



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIRONMENT AND PLANNING DIVISION**  
**ELC ENVIRONMENT AND PLANNING PETITION NUMBER**  
**E018 OF 2025**

**IN THE MATTER OF THE CONTRAVENTION AND  
THREATENED CONTRAVENTION OF THE FUNDAMENTAL  
RIGHTS AND FREEDOMS UNDER ARTICLES 26, 27 (1) & (2),  
28, 29, 32, 40 (1), 43 (1)(b) & (f), 47, 53, 54 AND 57 OF  
THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE VIOLATION AND OR THE  
THREATENED VIOLATION OF ARTICLES 1, 2, 3, 10, 11, 19,  
20, 21, 24, 25, 27, 38, 29, 40, 42, 43,47, 48, 53, & 174 OF  
THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE INTENDED UNLAWFUL EVICTIONS  
OF THE KANGEMI, DAGORETTI & RIRUTA RESIDENTS IN  
NAIROBI COUNTY**

**AND**

**IN THE MATTER OF SECTIONS 29, 31, 33, 52 & 53 OF THE  
PHYSICAL & LAND USE PLANNING ACT**

**AND**

**IN THE MATTER OF SECTIONS 3 & 5 OF THE FAIR  
ADMINISTRATIVE ACTION ACT**

**BETWEEN**

<b>GEORGE MBUGUA PETITIONER</b>	<b>GACHAU.....</b>	<b>1<sup>ST</sup></b>
<b>YAHYA MIANO PETITIONER</b>	<b>AYUB.....</b>	<b>2<sup>ND</sup></b>
<b>ASHAH WAMBUI PETITIONER</b>	<b>KIMANI.....</b>	<b>3<sup>RD</sup></b>
<b>JAMES KIMANI PETITIONER</b>	<b>MAINA.....</b>	<b>4<sup>TH</sup></b>
<b>GEORGE NGIGI PETITIONER</b>	<b>GACHAMBA.....</b>	<b>5<sup>TH</sup></b>
<b>WILSON NJOROGE PETITIONER</b>	<b>GACHAU.....</b>	<b>6<sup>TH</sup></b>
<b>LEGAL ADVICE CENTRE T/A KITUO CHA SHERIA PETITIONER</b>	<b>.....</b>	<b>7<sup>TH</sup></b>

*(Suing on their own behalf and on behalf of approximately 40 residents of Kangemi Central Ward-Kangora Location in Westlands Constituency, the Riruta Muslim Community in Dagoretti North Constituency, and residents of Kabiro Ward, all within Nairobi County.)*

**=VERSUS=**

<b>THE COUNTY EXECUTIVE COMMITTEE MEMBER-BUILT ENVIRONMENT &amp; URBAN PLANNING-NAIROBI CITY COUNTY RESPONDENT</b>	<b>.....</b>	<b>1<sup>ST</sup></b>
<b>NAIROBI CITY COUNTY RESPONDENT</b>	<b>.....</b>	<b>2<sup>ND</sup></b>
<b>WATER RESOURCE AUTHORITY RESPONDENT</b>	<b>.....</b>	<b>3<sup>RD</sup></b>
<b>MINISTRY OF DEFENCE RESPONDENT</b>	<b>.....</b>	<b>4<sup>TH</sup></b>

MINISTRY OF LANDS, PUBLIC WORKS,  
HOUSING & URBAN DEVELOPMENT.....5<sup>TH</sup>  
RESPONDENT  
THE HONOURABLE ATTORNEY GENERAL.....6<sup>TH</sup>  
RESPONDENT

AND

KENYA HUMAN RIGHTS COMMISSION.....1<sup>ST</sup>  
INTERESTED PARTY  
NAIROBI RIVERS COMMISSION.....2<sup>ND</sup>  
INTERESTED PARTY  
NATIONAL ENVIRONMENTAL MANAGEMENT  
AUTHORITY.....3<sup>RD</sup> INTERESTED  
PARTY

### RULING

1. By a Notice of Motion dated 21<sup>st</sup> May 2025 brought under Articles 22, 23 and 165 (3) of the Constitution and Rules 4, 19, and 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, the Applicants seek the following orders:-
  - i. ***Spent.***
  - ii. ***Spent.***
  - iii. ***Spent.***
  - iv. ***Spent.***
  - v. ***THAT a conservatory order be issued restraining the Respondents, their agents, employees, or any person acting under their instructions from entering, demolishing, evicting, or in any way interfering with the Petitioners' quiet possession,***

***use, and occupation of their respective parcels of land pending the hearing and determination of this application and Petition.***

- vi. THAT a conservatory order be issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from declaring the Nairobi River Corridor and its tributaries a Special Planning Area pending the hearing and determination of this Petition.***
- vii. THAT a conservatory order be issued restraining the Respondents from evicting the Petitioners, from constructing affordable houses on the Nairobi River Basin and from interfering with the title deeds held by the Petitioners pending the hearing and determination of this Petition.***
- viii. THAT the costs of this application be provided for.***

- 2. The application is premised on the grounds appearing on its face together with the supporting affidavits of George Mbugua Gachau and Dr. Wambua Kituku.

