citation: [2025] KEELC 6752 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND PETITION E004 OF 2005**

SM KIBUNJA, J

OCTOBER 8, 2025

BETWEEN

**CENTER FOR LITIGATION ON ENVIRONMENT AND GOVERNANCE
(CLEG) (SUING ON BEHALF OF FULGENCE NWANYALO
KISOMBA) PETITIONER**

AND

**COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT
COAST REGIONAL SURVEYOR, MINISTRY OF LANDS 2ND RESPONDENT
MOMBASA COUNTY LAND ADJUDICATION AND SETTLEMENT
OFFICER 3RD RESPONDENT**

AND

**ATTORNEY GENERAL OF THE REPUBLIC OF KENYA INTERESTED PARTY
COMMISSION ON ADMINISTRATION OF JUSTICE INTERESTED PARTY**

*(2nd & 3rd Respondents' and 1st Interested Party's
Notice of Preliminary Objection Dated 27th May 2025)*

RULING

1. The petitioner filed the petition dated the 21st May 2025, seeking for various reliefs including declarations under Articles 27, 40, 42, 43(1)(b), 47, 57(b) & (c), 62(4) & 232(1) of the Constitution, and orders stopping further development on access roads to plots Nos. 1683 and 1693 in Ziwa La Ngombe among others. Filed contemporaneously is the notice of motion of even date seeking for among others:



- a. An order prohibiting the respondents from undertaking any further developments on any access roads on plots Nos. 1683 & 1693, Ziwa La Ngombe, pending hearing and determination of the application and thereafter the petition, and
- b. An order directing the respondents to undertake a full ground survey on all access roads to the said plots, and demarcate the plots' boundaries and the report thereof be submitted to court, pending the hearing and determination of the application and petition.

In opposition to the petition and application, the 2nd & 3rd respondents and 1st interested party filed grounds of opposition dated the 27th May 2025 and notice of preliminary objection of even date.

2. When the matter came up for inter parties hearing of the application on the 9th July 2025, the court was informed that the petitioner, 2nd & 3rd respondents and 1st interested parties had filed their submissions on the preliminary objection. Mr. Ragen, representing the petitioner and Mr. Penda for the 2nd & 3rd respondents and 1st interested party and Mr. Makori for 1st respondent agreed that a ruling date on the same be fixed. The 1st respondent was given seven days to file and serve their submissions.
3. The notice of preliminary objection dated 27th May 2025 raises four grounds that are summarized as follows:
 - a. That the petitioner lacks the locus standi to institute and sustain the suit in a private capacity for private remedies in respect of a third party against the 2nd & 3rd respondents and 1st interested party on account that the petitioner does not have a power of attorney neither is he an advocate of the High Court of Kenya.
 - b. That the petitioner has instituted this constitutional petition before exhausting the available statutory remedies on establishment and maintenance of roads of access, and or access orders provided in the Physical and Land Use Planning (Development Control Enforcement) Regulations 2021, as well as the *Public Roads and Roads of Access Act* chapter 399 of Laws of Kenya.
 - c. That the petitioner's claim of violations under Articles 27, 35, 40(1) & (3), 42, 43(1)(b), 57 and 47(1) & (2) of the *Constitution* against the 2nd & 3rd respondents and 1st interested party has not been sufficiently pleaded to the threshold set in Anarita Karimi Njeru versus Republic [1979] eKLR.
 - d. That the suit is otherwise frivolous, vexatious and an outright abuse of the court process.
4. The petitioner filed their submissions dated the 19th June 2025, while the learned counsel for 2nd & 3rd respondents and 1st interested party filed theirs dated 2nd July 2025 which the court has carefully considered. I have perused the record and no submissions had been filed by the learned counsel for the 1st respondent by 16th July 2025 when the seven days granted on 9th July 2025 was lapsing.
5. The following are the issues for the court's determinations on the notice of preliminary objection dated 27th May 2025:
 - a. Whether the petitioner is with locus standi to file and sustain this petition and application.
 - b. Whether the petitioner has exhausted the available statutory dispute resolution remedies before filing the petition before this court.
 - c. Whether the petitioner's constitutional claim meets the threshold of particularity set in the case of Anarita Karimi Njeru versus Republic [1979] eKLR.



- d. Whether the petitioner's claim is frivolous, vexatious and an abuse of court process.
6. The court has given due considerations to the grounds on the notice of preliminary objection, submissions filed, the pleadings in both the petition and application, and come to the following determinations:
- a. It is trite that a preliminary objection must be correctly raised and qualify the principles set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd versus West End Distributors Ltd* (1969) EA 696, where Law J A stated that;

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract, giving rise to the suit to refer the dispute to arbitration.”

Sir Charles Newbold P. further held;

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

In the case of *Oraro versus Mbaja* (2005) 1 KLR 141, the court held that:

“I think the principle is abundantly clear. A preliminary objection correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which court should allow to proceed. I am in agreement with learned counsel, Mr Ougo, that ‘where a court needs to investigate facts, a matter cannot be raised as a preliminary objection’. This legal principle is beyond dispute, as there are divers weighty authorities carrying the message.”

