



REPUBLIC OF KENYA



KENYA LAW
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**James v County Government of Bungoma & another (Environment and Land
Petition E003 of 2025) [2025] KEELC 7681 (KLR) (6 November 2025) (Ruling)**

Neutral citation: [2025] KEELC 7681 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND PETITION E003 OF 2025
EC CHERONO, J
NOVEMBER 6, 2025**

BETWEEN

LUMBUGU JEFFREY JAMES PETITIONER

AND

THE COUNTY GOVERNMENT OF BUNGOMA 1ST RESPONDENT

TAXAN INVESTMENT LIMITED 2ND RESPONDENT

RULING

1. By a Notice of Motion application under certificate of urgency dated 24th July 2025, the Petitioner/
Applicant seeks the following orders;
 1. (Spent)
 2. That A Conservatory Order be issued restraining the Respondents, their agents or assigns from further disturbing, removing, transporting, disposing or interfering in any manner with the asbestos-containing waste arising from the demolition at Kanduyi Market, Bungoma, pending the hearing and determination of this Application.
 3. That a conservatory Order do issue compelling the Respondents jointly and severally to forthwith secure, collect, identify and remove all hazardous asbestos waste from its current location and arrange for its lawful transportation and disposal at a certified NEMA-approved facility, pending the hearing and determination of the Application.
 4. That a Conservatory Order do issue prohibiting the Respondents whether by themselves, employees or agents from further exposing the public to hazardous asbestos waste or undertaking actions inconsistent with the Environmental Management Statutes, pending the hearing and determination of this Petition.



5. That a Mandatory injunction do issue compelling the Respondents, jointly and severally, to forthwith secure, collect, identify and remove all hazardous asbestos waste from its current location and arrange for its lawful transportation and disposal at a certified NEMA – approved facility, pending the hearing and determination of the Petition.
 6. That the Costs of this Application be provided for.
2. When the application was placed before me sitting as the Duty Judge, I directed that the same be canvassed by affidavit evidence and written submissions.
 3. By way of a response, the 1st Respondent through its County Architect, one John Bayayi Munialo, filed a Replying affidavit sworn on 19/08/2025 and stated as follows;
 1. That the application lacks merit, is frivolous ,an abuse of the court process and ought to be dismissed.
 2. That the applicant is a busy body with no valid interest in the disposal of the said asbestos and or any waste within the site as the Purported letter marked “LJJ-1” was never served to the 1st Respondent to enable him respond to the allegations.
 3. That the Petitioner has not given any grounds upon which he thinks that the asbestos and/or any other waste was unlawfully and/or improperly disposed off.
 4. That in answer to paragraph 4 of the supporting affidavit, I state that;
 - a. The Petitioner/Applicant has not provided any evidence to show that the asbestos –containing materials were removed from the site without visible or recorded compliance with NEMA-licensed.
 - b. In any event, the wastes within the site were never removed from the site but instead are confined within the site and securely buried.
 - c. That the Petitioner has not provided any evidence to show that the said asbestos are improperly disposed hence causing harm and or health safety issues to the public.
 5. That the disposal of the waste was guided by the Environmental Impact assessment (EAI) report as required by the law.
 6. That in answer to paragraph 6, 7, 8 and 9 of the Petitioner’s supporting affidavit, the waste was properly disposed and buried under the ground going 15 meters deep before it was securely and properly covered as per the legal requirements for disposal of asbestos hence no open dumping nor possibilities of exposing the population to risk of asbestos or any other harmful waste from the site. (Attached please find the images of the burial site marked “JBM-1B”)
 7. That the building had already warn off and therefore letting it to continue standing on a public land as dangerous and hazardous to the population around. (Attached is the image of the worn-out building before its demolition marked “JBM-2”)
 8. That in response to paragraph 10 of the Petitioner’s/Applicants supporting affidavit, I wish to state as follows;
 - a. That there is no health safety or any possible harm worth of intervention from the Court as the Respondents have complied with the law.



- b. That there is no irreparable harm to be caused to the public as there are no asbestos openly dumped or transported to any improper site.
 - c. That the few wastes that were existing from the worn-out building and/or structure were securely buried within a day on 22nd June 2024.
 - d. That the Petitioner has not demonstrated that there is likelihood of anyone suffering irreparable harm if the temporary injunction sought are not issued.
 - e. That the project is in its last stages of completion and that there is no harmful waste within the site requiring any order in respect of its disposal. Attached are the images of the completed works as by 4th August 2025 marked “JBM-3A”, JBM-3B” and “JBM-3C”)
9. That the order sought cannot be granted by this Honourable Court as there is no any disposal to be done since there are no lying asbestos at the site capable of being transported or disposed at the moment.
 10. That the application herein is overtaken by events as there are no disposal asbestos at the site capable of being transported or disposed at the site. That by 30th July, 2024 the site was clear and the construction works had already taken shape. (Attached are the clear images of the Kanduyi bus park project ongoing as by July 30th, 2024 marked “JBM-4”).
 11. That the application is contrary to public policy and its meant to frustrate the work of the 1st Respondent for political expediency.
 12. That stopping the ongoing works will negatively impact on Bungoma residents as they will not enjoy the full impact of devolution, especially traders who are looking forward to the completion of the bus park.
 13. That the Petition and the application are motivated by bad faith, malice and political expediency without any regard to the residents of Bungoma who need service delivery.
 14. That the Petitioner has not given any sufficient reasons or justification to warrant the grant of orders sought.
 15. That there is nothing unconstitutional about the ongoing works.
 16. That granting this application will substantially prejudice the interests of the residents of Bungoma County and the 1st Respondent’s development agenda.
 17. That it is imperative and in the interest of justice that the application sought to be dismissed with costs.