### **THE PETITIONERS CASE**

- 3. The 1<sup>st</sup> Petitioner averred that the Petitioners are the registered or beneficial owners of the parcels within the Nairobi River Corridor and have occupied the land for more than four decades.
- 4. He further averred that on 6<sup>th</sup> March 2025, the 1<sup>st</sup> Respondent published a Notice of Intention to declare the

Nairobi River Corridor as a Special Planning Area”  
*[hereinafter referred to as a ‘SPA’]*.

5. He further averred that the declaration intends to designate private land where schools and mosques are located to be part of the SPA for the purpose of constructing affordable housing projects. He stated that L.R. No. Dagoreti/Riruta/909, registered in the name of Riruta Muslim Community, is among the affected plots.
6. He contended that the notice issued by the 1<sup>st</sup> Respondent and the impending designation of riparian land within thirty meters of the high water mark would affect the rights of minors and senior citizens. Additionally, he noted that a total of 301 students from the Kanyorosha Self-Help Group, located within the proposed special planning zone would be required to relocate once the affordable housing project is implemented.
7. He stated that the Notice shows that the proposed Special Planning Area would extend from Naivasha Road to Ruai, including the river's tributaries. He also mentioned that the Nairobi River corridor covers a spatial area that extends 60 meters beyond the high-water mark on each side of the river—30 meters for the riparian corridor and an additional 30 meters for the development zone.
8. He stated that the notice attracted significant public interest, including thousands of legal property owners near

the Nairobi River and its tributaries who would be impacted as the SPA moves forward with building affordable housing.

9. He stated that the duty of managing the Nairobi River, which flows through three Counties, namely, Kiambu, Nairobi City, and Machakos was the subject matter in **ELC Constitutional Petition 43 of 2019; Odando & Another, suing on their own behalf and as the registered officials of Ufanisi Centre, against the National Environmental Management Authority (NEMA) and two others**, where the court directed that all Counties along the river's course take precautionary measures to eliminate pollution of the river.
10. He contends that by publishing the notice, the 1<sup>st</sup> Respondent intends to exercise functions delegated to the County Executive Committee Member for Lands and Urban Planning for Kiambu and Kajiado Counties.
11. He argued that the 1<sup>st</sup> Respondent did not comply with Section 9(2) of the Nairobi City County Public Participation Act by publishing the Notice only in English, thereby limiting the scope for public participation.
12. He asserted that some sections of the Nairobi River and its tributaries lie outside the boundaries of Nairobi County, while other sections are between Nairobi and Kiambu Counties. He also stated that the CEM for Built Environment and Urban Planning exceeded his authority by issuing the

notice that seeks to declare sixty-meter sections of the river banks in Kiambu County as riparian land.

13. He further stated that the 1<sup>st</sup> Respondent failed to limit the scope of the Notice to the boundaries of Nairobi City County, thereby violating **Sections 28, 29, and 30** of the Physical and Land Use Planning Act.
14. He stated that the Respondents have started implementing the SPA by placing beacons on properties owned by residents of Nairobi Central Ward, Riruta Muslim Community, and Kabiro Ward.
15. He claimed that he is the registered owner of L.R. No. Dagoretti/Riruta/6312, which is ancestral land containing sacred sites and graves of relatives, and holds spiritual, cultural, and historical importance for his family.
16. He argued that the public notice published by the 1st Respondent was issued without consulting the community or providing sufficient notice to the residents and landowners affected.
17. He claimed that the implementation of the SPA by the 4th Respondent has caused widespread fear and anxiety among residents due to its military-style approach to a civilian issue.
18. He further stated that the 4th Respondent, along with Earth Services Limited, had already started engaging the public regarding the construction of the affordable housing projects in the Nairobi Basin.

