



**Mwingi Court Residents Associations v Barasa t/a Gabasa (K)
Enterprises & 3 others (Environment and Land Petition E016 of 2024)
[2025] KEELC 6766 (KLR) (2 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 6766 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND PETITION E016 OF 2024**

AA OMOLLO, J

OCTOBER 2, 2025

**IN THE MATTER OF: ARTICLES 2, 19(1), 20, 22, 23, 24, 27, 40, 42, 47, 66,
69, 70, 162(2)(B), 258 (2) AND 259 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF VIOLATIONS OF ARTICLES 40 & 42

BETWEEN

MWINGI COURT RESIDENTS ASSOCIATIONS PETITIONER

AND

**GABRIEL KHISA BARASA T/A GABASA (K) ENTERPRISES 1ST
RESPONDENT**

TELPOSTA PENSION SCHEME 2ND RESPONDENT

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY
(NEMA) 3RD RESPONDENT**

COUNTY GOVERNEMENT OF NAIROBI 4TH RESPONDENT

JUDGMENT

1. The Petitioners filed this suit against the Respondents vide Petition dated 21st May 2024 seeking for the following orders;
 - a. A declaration that the Petitioner's rights under Article 40 and 42 of *the Constitution* have been violated.
 - b. A declaration that the development. works and construction being undertaken by the 1st and 2nd Respondents on Nairobi/Block 23/ 576 and Nairobi/Block 23/ 577 are a violation of



the Petitioner's right to a clean and healthy environment as enshrined under Article 42 of *the Constitution* as read together with Section 3 of the Environment Management and Co-ordination Act No. 8 of 1999.

- c. A permanent injunction restraining the 1st and 2nd Respondents from continuing with any development, works and/or construction as Nairobi/Block 23/ 576 and Nairobi/Block 23/577 located along Mwingi Road, Kileleshwa Nairobi which is deleterious to the environment and/or out of character with the residential use of the area.
 - d. A declaration that any Environment Impact License issued by the 3rd Respondent in respect Nairobi/Block 23/576 and Nairobi/Block 23/577 located along Mwingi Road, Kileleshwa Nairobi are illegal, null and void and should be quashed, revoked and or expunged.
 - e. A declaration that any change user development permissions granted by the 4th Respondent in respect of Nairobi/Block 23/ 576 and Nairobi/Block 23/ 577 located along Mwingi Road, Kileleshwa Nairobi are illegal, null and void for lack of public participation and violation of Rule (2) Environmental (Impact Assessment and Audit) Regulations, 2003 and Should he quashed, revoked and or expunged.
 - f. A mandatory injunction compelling the 1st and 2nd Respondents to restore the degraded environment by restoring the surrounding environment Nairobi/Block 23/576 and Nairobi/Block 23/577 located along Mwingi Road, Kileleshwa Nairobi to the position as at March 2024.
 - g. A mandatory injunction compelling the 3rd and 4th Respondents to undertake public participation and to consider the environmental impact of any development, construction and/or works which the 1st and 2nd Respondents may wish to undertaken in respect Nairobi/Block 23/ 576 and Nairobi/Block 23/ 577 located along Mwingi Road, Kileleshwa Nairobi and to monitor that the said development, construction and works do not injure the environment.
 - h. Damages against the and Respondents for violation of their constitutional rights provided by Articles 40 and 42 of *the Constitution*.
 - i. Costs of this Petition.
 - j. Such other or further orders as this Honourable Court shall deem.
2. The Petition is grounded on the supporting and further affidavits both sworn by Eunice Nyala on 21st May 2024 and 8th July 2024 respectively. The Petitioner comprises residents of Mwingi Court Estate in Kileleshwa, Nairobi, and they are challenging the ongoing commercial development on plots Nairobi/Block 23/576 and 577 by the 1st and 2nd Respondents.
 3. It states that the area is zoned for low-density residential use. Yet, the developers are constructing a commercial complex without obtaining a change of user license, conducting public participation, and or securing the necessary Environmental Impact Assessment (EIA) license as required under the Environmental Management and Coordination Act (EMCA) and the *Physical and Land Use Planning Act*, 2019.
 4. Despite complaints lodged with the 3rd and 4th Respondents, which are the relevant authorities, no EIA report was published or shared, no development permission was exhibited, and no public engagement took place. The Petitioners stated that the project resumed even after a brief halt, causing nuisance,