Applicant’s Written Submissions.

4. The applicant through the Firm of Githinji & Associates Advocates filed submissions
5. The Applicant through the Firm of Githinji & Associates Advocates filed submissions dated 1st August 2025 on the following issue;



Whether the petitioner has demonstrated sufficient grounds for the grant of conservatory and mandatory injunctive orders to protect the right to a clean and healthy environment under article 42 of the constitution.

6. The learned counsel submitted that the principles for the grant of conservatory orders under Kenyan Law are now settled. He cited Article 23(3) (c) of the Constitution of Kenya which empowers this Honourable court to grant conservatory orders where it is shown that they are necessary to preserve the subject matter pending hearing and determination of the substantive Petition.
7. He further submitted that it is trite law that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the trial court that will ultimately hear the Petition. That at this stage, the Applicant is only required to establish a prima facie case with a likelihood of success. He argued that the Environment and Land Court has consistently held that before granting a conservatory order in Environment and Land matters, an applicant must meet the following threshold;
 - a. A prima facie case with a likelihood of success.
 - b. Demonstrate a real risk of irreparable harm if interim orders are withheld.
 - c. Demonstrate that the Petition would be rendered nugatory if the order is not granted.
 - d. Show that public interest favours protection of the right in question.
8. The Applicant relied in the following cases; George Mike Wanjohi v Steven Kariuki & 2 Others (2014) KLR; Wilson Bursen Mokuia v Central Conference of the Seventh Adventist & Another (2021) KLR; Satrose Ayuma & 11 Others v Registered Trustees of Kenya Railways Staff Retirements Benefits Scheme (2011) KLR; Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others (2013) KLR; In Attorney General v Matindi & 55 Others (2023) KECA 1475 (KLR); Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others, Supreme Court of Kenya, Petition NO.2 of 2014 (U.R); Seli & 10 Others v Nairobi County Government & 8 Others (2024) KEELC 5998 (KLR); Robert Njenga & Daniel Irungu Maina v Sylvester Njihia Wanyoike & Bahati African Ltd; National Environment Management Authority (Interested Party) (2020) KEELC 1864 (KLR)

1st Respondent's Submissions

9. The Respondent also through its County Attorney Abigael N. Walaka filed written submissions dated 19th August 2025. According to the 1st Respondent, the Applicant has not established a prima facie case as she has not demonstrated that any harm has been occasioned that is worth the orders sought. She relied in the following cases; Mrao Ltd v First American Bank of Kenya & 2 Others (2003) KLR 125; Kenleb Cons Ltd v New Gatitu Service Station Ltd & Another (1990) KLR; Showind Industries v Guardian Bank Limited & Another (2002) 1EA 284;
10. On whether the Applicant will suffer irreparable injury/loss that cannot be compensated by an award of damages if the orders of injunction is not granted, the 1st Respondent answered in the negative and submitted that the building was already old and posed great danger if not brought down and/or demolished. She argued that the plaintiff/Applicant cannot claim that he will suffer irreparable loss incapable of compensation by an award of damages as the worn out building is already demolished and the waste buried under the ground as per the healthy and safety procedures. She cited the case of; Habiba Ali Mursal & 4 Others v Mariam Noor Abdi (2018) eKLR.