- b. The first issue for determination is whether the petitioner is with capacity/locus standi to institute and sustain this petition as filed. The learned counsel for the 2nd & 3rd respondents and 1st interested party has among others submitted that the *Constitution* and the Mutunga Rules do not permit non-recognised entities like the petitioner to institute suits/petitions against third parties for the remedies to be granted to third parties. That the petitioner has not demonstrated that Fulgence Mwanyalo Kisomba, the landowner, is unable to institute the petition, or to execute a power of attorney in its favour to prosecute it. That the petitioner is



therefore a busy body and the petition a non-starter, an abuse of court process and should be dismissed.

- c. Though the 2nd & 3rd respondents and 1st interested party were expected to file their submissions in support of their preliminary objection before the petitioner, it was the latter that did so first. On the ground of locus standi, the petitioner inter alia submitted that it is with capacity within the meaning of Articles 22 & 23 of the Constitution, as it is so authorised by Fulgence Mwanyalo Kisomba, through his letter marked “K35” that is attached to the supporting affidavit. That Fulgence Mwanyalo Kisomba owns plots numbers 1683 & 1693, Ziwa La Ngombe, whose access has been obstructed since 2014, by unscrupulous developers known and protected by the respondents, who have developed structures on the access roads. That Fulgence Mwanyalo Kisomba is 75 years old and has been condemned to perpetual poverty by being denied access to his plots and is unable to afford an advocate to represent him but the petitioner, a human rights organization, has stepped in with his permission. The petitioner further submitted that the letter by the 1st respondent that is annexed to the supporting affidavit marked “K8”, that is addressed to 17 plot owners who had encroached on the road of access, confirms this petition has a public interest component. That the impact of the 17 plot owners’ buildings on the access roads hinders the access rights of other plot owners and general public, a fact the 1st respondent had acknowledged through their above letter.
- d. Flowing from the facts and submissions by the parties as summarized in (b) and (c) above, it is not difficult finding that though locus standi is essentially a question of the law, evidence is needed in this case in deciding whether the petitioner is with capacity to institute and sustain this suit. Locus standi is therefore a ground that in this instance could best be raised through an application that is supported by an affidavit, instead of a notice of preliminary objection, hence giving the opposing party an opportunity to present their evidence through a replying affidavit. The way the ground of locus standi has been raised in the instant scenario runs afoul the test laid in the case of Mukisa Biscuit Manufacturing Co. Ltd versus West End Distributors Ltd [supra], and the preliminary objection fails on that ground.
- e. The second issue is whether the petitioner had exhausted the available statutory dispute resolution remedies before filing the petition before this court. The learned counsel for the 2nd & 3rd respondents and 1st interested party has inter alia submitted on the available dispute resolution mechanisms under the Physical and Land Use Planning Act, specifically that the petitioner ought to have lodged a complaint with the County Director of Planning and Land Use, before coming to court. The petitioner has among others, submitted that it does not seek to construct roads of access on the suit properties, and the doctrine of exhaustion does not apply. Further, that the Mombasa County Physical and Land Use Planning Liaison Committee is yet to be operationalized, a fact captured in Mombasa ELCEPPET No. E001 of 2024. The position taken by the 2nd & 3rd respondents and 1st interested party could apply had the petition been against the other property owners whose developments have encroached onto the roads of access. The petition herein is against the County Government of Mombasa and two other public offices as 1st to 3rd respondents, and the reliefs sought includes declaratory orders. The 1st respondent is alleged to have received the complaints on encroachment of roads of access and in its letter dated 3rd June 2021 that is marked “K32” and annexed to the supporting affidavit it is clear that demolition was contemplated. It cannot therefore be said that the matter had not been brought to the attention of the County Director of Planning and Land Use, when evidence in the form of correspondence from the 1st respondent points



to the contrary. The petitioner cannot be faulted for approaching the court after waiting for the respondents' to sort out the blockage of the roads of access without any real progress.

- f. On the third issue of whether the petitioner's constitutional claim meets the threshold of particularity set in the case of Anarita Karimi Njeru versus Republic [supra], the petitioner has at paragraphs 39 to 52 of the petition captured the "Legal Foundation of this Petition" citing Articles 2(1), 10(1)(a) & (b), 42(a) & (b), 27(1), (2) & (4), 35, 40(1) & (3), 43(1)(b), 47(1) & (2), 57, 73(2)(c) & (d) and 232(1)(a)(e)(f) & (2) of the *Constitution*, and at paragraphs 54 to 70 set out the alleged violations, which I find sufficiently particularized. The petition should be allowed to proceed to hearing for a determination on merits.
- g. Being mindful that the court does not need to pronounce itself with finality at this interlocutory stage on any issue of laws or facts, as that has to wait for parties to present their evidence and arguments first, and having found inter alia that the question of the petitioner's locus standi would need evidence to be determined; that the petition does not contravene the doctrine of exhaustion; that alleged violations have been sufficiently particularized, then the fourth ground that the petitioner's claim is frivolous, vexatious and an abuse of court process is without merit.
- h. That on the question of costs, and bearing in mind the reliefs sought in the petition, the court is of the view that justice will better be served by an order that costs abide the outcome of the petition.
- i. Flowing from the above determinations on the 2nd & 3rd respondents' and 1st interested party's preliminary objection dated the 27th May 2025, the court finds and orders as follows:
- a. The said preliminary objection is without merit and is hereby rejected.
 - b. That the costs abide the outcome of the petition.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 8TH DAY OF OCTOBER 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Petitioner : Mr. Ainea Ragen

Respondents : Mr Makori For 1st Respondent

Interested Parties : No Appearance

Kalekye-court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

