



**Awino v Githinji; Kimunto & another (Interested Parties) (Environment and Land  
Petition E001 of 2025) [2025] KEELC 7886 (KLR) (13 November 2025) (Judgment)**

Neutral citation: [2025] KEELC 7886 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND PETITION E001 OF 2025  
AA OMOLLO, J  
NOVEMBER 13, 2025**

**BETWEEN**

**FRANCIS AWINO ..... PETITIONER**

**AND**

**JOEL GITHINJI ..... RESPONDENT**

**AND**

**JAZZ KIMUNTO ..... INTERESTED PARTY**

**NATIONAL CONSTRUCTION AUTHORITY ..... INTERESTED PARTY**

**JUDGMENT**

1. Vide a petition dated 8<sup>th</sup> July, 2025, the Petitioner who described himself as the President of the Bunge La Mwananchi, a Social Justice Movement. He sued the 1<sup>st</sup> Respondent who owns the residential multi-storey building located on L.R Nairobi Block 115, Karagita L.R No. 213.5.
2. The Petition is premised inter alia, on articles 10(2) (a), 22, 40,33, 258 and 259(1) of *the Constitution* of Kenya 2010.
3. The petitioner pleads that he has noted overwhelming illegalities and circumvention of the law that was done by the Respondent, Joel Githinji at his multi-storey residential buildings located at Nairobi Block 115, Karagita.
4. Some of the irregularities pointed out included a visible structural crack spanning from the ground floor to the eighth floor and the building lacking a functional lift. Following these findings, the tenants were evacuated on 4<sup>th</sup> September, 2024 under the supervision of local authorities.
5. It is his averment that the building was cosmetically repaired and later re-occupied without any structural integrity certification. That this evidence the Respondents reckless disregard for public



safety and a clear violation of construction safety laws including the Building Code of Kenya (2020), the Occupation Health and Safety Act 2007 and article 42 of *the Constitution*.

6. As a result of the foregoing averments, the Petitioner prays to be granted the following reliefs;
  - a. A declaration that the Respondent violated the Building Code of Kenya (2020) and the Occupation Health and Safety Act (2007).
  - b. A declaration that the Respondent's actions constitute gross negligence and endangerment of human life.
  - c. An injunction barring further occupation of the building until a certified structural audit is conducted and approved by a qualified authority.
  - d. An order compelling the Respondent to provide a detailed and certified structural audit report from a registered structural engineer.
  - e. An eviction order mandating all occupants to vacate the building until safety compliance is achieved.
  - f. An order for damages for emotional distress, inconvenience, and risks suffered by the tenants.
  - g. An order directing the relevant authorities to monitor and enforce compliance with safety regulations on the property.
  - h. Costs of this Petition be borne by the Respondent.
  - i. Any other relief this Honourable Court deems just and appropriate.
7. The Petitioner swore an affidavit dated 6<sup>th</sup> January, 2025 in support of the reliefs sought. The affidavit repeated the facts narrated in the petition.
8. The Respondent opposed the Petition through his replying affidavit sworn on 22nd July, 2025. He denied the allegation that his building is not structurally sound. The Respondent states that his building underwent a structural integrity assessment, and an engineer prepared a report which he annexed as "J.N.I".
9. He deposed that the report arrived at the following conclusion;
  - a. The inspection conducted shows that the building is structurally fit for its purpose.
  - b. The coloumn size of 350 x 200 with reinforcement of 6D16 are adequate and support the eight suspended floors as framed structure.
  - c. The foundation base sizes of 1000 x 1000 x 400 are adequate in supporting the eight (8) floors. This is with masonry wall founded on 600 x 200 strip footing.
  - d. The building is fit for occupation and the owner should be allowed to bring in tenants.
10. The Respondent drew the court's attention to page 7 of the report, which contains the outcome of the test and assessment carried out. It was reported that there were no defects, bending, or sway noted in the building structure. He added that the tenants already occupying the building are doing so based on the structural assessment report, which found that the building is fit for occupation. He urged the court to dismiss the petition for not meeting the threshold of a constitutional petition.



## Submissions:

11. The petition was prosecuted by way of filing of written submissions. The submissions by the petitioner is dated 8<sup>th</sup> July, 2025. He raised the following five (5) questions for determination;
  - i. Whether the Respondent violated statutory and constitutional obligations by re-occupying a structurally compromised building.
  - ii. Whether the actions of the Respondent amount to gross negligence, endangerment of human life, and breach of public duty.
  - iii. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties failed in their statutory oversight responsibilities.
  - iv. Whether the Petition meets the threshold under Articles 22 and 258 of *the Constitution*.
  - v. Whether the Petitioner is entitled to the reliefs sought.
12. On the first issue, the Petitioner restated the provisions of article 42 of *the Constitution* and clause 18.2.4 of the Building Code, 2020. He argues that the building in question does not satisfy the above requirement.
13. In support of his argument, he cited the case of Waweru vs Republic which underscored that the right to housing must be interpreted to include “the right to live in dignity, in a safe and habitable environment.” The Respondent’s action violated this standard.
14. The crack spanning from the ground to the eighth floor is not a minor cosmetic flaw but a sign of possible foundational or vertical load-bearing failure. Continuing occupation in such a context constitutes reckless disregard for life. Section 322 of the Penal Code criminalizes any act or omission that “knowingly or negligently endangers human life.” The Respondent’s knowledge of the danger and subsequent reoccupation meets the threshold.
15. The Petitioner faults the Interested Parties for not carrying out their statutory mandates. He also added that he has locus to bring this petition anchored on the provisions of article 22(1), 258(1) and 70(1) of *the Constitution*.
16. Vide submissions dated 2<sup>nd</sup> July, 2025, the Respondent submitted that this Petition offends the principle of Constitutional avoidance. He restated article 162 (2) of *the Constitution* Section 13 of ELC Act and Section 61 of PAUPA and cited case law to support the argument.
17. He submits that the net effect of this doctrine is that where there are adequate statutory avenues for resolution of dispute, the Constitutional Court ought to defer to the statutory options and decline to entertain the dispute. In essence, therefore, when formulating a claim, a claimant must pursue a statutory relief where it is available through an ordinary suit as opposed to approaching the Constitutional Court. In the same vein, they took cognizance of the case of Sumaayya Athmani Hassan v. Paul Masinde Simidi & Another (2019) eKLR where the Court of Appeal opined as follows;

