



REPUBLIC OF KENYA



**KENYA LAW**  
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**County Government of Mombasa v Kenya Railways Corporation & another (Environment and Land Petition E002 of 2023) [2025] KEELC 5639 (KLR) (30 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5639 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**  
**ENVIRONMENT AND LAND PETITION E002 OF 2023**  
**SM KIBUNJA, J**  
**JULY 30, 2025**

**BETWEEN**

**COUNTY GOVERNMENT OF MOMBASA ..... PETITIONER**

**AND**

**KENYA RAILWAYS CORPORATION ..... 1<sup>ST</sup> RESPONDENT**

**CHINA ROAD & BRIDGE CORPORATION ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Through the petition dated the 21<sup>st</sup> November 2023, the petitioner sought for:
  - a. A declaration that the respondents have violated the petitioner's functions and powers under the fourth schedule and *Physical and Land Use Planning Act*, 2019.
  - b. An order compelling the respondents to apply and regularize the development being carried out on plot XIV/362.
  - c. An order compelling the respondents to pay for the development permission and the penalties accrued once they have regularized the development.
  - d. An order of mandatory injunction to issue should the respondents not comply with regularization requirements.
  - e. A declaration that the respondents have by their actions, omissions and commissions undermined the authority and functions of the petitioner and should pay general damages.
  - f. Such other and or further relief as the court may deem fit and just to grant.
  - g. The costs in the petition.



The petition is predicated on the facts on the petition and supported by the affidavits of Paul Manyala, Director Physical Planning, sworn on 21<sup>st</sup> November 2023 and 1<sup>st</sup> April 2025, *inter alia* deposing that the Constitution of Kenya and the Physical and Land Use Planning Act 2019, vests the powers of development permission, planning and related functions upon County Governments, but the respondents have proceeded to undertake the development on the suit property without regard to the law; that the respondents have not applied either for the development permission or informed the petitioner of its intention to undertake the said development within its jurisdiction, thereby negatively impacting on its functions; that the petitioner issued a stay order on 18<sup>th</sup> November 2023 and served it upon the 1<sup>st</sup> respondent, and enforcement notice dated 20<sup>th</sup> November 2023, but both have been ignored; that the petitioner had written to the Prime Cabinet Secretary, Hon. Musalia Mudavadi, over the compliance issue on 14<sup>th</sup> March 2023, who responded vide the letter dated 17<sup>th</sup> April 2023, to all state corporations asking them to comply; that a legal opinion from the Solicitor General to all corporations had opined that they should comply with the County Development Control Laws; that after the respondents failed to comply, the petitioner filed this petition.

2. The petition is opposed by the 1<sup>st</sup> respondent through the replying affidavit of Gerald Malele, Regional Civil Engineer, sworn on 24<sup>th</sup> February 2025, *inter alia* deposing that contrary to the petitioner's claim, all the construction works on the suit property are being carried out in strict compliance of the law; that after completing the construction of the 472km Mombasa – Nairobi SGR line on 30<sup>th</sup> May 2017, and the passenger and freight services commencing shortly thereafter, the National Government through the 1<sup>st</sup> respondent engaged a contractor for construction of the Miritini – Mombasa SGR terminus MGR link and a railway bridge across Makupa causeway, to ease the traffic challenges as the SGR terminus is about 15km away; that the construction is at advanced stages, and to enable the commencement of the commuter services between the SGR terminus and the Mombasa MGR station, there is need to rehabilitate the Mombasa MGR station by constructing station buildings and necessary facilities, which the petitioner seeks to stop through this proceedings; that contrary to the petitioner's claim, the development plans were submitted to the petitioner on 22<sup>nd</sup> November 2023, who requested for the construction plans through their electronic portal on 10<sup>th</sup> June 2024, that the 1<sup>st</sup> respondent provided vide its letter dated 28<sup>th</sup> June 2024; that the 1<sup>st</sup> respondent is yet to receive any response or comments from the petitioner on the detailed designs and development plans submitted; that the project had received necessary approvals from the National Treasury & Economic Planning in line with the Public Finance Management (Public Investment) Regulations 2022; that the 1<sup>st</sup> respondent had commissioned a comprehensive Environmental Impact Assessment (EIA), that was conducted in adherence to environmental regulations and guidelines, prior to the commencement of the construction project in question; that the EIA was duly approved by the National Environment Management Authority (NEMA) who issued a license endorsing the environmentally sound nature of the proposed development; that in view of the stringent review and approval process undertaken by NEMA, it is inconceivable that the developments being undertaken by the 1<sup>st</sup> respondent would cause any blockage of drainage facilities or pose a threat to the environment well-being of the region; that the petition should therefore be dismissed with costs.
3. The 2<sup>nd</sup> respondent also opposed the petition through the notice of preliminary objection dated 25<sup>th</sup> February 2025 that raises five (5) grounds, and the replying affidavit of Zhang Yun, representative of the 2<sup>nd</sup> respondent, sworn on the 25<sup>th</sup> February 2025. It is the 2<sup>nd</sup> respondent's case that the project the petitioner is challenging is one of strategic national importance as defined under the Physical and Land Use Planning Act and the Physical and Land Use Planning (Classification of Strategic National or Inter-County Projects) Regulations, that do not require approval of a County Government, but are