- noise, and environmental degradation, and infringing on their constitutional rights under Articles 40 and 42.
5. The Petitioners relied on various constitutional provisions and statutes, including articles 10, 22, 23, 42, 47, 70, and 258 of *the Constitution*, which safeguard property rights, the right to a clean and healthy environment, and access to fair administrative action. Additionally, they cited non-compliance with Sections 3, 58, and 59 of the EMCA, which mandate a publicly advertised EIA process for developments likely to affect the environment, and Section 57 of the *Physical and Land Use Planning Act*, which prohibits developments without prior approval.
 6. The Petitioners argue that the Respondents have violated environmental and planning laws, denied procedural fairness, and contravened constitutional obligations, thus justifying judicial intervention. They further argued that the 1st and 2nd Respondents have undertaken the construction of an unlicensed and unapproved commercial development within Mwingi Court Estate, a low-density residential area, thereby violating their constitutional rights under Articles 40 and 42.
 7. That the development has caused a general nuisance, noise pollution, traffic congestion, and environmental degradation, all of which restrict the Petitioners' quiet enjoyment of property and significantly reduce its value. They contend that this amounts to an arbitrary deprivation of property rights and an infringement on their right to a clean and healthy environment.
 8. Additionally, that the construction was carried out without the legally required Environmental Impact Assessment (EIA), Environmental Impact License, or public participation. The Petitioners aver that the 1st and 2nd Respondents failed to submit or publish the EIA report as required under Sections 58 and 59 of the Environmental Management and Coordination Act (EMCA).
 8. That also the 3rd Respondent, National Environment Management Authority (NEMA), failed to publicize any EIA report or engage the public, thereby breaching statutory and constitutional obligations. They contend that no change of user or development permission was legally obtained from the 4th Respondent, County Government, and if any was issued, it was done irregularly, unprocedurally, and is therefore null and void.
 9. The Petitioners further argue that their legitimate expectations under Article 232(1) of *the Constitution* were violated. That they expected transparency, accountability, and timely responses from the 3rd and 4th Respondents upon raising complaints and seeking information on the project.
 10. They stated that the failure by public officers to respond or act on their complaints, enforce zoning laws, and ensure lawful development processes constitutes a disregard for statutory mandates and public service values.

2nd Respondent's Replying affidavit

11. In support of the Petition, the 2nd Respondent filed a replying affidavit sworn by Peter K. Rotich confirming ownership of the suit property. He stated that the 2nd Respondent granted the 1st Respondent a license to occupy the property for residential use through a license agreement dated 1st May 2023.
12. That under this agreement, the 1st Respondent was obligated to obtain all necessary statutory approvals, avoid being a nuisance to neighbors, and seek prior written consent before making any structural changes. They stated that in the beginning of March 2024, they received complaints about unauthorized construction works being undertaken by the 1st Respondent. That upon investigation,



- they established that the developments were ongoing without the required approvals and/or their consent, in breach of the license agreement.
13. The 2nd Respondent stated that despite their multiple letters demanding compliance and evidence of approvals, the 1st Respondent failed to respond. They assert that they played no role in obtaining the approvals for change of user or the EIA license thus cannot be held liable for any procedural irregularities and violations of the Petitioner's rights.
 14. The 2nd Respondent stated that the suit properties were leased to the 1st Respondent strictly for residential use, yet commercial developments commenced without the required approvals or consent from the registered owner (the 2nd Respondent), rendering all subsequent approvals null and void. It is alleged that the 1st Respondent failed to comply with the *Physical and Land Use Planning Act*, lacked proper structural approvals, and commenced illegal construction.
 15. Further, the Environmental Impact Assessment (EIA) license was issued contrary to legal requirements, including lack of public participation and publication. The 2nd Respondent denies any concealment or misrepresentation, asserting that multiple attempts were made to obtain information from relevant state agencies, which went unanswered.
 16. They argue that constitutional rights under Articles 40 and 42 were violated and that only this Court has the jurisdiction to address such violations under Article 162(2) and relevant statutes.
 17. Only the Petitioner and the 2nd Respondent filed written submissions which I have read and considered.

Analysis and Determination

Whether the Petitioner's rights under Article 40 and 42 have been violated

18. The Petition pleaded that Article 40 (2)(b) of *the Constitution* provides that no law shall be enacted to restrict the enjoyment of any right to acquire and or own property anywhere in Kenya. Other than pleading that the proposed development will change the character of Mwingi Road and have negative impact on human and vehicular traffic, the Petitioner does not state that the Respondents have expressed intention to take away their property.
19. The changing of character of the environment is not synonymous to restricting the right to acquire or own property. The members of petitioner have not adduced evidence of interference with their individual titles. They have not specified how the impugned development would limit their use & possession of their individual properties. I find there is no proof for violation of rights guaranteed under Article 40 of *the Constitution*.
20. On the rights under Article 42, the development was abandoned midway after the 1st and 2nd Respondents disagreed on the terms of the lease/licence. Hence there is nothing that changes the prevailing status quo the Petitioner's membership are enjoying. They shall apply in the event a development not approved commences on the suit property.
21. Further the 2nd Respondent pleaded and submitted that it was not in anyway involved in the impugned development. Their averments are corroborated by the annexures to the replying affidavit of Gabriel Khisa Barasa. The said annexures confirm the development approval licences were issued to the 1st Defendants.
22. Further, the 2nd Defendant produced a copy of licence agreement executed with the 1st Defendant. The licence agreement clearly stated the premises was to be used for residential and not commercial purposes. Before an approval is given by the 3rd and 4th Respondent, they have to be satisfied by the



ownership documents of the developer. Section 58(4) of the Physical Land Use and Planning Act (PLUPA) states this;