19. He stated that the boundaries of the parcels of land bordering the Nairobi River had already been demarcated as per Gazette Notice 9433 of 2021, and that the 3rd Respondent has designated some areas as protected zones.
20. He argued that the Petitioners' right to information under Article 35 of the Constitution has been violated because the affected residents lack access to project plans, development frameworks, and details about the affordable housing plan.
21. The 7th Petitioner submitted an affidavit sworn by Dr. Wambua Kituku, the Executive Director, in support of the Petition. He stated that no corresponding notice was published in Kiswahili for the affected members of the public to understand and submit their submissions. He contended that the proposed SPA along the Nairobi River Corridor violates the principles and standards of land use and physical planning, as the development activities planned for the Nairobi River Corridor overlook the sustainable use of land and the preservation of limited land resources. He also argued that the Respondents failed to consider the local people's heritage and culture.
22. He averred that the 2<sup>nd</sup> Respondent declared in a Public Notice dated 25<sup>th</sup> March 2023, that the Nubian Community's title deed would serve as a SPA for building affordable housing.
23. He claimed that the Notice issued by the 1<sup>st</sup> Respondent attracted significant public attention because it affected

thousands of property owners along the Nairobi River and its tributaries. The deponent observed that, despite overwhelming objections, the Respondents have continued to interfere with the Petitioners' properties.

### **THE 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS' CASE**

24. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a replying affidavit sworn on 24th June 2025 by Raphael Kazungu, an urban planner with the Nairobi City County Urban Planning Department.
25. The deponent stated that in early 2024, the Government of Kenya, following guidance from the National Meteorological Department, advised residents along the riverbanks to move to higher ground due to forecasted increased rainfall linked to flood risk, which materialized in May 2024 as predicted.
26. He further stated that the Government observed that occupying riverbanks caused partial blockage of stormwater flow due to developments along the riverbanks, resulting in loss of life and property.
27. As a result, managing the Nairobi River Riparian corridor became more urgent due to that observation and the flood level data recorded over time by the Water Resources Management Authority.
28. He stated that the corridor width was negotiable because the management of the Nairobi River Riparian Corridor

- planned to adopt waterfront land use strategies that allowed land activities capable of withstanding increased flooding.
29. He further stated that instead of raising their concerns within the 14 days given, the Petitioners wrote to Kituo Cha Sheria and did not copy the County office.
  30. He argued that whether the Petitioners' property rights were violated can be determined after reviewing the ground survey results, the gazette notice indicating the relevant property within a 60-meter radius, and the Petitioners providing proof of ownership.
  31. He also argued that the right to property under Article 40 of the Constitution is not absolute and may be limited by law. He further clarified that Article 10(2)(d) of the Constitution emphasizes the importance of sustainable development and environmental protection as fundamental principles of governance.
  32. He contended that the court should strike a balance between governance principles and socio-economic rights to prevent current needs from jeopardizing the future.
  33. He also argued that conservatory orders were unnecessary because the Petitioners were aware of the Notice but did not respond. He insisted that the case should proceed to a full hearing to allow them to demonstrate that due process was followed.

34. He also emphasized that the County has a legal duty to plan and regulate development for the public good, as mandated by the Constitution of Kenya, Sections 104 and 115 of the County Government Act, the Urban Areas and Cities Act, and the Physical Land Use Planning Act.
35. He urged the court not to issue the orders because it would violate the 4th schedule of the Constitution.

### **THE 3<sup>RD</sup> RESPONDENT'S CASE**

36. The 3<sup>rd</sup> Respondent filed a replying affidavit sworn by John Kinyanjui on July 17, 2025, in opposition to the application.
37. The deponent stated that following significant rainfall throughout the country in March, April, and May 2024, the 3<sup>rd</sup> Respondent began identifying the areas most affected by flooding, in line with their mandate to establish and enforce flood mitigation standards, procedures, and regulations.
38. He stated that their main goal was to conduct geo-referencing of coordinates, create maps, mark high flood levels, and define the maximum 30-meter boundary designated as riparian land and its reserve boundaries. Additionally, they sought to identify the source of pollution.
39. He denied the allegations that the 3<sup>rd</sup> Respondent had acted outside the scope of applicable laws regarding the demarcation of riparian areas.