approved by the Cabinet Secretary responsible for matters intergovernmental relations; that this court has no jurisdiction to hear and determine this petition for reasons that:

- a. The petitioner has no locus standi to sue another state agency complaining of violation of constitutional rights;
  - b. The petition does not disclose any constitutional question/issue for determination by this court sitting as a constitutional court; and
  - c. That the original mechanism of resolving a dispute between a County and a State agency is vested in the Summit, the Council or any other intergovernmental structure established under the *Intergovernmental Relations Act*.
4. The learned counsel for the petitioner filed their submissions dated 20<sup>th</sup> February 2025 and 16<sup>th</sup> April 2025 respectively. The learned counsel for the 1<sup>st</sup> & 2<sup>nd</sup> respondents filed theirs 25<sup>th</sup> February 2025 and 3<sup>rd</sup> March 2025 respectively. The court has considered the said submissions.
5. The issues for the court's determinations in the petition are as follows:
- a. Whether the petition raises any constitutional issue for the court determine.
  - b. Whether the petitioner has locus standi to commence and prosecute the petition.
  - c. Whether the project being carried out by the respondents was subject to the petitioner's approval, and if so whether it was so approved.
  - d. What order(s) commends to be issued from the available evidence and the law.
6. The court has carefully considered the grounds set out on the petition, grounds on the preliminary objection, affidavit evidence, submissions by the learned counsel, superior courts decisions cited thereon and come to the following determinations:
- a. It is important that I start my analysis by summarising the history of the dispute herein, as I understand it, from the factual material presented. From the pleadings, documents and affidavit evidence, the 1<sup>st</sup> respondent is the proprietor of plot number XIV/362 that is situated at Mombasa, Mombasa County, and therefore, within the jurisdiction of the County Government of Mombasa, the Petitioner. It is also not disputed that the 1<sup>st</sup> respondent has contracted the 2<sup>nd</sup> respondent to undertake the project in dispute on plot No. XIV/362. The petitioner contends that the respondents are carrying out the construction works without first seeking and obtaining the necessary approvals from the County Government, contrary to the provisions of the *Physical and Land Use Planning Act*, and despite notices and demands being made to regularize the project, the respondents have failed to comply, and hence this petition.
  - b. To the affidavit in support of the petition is annexed several documents that speaks to the genesis of the dispute herein including:
    - i. Letter dated 14<sup>th</sup> March 2023 by the Governor, Mombasa County, to Prime Cabinet Secretary that is copied to the Attorney General, among others.
    - ii. Letter dated 17<sup>th</sup> April 2025 by the Prime Cabinet Secretary responding to the Governor's letter. It is addressed to Phillip J. Mainga, Chief Executive Officer, Kenya Railways [1<sup>st</sup> respondent], and copied to the Attorney General and Governor, Mombasa County among others.