“Where an applicant is not the registered owner of the land for which development permission is being sought, that applicant shall obtain the written consent of the registered owner of that land and the applicant shall provide that written consent to the respective county executive committee member at the time of applying for development permission.”

23. The 2nd Respondent not having given written consent for the proposed commercial development, the 1st and 4th Respondent had obligation/burden to prove on what basis the approval was given. The 1st Respondent admits the licence agreement obligated him to obtain the necessary consents and or change of user. He only applied for consent to change use from the 4th Respondent but not the 2nd Respondent. Thus, the foundation of his application for the change of use was wanting and the 4th Respondent ought not to have granted the change of user.
24. The 1st Respondent displayed the development licenses issued to him by the 3rd and 4th Respondents. Before any of the two licenses are issued, there is a process provided under PLUPA and EMCA to be complied with. Section 58(7) of PLUPA states thus;

“A person applying for development permission shall also notify the public of the development project being proposed to be undertaken in a certain area in such a manner as the cabinet secretary shall prescribe”
22. Under Rule 2 and 17 of the EIA regulations of 2003 the 1st Respondent was required to prepare a project report to be submitted to the 3rd Respondent. The preparation of the project report includes public/stakeholder consultation. Since the Petitioner alleges they were not consulted/engaged, the 1st and 4th Respondent ought to have contradicted such allegation by providing evidence of the public participation. No such evidence was adduced, thus leaving the petitioner’s averment unchallenged.
23. The ripple effect of this failure on the part of the 1st and 4th Respondent evidences contravention of Article 10(2) of *the Constitution* and Section 58 of the *Environmental Management and Co-ordination Act*. Therefore, it gives merit to paragraphs (d) and (e) of the reliefs sought.
24. The Petitioner equally sought restoration orders under paragraph (f) of the reliefs. I have read the Petition and the affidavit sworn in support thereof. There is no description of the damages caused to the suit property or the surrounding areas, which necessitates that this court grant the order for restoration. An order for restoration cannot be anticipatory.
25. The Petitioner asked the court to grant a mandatory injunction to compel the 3rd and 4th Respondents to undertake public participation and consider the impact of the development and monitor it so that it does not injure the environment. Section 58 of EMCA and Section 59 of PLUPA impose a duty on the project proponent to carry out public participation. The law imposes a duty on the approving authority to ensure compliance, but not to undertake public participation on its own.
26. Secondly, I have found that the development permission licenses were irregularly obtained due to lack of consent of the registered land owner as well as want of public participation. For these reasons, the 1st Respondent is not permitted to continue the development until he complies with the law. Since there is no development as of this petition to be monitored by the 3rd and 4th Respondent, there is no basis in granting prayer (g) of the Petition.



27. Lastly, is the question whether damages should be awarded for violation of the constitutional rights under Article 40 and 42. I stated in the earlier paragraphs of this determination that no proof of both Articles. For Article 40, the Petitioner's membership did not demonstrate any loss of use, possession and ownership rights. Similarly, the project construction did not proceed to conclusion. Thus, no breach on the Article 42 rights.
28. It is my considered opinion that the Petitioner has not proved that its members has suffered direct loss for which this court can make an order for payment of damages. Hence no damages are awarded.
29. On the issue of costs, there are several case laws which set precedents that in public interest litigation, costs should not be awarded. For instance, in the case of Harun Mwau and Others vs A. G. and Others [2012]eKLR, where Majanja J. explicitly stated the rationale;
- “In matters concerning P.I.L, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public. Costs should therefore not be imposed on a party who has brought a case against a state and lost.”
30. In the circumstances where the case was brought on behalf of the membership of the Petitioner (public) and the environment, I order each party to bear their respective costs of the petition.

Final Orders

31. Having analysed all the reliefs sought vis a viz the evidence and submissions rendered, I hold that the petition partially succeeds. I hold that prayers (a), (b), (f), (g) and (h) are dismissed for lack of merit. Prayers (c), (d) and (e) are granted. Each party to bear their costs of the Petition.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 2ND DAY OF OCTOBER, 2025

A. OMOLLO

JUDGE