40. He maintained that the prayers sought are premature, speculative, ill-advised, and do not disclose any cause of action against the 3<sup>rd</sup> Respondent. The deponent swore that the notices had been misunderstood.
41. He stated that Articles 66 and 69(1) of the Constitution require the government to ensure sustainable use, management, and conservation of the environment and natural resources, and also to guarantee an equitable sharing of the benefits that arise.
42. The deponent stated that Article 66 grants the state the authority to enforce regulations concerning public safety, public order, public health, and land use planning.
43. The 1<sup>st</sup> interested Party stated that they are in support of the application.
44. The 2<sup>nd</sup> Interested Party did not file any response to the application.
45. The 3<sup>rd</sup> Interested Party stated it would not participate in the application.
46. The application was canvassed by way of written submissions
47. The Petitioners filed their submissions dated 18<sup>th</sup> July 2025, in which they reiterated the contents of the supporting affidavits.
48. As at the time of writing this ruling, the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents had not filed their submissions as directed.

## **ANALYSIS AND DETERMINATION**

49. The Petitioners seek a conservatory order restraining the 1st and 2nd Respondents from evicting them from their respective parcels of land and from declaring the Nairobi River Corridor and its tributaries as a Special Planning Area.
50. The Petitions contended that the declaration of the intention would violate their rights under Articles 28, 29, 32, 40(1), 42, 43, 47, 48, 53, 54, and 57 of the Constitution.
51. Article 165(3)(b) of the Constitution grants this court the jurisdiction to determine whether a fundamental right or freedom has been denied, threatened, or violated. It provides as follows:-

***Jurisdiction to determine the question of whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or threatened***

52. The Petitioners averred that they are long-standing residents of Kangemi Central Ward, Kangora, Gatina, Dagoretti, and Riruta Muslim. They further averred that they are the registered and/or beneficial owners of the suit parcels.
53. They alleged that the notice of intention to declare Nairobi River Corridor a Special Planning Area is intended to alienate private land where schools, churches, and mosques are located to be part of the Special Planning Area for the purpose of constructing affordable houses, which amounts to constructive dispossession and violates Articles 40 and

- 47 of the Constitution. They further asserted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents intend to evict the residents of Kangemi, Dagoretti, and Riruta to make way for affordable housing without any compensation.
54. They argued that the impending designation of riparian land will affect the rights of minors and senior citizens, who will be required to relocate once the affordable housing is implemented.
  55. It was alleged that the Notice failed to limit the scope to the boundaries of Nairobi County, contrary to Sections 28, 29, and 30 of the Physical Planning Act. The Petitioners argued that the proposed Special Planning Area along the Nairobi River Corridor violates principles and standards of land use and physical planning, as the proposed development activities for the Nairobi River Corridor neglect the sustainable use of land, conservation of limited resources, and the heritage and culture of the local people.
  56. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents argued that the management of the Nairobi River Riparian Corridor planned to adopt waterfront land use strategies that could support activities capable of withstanding increased flooding. They further argued that the Petitioners' right to property, which may be limited by law, can only be determined after reviewing the ground survey results, the gazette notice indicating the relevant property is within a 60-meter radius, and proof of ownership.

57. The 3<sup>rd</sup> Respondent denied the allegations that it acted outside the scope of the applicable laws and maintained that the Petition does not disclose any cause of action against it.
58. Having considered the application in light of the Petition, the affidavits, and submissions by the Petitioners, it is evident that the application raises several issues related to eviction and/or livelihoods of the communities living along the Nairobi River, which extend beyond the Counties of Nairobi, Kiambu, and Machakos, as well as government policies and legal issues.
59. In light of the foregoing, this court is called upon to determine whether the application and Petition raise a substantial question of law to warrant the file to be placed before the Chief Justice for empanelment of a bench under Article 165(4) of the Constitution.
60. The guiding authority for empanelment of judges is enumerated in Article 165(4) of the Constitution, which provides as follows:
- “Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, not less than three, assigned by the Chief Justice.”***
61. It is clear from the above provision of the Constitution that for a matter to be heard by a bench, the Court must certify

it as one raising a substantial question of law that falls under Article 165 3 (b), (c), or (d) of the Constitution. Article 165(d) provides as follows:-

Subject to clause (5), the High Court shall have

***d) jurisdiction to hear any question respecting the interpretation of the Constitution, including the determination of: -***

***i) The question whether any law is inconsistent with this constitution;***

***ii) The question whether anything said to be one under the authority of this constitution or of any law is inconsistent with, or in contravention of, this constitution;***

***iii) Any matter relating to constitutional powers of state organs in respect of county governments and any matter relating to constitutional relationship between levels of government;***

***iv) A question relating to conflict of laws under Article 191 and***

***v) Any other jurisdiction, original or appellate, conferred on it by legislation***

62. The Constitution does not define the term substantial question of law. There are numerous decisions that state what constitutes a substantial question of law.