“ where a legislation has been enacted to give effect to constitutional right, it is not permissible for a litigant to found a cause of action directly on *the Constitution* without challenging the legislation in question.”
18. Further, this petition, albeit crafted under the guise of “Constitutional issue”, ultimately seeks to compel the Respondent to produce a structural audit report which is in the purview of the National Construction Authority or the County Executive Committee.



19. It is apparent that the Petitioner’s argument, being like breach of the obligations under the Building Code of Kenya (2020), the Occupational Health and Safety Act (2007), Section 322 of the Penal Code and Common Law Principles on Negligence, can only be dispensed with in the first instance, through the laid down dispute resolution structures. Thus, they emphatically submit that no constitutional question arises for determination by this Court.
20. On the merit of the Petition, the Respondent submits that, as a general principle, the legal burden of proof rests on the party who invokes the law’s aid and substantially asserts the affirmative of the issue. That is the essence of Section 107(1) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden is placed on any party to prove a particular fact that they wish the court to believe in its existence
21. The Respondent contends that the Petitioner failed to discharge this burden. He also stated that the Petition is based on incorrect facts and unsubstantiated speculation. He argued that it is important to emphasise that, for a cause of action to be definitively established, it must be articulated precisely.

Analysis and determination:

22. There are two questions which frame after analyzing the pleadings and the submissions.

1. Whether the petition offends the doctrine of Constitutional avoidance.

SUBPARAGRAPH 2.

Whether or not there is merit is the Petition.

23. The argument posed by the Respondent is that the dispute/complaint ought to have been lodged under the PLUPA of 2019. He went in to detail to cite cases which has discussed the doctrine of exhaustion.
24. Section 61(3) of PLUPA states thus;  

“ An applicant or an interested party that is aggrieved by the decision of a county executive committee member regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee within fourteen days of the decision by the county executive committee member and that committee shall hear and determine the appeal within fourteen days of the appeal being filed.”
25. This statutory provision relates to challenging the decision of the County Executive Committee Member regarding an application for development. The petition is not challenging any decision but rather the safety of the building. The petitioner alleges the existence of cracks on the building and the lack of a lift, which are issues that, if proved, may have been caused by negligence of the Respondent and/or lack of supervision by the Interested Parties.
26. This same scenario above applies to invoking provisions of section 129 of EMCA as there is no decision of NEMA on licensing being challenged. Hence the preliminary objection anchored on these two statutes is without merit.
27. On whether the Petitioner has locus to lodge the claim, the answer lies in article 22(1) and 42 of *the Constitution*.

“ 22(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—



- (c) a person acting in the public interest.
- 42. Every person has the right to a clean and healthy environment, which includes the right—
  - (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69.”

- 28. Whether this petition is merited, the Petitioner argues that the crack spanning from the ground floor to the eighth floor is not a minor cosmetic flaw. The law of evidence places the burden on the petitioner to demonstrate first the existence of the crack and second that it is a possible foundational or vertical load bearing failure.
- 29. In his affidavit in support of the petition, the petitioner did not give his professional background. Besides quoting the law which the impugned multi-storey dwelling contravenes no expert report was produced. Infact the petitioner did not even present photographic evidence of the alleged cracks.
- 30. At paragraph 6 of the supporting affidavit, he refers to a site visit by the sub-county administrative a representative of the area MCA and a County Engineer following complaints from members of the public. The petitioner did not file a report of the said visit whose findings he deposes to in paragraph 7 and 8 of the affidavits.
- 31. The Respondent, in contradicting these allegations, filed a report prepared by Eng. Bitange Ondira Isaiah in November 2024. The report detailed the assessment carried out on the building.
- 32. The report on page 44 concluded that the building is structurally suitable for its intended use as an eight-storey framed residential structure. No contrary expert opinion was provided by the Petitioner. Therefore, his claim of the building's unsafety remains as "allegations.”
- 33. The Respondent submitted that the Petitioner referenced a non-existent Building Code 2020. It is true there is no Code of 2020, but that there exist a National Building Code 2024, which came into effect in March 2024, replacing the 1968 Regulations.
- 34. The Petitioner referred the court to clause 18.2.4. However, a reading of the 2024 Code shows that Regulation 18 only contains subsections, and it relates to spaces in front of a building. I am unable to determine which regulation the Petitioner intended to reference, as a brief review of this Building Code does not mention any requirement for a structural audit before issuing an occupation licence.
- 35. In conclusion, I hold that the Petitioner did not successfully prove the allegations of constitutional violations outlined in the petition. Therefore, the Petition is dismissed for lack of merit. I award no costs as the petition was brought in public interest.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF NOVEMBER, 2025**

**A. OMOLLO**

**JUDGE**