- iii. Letter dated 22<sup>nd</sup> June 2023 from the Solicitor General to the Governor, Mombasa County, and copied to the Prime Cabinet Secretary and the Attorney General.

It is noted that the three letters above, have more or less the same reference of compliance with planning and development control laws.

- c. The Governor's letter in (b)(i) above stated inter alia as follows:

“Our requests for compliance with the requirement of the stated laws by state agencies have been unfruitful. This therefore is to request that you bring to the attention of all state corporations and agencies intending or carrying out development within Mombasa to comply with the law by submitting their development applications and making requisite payment (section 63 of PLUPA) to the County Government for processing just like they seek approvals National Environment Management Authority (NEMA) and National Construction Authority (NCA) and to avoid unnecessary penalties imposed by the same laws. This is also in line with the counsel of the President of the Republic of Kenya, while chairing the Summit at Naivasha on 10<sup>th</sup> and 11<sup>th</sup> February 2023, to the county governments to exploit ways to optimize the own source revenue.

Kindly take note that the contracts signed by the state with elements of tax and fees exemption and waiver respectively shall be individually considered (section 70 of PLUPA) and the County Secretary shall ensure the approvals are processed in the shortest time possible.....”

The letter is strictly speaking raising a complaint of the State Corporations and Government Agencies failing to adhere to the planning and development laws in respect to projects at the County Government of Mombasa. It does not contain any complaint that can be understood, or construed to be a Constitutional question or issue.

- d. The Prime Cabinet Secretary letter in (b)(ii) above stated as follows among others:

“I wish to draw your attention to letter No. MsaCG/LAND/1/VOL.X/38 of 14<sup>th</sup> March 2023 (copy attached) addressed to my office by the Governor of Mombasa County regarding the above.

The Governor has cited non-compliance of some state corporations with various legislations that relate to land use and physical planning, especially in Mombasa County. I want to assume that any such non-compliance with Laws of Kenya has been an inadvertent oversight and not a questioning of logic for compliance.

This is therefore to reiterate that all state corporations are required to comply with the cited legislations and specifically the need for:-

- i. All Chief Executive Officers to fully acquaint themselves with the provisions of the cited laws, among others, that require compliance.
- ii. All state corporations to obtain all required licenses or waiver or delegation in lieu thereof.
- iii. All state corporations to pay any required fees or obtain exemptions thereof.



This office will expect quarterly reports from the County Government of Mombasa on the levels of compliance with these measures henceforth.”

This letter does not contain any direction that may qualify to be a constitutional issue as well.

- e. The solicitor General’s letter dated 22<sup>nd</sup> June 2023, started by referring to the Governor of Mombasa County letter dated 15<sup>th</sup> June 2023, requesting for a legal opinion on whether the County Government of Mombasa’s understanding of the Planning and Development laws was accurate, and whether it was within its rights to require relevant State Corporations and Government Agencies to comply with the said laws. The letter also at paragraph 2 made reference to the Governor’s letter to the Prime Cabinet Secretary dated 14<sup>th</sup> March 2023, and the reply thereof dated 17<sup>th</sup> April 2023. In the letter, the Solicitor General set out the various provisions of the Constitution of Kenya, 2010, County Government Act, No. 17 of 2012, Urban Areas and Cities Act No. 13 of 2011 and the Physical and Land Use and Planning Act No. 13 of 2019 and advised thus:

“ 13. We, therefore advise as follows:

- a. County Governments have the mandate to regulate and manage development activities within their respective jurisdictions in accordance with the Constitution of Kenya 2010 and relevant legislation.
- b. State Corporations and Government Agencies are required to comply with the said development control laws and regulations that apply to private entities. Accordingly, save where lawfully exempted, they are required to obtain development approvals from the relevant county governments.
- c. The County Government may provide further guidance and clarification on compliance with development control laws at the county level.

.....”

Again, the Solicitor General opinion does not elicit or address any constitutional issue.