63. The issue of when a matter should be referred to the Chief Justice under Article 165(4) of the Constitution was

addressed in the case of **Community Advocacy and Awareness Trust and Others v. Attorney General, Nairobi Petition No 243 of 2011 (unreported)**, where it was held:-

***“The constitution of Kenya does not define “substantial question of law”. It is left to the individual judge to satisfy himself or herself that the matter is substantial to the extent that it warrants reference to the chief justice to appoint an uneven number of judges not being less than three to determine a matter...giving meaning to “substantial question” must be taken into account the provisions of the Constitution and need to dispense justice without delay particularly given a specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter.”***

64. The law as to what amounts to a substantial question of law is now well settled. In the case of **Sir Chuntlal Mehta and Sons Ltd Vs The Century Spinning and Manufacturing Co. Ltd 1962 AIR 1314**, the Supreme Court of India defined the elements of a substantial question of law as follows;

***“The proper test for determining whether a question of law raised in the case is substantial would in our opinion, be whether it is of general***

***public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this court or by the Privy Council or by the Federal Court or not free from difficulty or calls for discussions of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled, and there is a mere question of applying those principles, or if the plea raised is palpably absurd, the question would not be a substantial question of the law.***

65. Back home, the Court of Appeal set forth the guidelines for certification under Article 165(4) of the Constitution in the case **of Omikya Omtatah Okoiti & Another vs Ann Waiguru - Cabinet Secretary, Devolution and Planning & 3 Others (2017) eKLR** as follows:-

***“There are, in our view, parallels to be drawn between certification for purposes of Article 163(4)(b) of the constitution and certification for purposes of Article 165(4) notwithstanding that the drafters of the constitution, in providing for certification of matters for purposes of appeal to the supreme court under Article 163(4)(b) stipulated that a matter should be of “general***

***public importance". There is therefore wisdom to be gained from the pronouncements court of Kenya respecting interpretation of Article 163(4) (b).***

66. In the case of **Hermanus Phillipus Steyn Vs Giovanni Gnechi-Ruscone (2013) eKLR**, the Supreme Court of Kenya pronounced the principles for purposes of certification under Article 163(4)(b) of the Constitution, some of which are relevant in the context of certification under Article 165(4). Drawing therefrom, we adopt, with modification, the following principles;

***1) For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interests;***

***2) The applicant must show that there is a state of uncertainty in the law;***

***3) The matter to be certified must fall within the terms of Article 165(3)(b) or (d) of the Constitution.***

67. Similarly, in the case of **Harrison Kinyanjui Vs Attorney General & Another (2012) eKLR**, the court held that;

***“The meaning of ‘substantial question’ must take into account the provision of the constitution as a whole and the need to dispense justice without delay particularly given specific fact and situation. In other words, each case must be considered on its own merits by the judge certifying the matter. It must also be remembered that each High court judge, has authority under Article 165 of the constitution to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of Article 165(4) of the constitution, the decision of a three Judge bench is of equal force to that of a single judge exercising the same jurisdiction. A single Judge deciding a matter is not obliged to follow a decision of the court delivered by three judges.*”**

68. Accordingly, a substantial question of law is one that is of general public importance or one that affects the rights of a large cross-section of the public.
69. Based on the material placed before me, it is evident that there is some connection between the impending declaration and the communities living along the Nairobi River. The allegations that the declaration will render the communities homeless and the legal issues involved are of great public importance to the communities living around

the Nairobi River, which flows through Nairobi, Kiambu, and Machakos Counties.

70. The declaration of a special planning area is a complex matter with a significant impact on a broad cross-section of the public, particularly communities living along the Nairobi River. I find and hold that this Petition raises substantial questions of law of general public importance which directly and substantially affect the rights of the Petitioners herein and communities living around the Nairobi River and whose determination will have a significant bearing on the public interest.
71. Accordingly, I find that the substantial question of law of public importance will be enriched with the input of more than one judge.
72. Consequently, this Petition should be placed before the Honourable Chief Justice for Her Ladyship to consider constituting an uneven number of judges, not less than three, to hear and determine this Petition.

.....  
**HON. T. MURIGI**  
**JUDGE**

**RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TERMS THIS 24<sup>TH</sup> DAY OF NOVEMBER 2025.**

**IN THE PRESENCE OF: -**

Kioko appearing together with Asiago for the Petitioners  
Ahmed – Court Assistant

ORIGINAL