Legal Analysis and Decision

11. I have considered the Notice of Motion application, the supporting affidavit, the Replying affidavit, the rival submissions and the relevant law. The present application is brought under Articles 22, 23 42 and 70 of *the Constitution* of Kenya 2010, Rules 4, 23 & 24 of *the Constitution* of Kenya (protection of Rights and Fundamental Freedoms) practice and Procedure Rules 2013, the *Environment and Land Court Act* and Section 3, 58 and 89 of Environmental Management Coordination Act (EMCA). It seeks a conservatory order restraining the Respondents, their agents or assigns from further disturbing, removing, transporting, disposing or interfering in any manner with the asbestos-containing waste arising from the demolition at Kanduyi Market Bungoma pending the hearing of the application inter-partes and the main Petition.
12. From the supporting affidavit to the present application, the Applicant deposed that on or about the period between 1st January and 26th April 2024, the 1st Respondent awarded the 2nd Respondent a construction tender at Kanduyi Market which contract entailed demolition of old Market structures containing asbestos. He stated that under EMCA and its subsidiary regulations, asbestos is classified as hazardous substance requiring strict adherence to safe removal, handling, transportation and disposal protocols exclusively by NEMA licensed persons/entities. That he has observed and obtained information confirmed by site visits and documentary evidence that asbestos-containing materials were removed from the site without visible or recorded compliance with NEMA licensing, environmental audits or documentation that would provide assurance of safe handling and disposal and that neither NEMA-licensed handlers nor records of lawful disposal at designated facilities have been disclosed or made available to him the public despite written requests to the County Attorney, Bungoma. He annexed a copy of the letter dated 16th June 2025 as LJJ-1. At paragraph 7 (b) & 8 of the Replying affidavit, the 1st Respondent stated as follows;
 - “7.
 - (b) in any event, the wastes within the site were removed from the site but instead are confined within the site and securely buried.”
 - “8. That the disposal of the waste was guided by the Environmental Impact Assessment (EAI) report as required by the law.”
 - “9. That in answer to paragraph 6, 7, 8 and 9 of the Petitioner’s supporting affidavit, the waste was properly disposed and buried under the ground going 15 metres deep before it was securely and properly covered as per the legal requirements for disposal of asbestos hence no open dumping nor possibilities of exposing the population to risk of asbestos or any other harmful waste from the site. (Attached please find the images of the burial site marked JBM-1-A” and “JBM-1B”)
13. It is not in dispute that between 1st January and 26th April 2024, the 1st Respondent awarded the 2nd Respondent a tender for the demolition of old Kanduyi Market which contain asbestos material and to construct a new modern Kanduyi Market.
14. It is not also in dispute that the *Environmental Management and Co-ordination Act* (waste Management Regulations, 2006) categorise hazardous and non-hazardous wastes. The fourth schedule of the Regulations, item 136 categorises waste containing asbestos in the form of dust or fibres as hazardous.
15. The 1st Respondent in her Replying affidavit stated that the waste from the demolition of Kanduyi old Market including asbestos substances was properly disposed and buried under the ground going 15 meters deep before it was securely and properly covered as per the legal requirements for disposal of



asbestos. However, the 1st Respondent has not attached an Environment Impact Assessment project report. Where such hazardous substance is being disposed, it must be done under the guidance and directions by experts from the National Environmental Management Authority.

16. In the case of *Ken Kasinga-v Daniel Kiplagat Kirui & 5 Others* (2015) eKLR, the court held that where the procedures for the protection of the Environment are not followed, including the process of public participation, then an assumption may be drawn that the right to a clean and healthy Environment is under threat which is the same position the court took in the case of *Moffat Kamau & 9 Others v Actors Kenya Limited & 9 Others* (2016) eKLR.
17. It is imperative to note that asbestos is heat resistant and mostly impervious to chemical treatment. It is also common knowledge that when asbestos fibres are airborne, they cause health risk to people in the surrounding area including causing lung cancer, Mesothelioma, cancer of the bronchus, cancer of the intestines amongst other diseases.
18. According to the Environmental Impact Assessment project, once the asbestos have been buried, the site is decommissioned not to be used again. The site is also supposed to be fenced with a chain link, lockable-fence with a warning notice to members of the public to keep off the area.
19. There is no evidence that the 2nd Respondent who was contracted to undertake the project and remove the asbestos roofing is a licensed contractor specializing in asbestos management as well as the proper of the resulting asbestos waste due to the significant risks it poses to human health and the environment.
20. Principle 15 of the Declaration of the 1992 UN Conference on Environment and Development (The “Rio Declaration”) which Kenya is a signatory provides as follows;

“ In order to protect the Environment, the precautionary approach shall be widely used by states according to capabilities. Where there are threats of serious and irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent Environmental degradation.”

21. In the circumstances, I find that the Petitioner/Applicant has established a prima facie case against the Respondents as the available evidence indicates an ongoing violation of rights. Arising from the foregoing, I find the Notice of Motion application dated 24th July 2025 merited and the following consequential orders are hereby issued;
 1. That a conservatory order do issue prohibiting the Respondents, whether by themselves, employees or agents from further exposing the public to hazardous asbestos waste or undertaking actions inconsistent with the Environmental Management statutes pending the hearing and determination of this Petition
 2. That a mandatory injunction do issue compelling the Respondents, jointly and severally to forthwith secure, collect, identify and remove all hazardous asbestos waste from its current location and arrange for its lawful transportation and disposal at a certified NEMA-approved facility, pending the hearing and determination of this Petition.
 3. That the costs of this application to be borne by the Respondents.
 4. The Petitioner/Applicant to take pragmatic steps to have this Petition heard and determined within Six Months from the date hereof.

READ, DELIVERED AND SIGNED AT BUNGOMA THIS 6TH DAY OF NOVEMBER, 2025.

HON. E.C CHERONO



ELC JUDGE

In the presence of;

1. Mr Namude for the Applicant
2. M/S Walaka for the Respondent
3. Bett C/A.