- f. Having dealt with the history or genesis of the dispute in (a) to (e) above, the court will now first deal with issue of whether or not the petitioner has the locus standi to file and prosecute this proceeding. Thereafter, the court will establish whether the petition raises any constitutional issue(s) to invoke the court’s constitutional jurisdiction, before embarking on the analysis of other issues. This is because should the petitioner be without locus standi, or the petition be without any constitutional question then, there may be no need to go to the analysis of other issues.

The 2<sup>nd</sup> respondent has through its replies to the petition and submissions posited that the petitioner is without locus standi to institute and prosecute this petition against another state agency. It is important to note for posterity’s sake that going by the description in paragraph 3 of the petition that has not been rebutted, the 2<sup>nd</sup> respondent is a private company and not a state agency.



- g. The 2<sup>nd</sup> respondent's learned counsel cited the case of *Meru County Government versus Ethics and Anti-Corruption Commission* (2018) eKLR, where the Court of Appeal held that the protections and guarantees in the *Constitution* are afforded to natural persons as individuals and do not extend to state or organs such as National and County Governments. The learned counsel for the petitioner inter alia referred to the said decision and submitted that in the *Meru County Government versus Ethics and Anti-Corruption Commission* [supra], and submitted inter alia that the Court of Appeal had further stated that:

“We respectively agree with the sentiments expressed in that case. State organs can indubitably file suit inter se to protect various rights, capabilities, competencies and privileges accorded to them by the *Constitution*”;

And submitted that the petitioner is not seeking to enforce and or protect rights under the bill of rights but is in court to protect the powers and functions accorded to her by the *Constitution* at the fourth schedule and under the *Physical and Land Use Planning Act*, 2019. It is noted that the 1<sup>st</sup> respondent has not raised any objection to the petitioner's locus standi in the matter before the court. I have perused the paragraphs 4 to 22 of the petition and the prayers thereof and agree with the petitioner that there is nothing to suggest the petition is about disputes in the bill of rights. It comes out clearly from the petition that the petitioner's main contention is that the respondents are carrying out the project on plot XIV/362, that is within its jurisdiction, without prior approval and permission being obtained from it, and that its demand for regularization has gone unheeded. There is nothing raised about the bill of rights in the petition and I find the objection by the 2<sup>nd</sup> respondent on the ground of locus standi to be without merit and is rejected.

- h. On the second ground of whether the petition raises any constitutional issue to invoke the court's constitutional jurisdiction, the counsel for the 2<sup>nd</sup> respondent submitted that the allegations that the developments were being carried out without approvals under sections 57 & 58 of the *Physical and Land Use Planning Act* does not amount to a constitutional question or issue to be raised through a Constitutional petition. That the petition has not specified any specific provision of the *Constitution* that has been violated as required by the locus classicus case of *Anarita Karimi Njeru versus Republic* [1979] KEHC 30 (KLR). Counsel further submitted that the petitioner has not pleaded that procedures and remedies available through a normal suit were insufficient to justify approaching the court through a petition, and therefore the petition should be struck out. The learned counsel for the petitioner did not submit on this ground of objection in both their initial and supplementary submissions. The 1<sup>st</sup> respondent has not raised an objection on this ground.
- i. I have looked at the petition, again from paragraphs 4 to 22 and the prayers thereof, and the only reference to the *Constitution* is at paragraphs 5, 8, 9, 16, 18, 19, and 22 of the petition, as summarized herein below:
- i. Paragraph 5 talks of the development being “.....in total disregard with the law especially the *Constitution* of Kenya 2010 and the provisions of the *Physical and Land Use Planning Act*.”
  - ii. Paragraph 8 states “The fact that the respondents are undertaken the project without public participation contravenes the *Constitution* of Kenya 2010 and more specifically the provisions of section 58 (7) & (8) of the *Physical and Land Use Planning Act*.”



- iii. Paragraph 9 restates the national value and principles of governance at Article 10(1) & (2) of the Constitution.
- iv. Paragraph 16 refers to Article 27 of the Constitution of Kenya that provides of equality of every person before the law.
- v. Paragraph 18 refers to the fourth schedule of the Constitution of Kenya that outlines clearly the distribution of functions between the National and County Governments.
- vi. Paragraph 19 refers to part two of the fourth schedule that outlines the functions and powers of the County Governments; and
- vii. Paragraph 22 that states that “By virtue of the respondents undermining the provisions of the law and the Constitution and continue doing so they ought to pay general damages.”

That applying the requirements in the case of Anarita Karimi Njeru versus Republic [supra], to this petition, it is crystal clear it does not contain any specific allegations or particulars of constitutional infringements or threats thereto. The Anarita Karimi Njeru versus Republic case [supra], is a landmark origin of the doctrine of avoidance, which emphasizes the need for precision in presenting constitutional petitions. That decision, and other superior courts decisions that came after it have required a petitioner to set out with reasonable precision the constitutional provisions alleged, and the manner of infringement. This should include outlining the specific provision of the Constitution alleged to have been infringed and the manner in which the provisions were infringed, thereby ensuring such petitions are well founded and not frivolous. Vague or generalise claims are insufficient for constitutional petitions.

- j. The principle of precision helps in saving judicial time and resources by focusing on the exact issues that need to be addressed by the court and other respondents. The position in the Anarita’s case has been echoed in subsequent cases including that of Mumo Matemu versus Trusted Society of Human Rights Alliance & Other (Civil Appeal 290 of 2012) [2013]KECA 445 (KLR) Civ) (26 July 2013), where the Court of Appeal allowed the appeal among others finding that the pleadings were sufficiently precise; and Consumer Federation of Kenya versus Toyota Motors Corporation & 4 Others (Petition 455 of 2018) [2022] KEHC 15459 (KLR) Constitutional and Human Rights) (18 November 2022) (Judgement) in which the court dismissed the petition on the grounds that it did not meet the required threshold for a constitutional petition and could be resolved through other legal mechanism. The dispute brought through this petition is clearly about the development project being undertaken by the 1<sup>st</sup> respondent through the 2<sup>nd</sup> respondent on plot No. XIV/362 that is within the petitioner’s jurisdiction, without submitting the development plans for approval, and making the requisite payments or obtaining exemption or waiver if applicable. This is what paragraphs 6 to 8, 10 to 15, 17 & 20 of the petition dated 21<sup>st</sup> November 2023 and prayers (1) to (5) thereof are about. The contents of the correspondences I have set out in (6)(c) to (e) above, that preceded the filing of this proceeding, confirms that the dispute subject matter in the three letters thereof, was the failure to comply with the control and development approval laws for said project. Applying the decisions of the superior courts decisions set out above to the facts in this petition, it is clear the petitioner clothed the dispute about projects development control and approvals as a constitutional petition, while it should have been processed through other processes. Clothing an ordinary civil dispute in the constitutional petition dressing does



not make it one, for the reason of absence of a constitution question to invoke the court's constitutional jurisdiction.

- k. Though I appreciate that the petitioner had taken commendable steps to ensure the respondents complies with the applicable legislations in respect of the development on plot No. XIV/362, before filing this petition it unfortunately approached the court through a constitutional petition instead of an ordinary suit. The court having come to that finding does not need to pronounce itself on any other issue as the petition is undoubtedly for striking out. The petitioner will however be at liberty to commence their claim through an ordinary suit in accordance with the applicable laws.
- l. That in view of the history in this proceeding, the court is of the view that justice will be served better with an order that each party bears their own costs.
1. Having come to the foregoing conclusions on the petition dated 21<sup>st</sup> November 2023, the court finds and orders as follows:
  - a. There being no constitutional question or issue for determination on the petition dated the 21<sup>st</sup> November 2023, the same is hereby struck out.
  - b. That each party to bear its own costs in the petition.

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 30TH DAY OF JULY 2025.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In The Presence Of:

Petitioner : Mr. Tajbhai For Petitioner

Respondents : Mr. Willy For 1<sup>st</sup> Respondent

Shitemi-court Assistant.

