

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. E003 OF 2025

IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 27, 40,
42, 47 AND 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED VIOLATION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLES 27, 40, 42 AND 47 OF THE
CONSTITUTION

BETWEEN

SIRI GURU SINGH SABHA KISUMU TRUSTEES REGISTERED,

A registered Trust under the Trustees (Perpetual Succession) Act,

Suing through its authorized Representative

PRITHPAL PANDHAL1ST PETITIONER

AGGREGATE CONCRETE QUARRIES LIMITED,

A limited liability company incorporated under the Companies Act, 2015,

suing through its authorized director, ARVIN RABADIA 2ND

PETITIONER

DR. MANSUKHBHAI VIRJIBHAI PATEL &

HASMUKH VIRJI BHALODIA, Jointly registered proprietors of Plot

No. KISUMU/MUNICIPALITY/BLOCK 7/321..... 3RD PETITIONER

CHANDULAL HARJIBHAI RATHOD, ALKA TANNA &

KRUSHA SOLANK Jointly registered proprietors of Plot No.

KISUMU/MUNICIPALITY/BLOCK 7/317 4TH PETITIONER
*(Suing on their own behalf, on behalf of other landlords and tenants along
Ang'awa Street, Kisumu and in the public interest)*

VERSUS

THE COUNTY GOVERNMENT OF KISUMU1ST RESPONDENT
KISUMU CITY BOARD2ND RESPONDENT
CITY MANAGER, KISUMU 3RD RESPONDENT

R U L I N G

The Notice of Motion application dated 7th July, 2025 seeks for orders that:-

- 1) The application be certified urgent and service thereof be dispensed with in the first instance due to the imminent threat to the authority of the honourable court.
- 2) The honourable court be pleased to issue summons directed at;
 - a) Mr. Hesbon Owuor Hongo - the County Secretary of the 1st Respondent; and
 - b) Mr. Abala Wanga - the City Manager of Kisumu City, the 2nd Respondent, who implements the policies and decisions of the 3rd Respondent.

To personally appear before this court and show cause why they should not be committed to civil jail for willful

disobedience of the orders issued by this court on 1st July, 2025.

- 3) the honourable court be pleased to find the Respondents, their agents and/or officers, in contempt of the order issued on 1st July, 2025, restraining any construction, allocation, or obstruction of the public service lane situated behind land parcels KISUMU MUNICIPALITY/BLOCK 7/310 to 321.
- 4) The honourable court be pleased to order the Respondents jointly and severally to forthwith demolish and remove all structures erected on the said public service lane in violation of the court's order.
- 5) The honourable court be pleased to order the Officer Commanding Station (OCS) Kisumu police station to provide security, oversight and protection to the Petitioners, Respondents and their agents and/or servants and/or court bailiff during the demolition and clearance of the said public service lane situated behind the land parcels KISUMU MUNICIPALITY/BLOCK 7/310 to 321 to ensure compliance with the court's orders.
- 6) The court be pleased to issue a structural interdict compelling the Respondent to:-

- (a) Immediately file in court within 7 days of the date of this order, a comprehensive report detailing all steps taken to comply with the interim conservatory orders issued on 1st July 2025, including identification of any persons or entities responsible for the ongoing construction on the subject lane.
- (b) Demolish and clear all illegal structures erected on the public service lane behind land parcels KISUMU MUNICIPALITY/BLOCK 7/310 to 321 within 14 days and file photographic and written proof of compliance.
- (c) Ensure that all officers responsible for physical planning, enforcement and security are present and fully cooperate with the compliance process.
- (d) Submit periodic compliance reports every fourteen (14) days thereafter until full and verified compliance with this court's orders is confirmed.
- (e) Take reasonable administrative and enforcement measures to prevent further

encroachment or obstruction of the said public lane pending final determination of the petition.

(f) The honourable court shall retain supervisory jurisdiction over this matter for the purpose of enforcing this structural interest.

7) The honourable court be pleased to issue such further or other orders as it may deem just and appropriate to uphold the rule of law and preserve the dignity and authority of the court.

8) The costs of the application be borne by the Respondents.

The application was supported by the contents of the Supporting Affidavit sworn by Dr. Mankukhbhai Virjibhai Patel on 7th July, 2025. The Applicants' case is that the court on 1st July, 2025 issued an interim conservatory order expressly restraining the Respondents, their agents and/or employees from allocating, permitting, construction upon, or obstructing the public service lane running behind land parcels KISUMU MUNICIPALITY/BLOCK 7/310 to 321 situated along Ang'awa Street, Kisumu, pending hearing and determination of the application. That the respondents were served with the order. That the Respondents had willfully and

flagrantly disobeyed the court order. That the honourable court has power under Article 23(3) of the Constitution of Kenya and section 3A and 63 of the Civil Procedure Act to issue coercive and supervisory order including committal for contempt, demolition directions and structural interdicts to ensure compliance with its orders and protect the dignity of judicial authority.

The proceedings

The record shows that when the matter came up for directions on 9th July, 2025, this court directed the Applicants to serve the application upon the Respondents and the people named in paragraph 2 of the Notice of Motion for mention for further directions before Hon. Justice Okong’o on 22nd July, 2025 as this court was proceedings on leave.

Affidavit of Service sworn by Julius Otieno Raminya on 15th July, 2025 explains how service was effected.

The record shows that when the matter was mentioned before Hon. Justice Okong’o on 22nd July, 2025 a further mention date of 28th July, 2025 was given as the Respondents’ counsel undertook to have the trespassers removed from the disputed area within 72 hours.

On 28th July, 2025 the contempt application against Hesborn Owuor Hongo, the County Secretary, was withdrawn and directions given for disposal of the application dated 7th July, 2025 by way of written submissions and a ruling date set.

When the matter came up for ruling on 20/11/2025, Counsel for the ex parte applicant sought for time to file Supplementary Affidavit and supplementary submissions.

Vide the Supplementary Affidavit sworn by Dr. Mansukhbhai Virjibhai Patel on 8th October, 2025 the Petitioner deposed that the 3rd Respondent was served with all pleadings, the Notice of Motion, the application and the court order on multiple occasions.

That the County Attorney appeared on record for all the Respondents and undertook to ensure compliance with the orders and that no objection or disclaimer was raised by the 3rd Respondent.

That on 31st July, 2025, the court issued directions closing pleadings and fixing the matter for ruling. That despite the directions, the 3rd Respondent proceeded to file Replying Affidavit dated 30th July, 2025 and a Notice of Preliminary Objection dated 31st July, 2025.

That these were filed without leave of the court and are therefore irregular, incompetent and ought to be disregarded.

That notwithstanding the court orders of 1st July, 2025 and 7th July, 2025, the illegal occupation and construction on the public service lane has not only continued but progressively increased during the pendency of the petition.

That the 3rd Respondent's conduct constitutes ongoing willful violation of authority of the court.

The case of the 3rd Respondent

In response to the application, the 3rd Respondent filed an Affidavit in Reply dated 30th July, 2025 and Preliminary Objection vide the Notice of Preliminary Objection of even date.

The 3rd Respondent's case is that he is unaware of any allocations made to any traders formal or informal, permitting occupation of the aforesaid public service lane wherefore it is improper and unfair for a presumption to arise out of no evidence at all that the claimed occupation of the aforesaid public service lane by unidentified informal traders was as a result of allocation by him or his office.

That he expected the Petitioners to lay formal complaint against the informal traders to him for investigations or intervention, or to the police rather than running to court.

That by the Petitioners failing to make such formal complaints, they are guilty of constitutional avoidance that have brought a petition that the court has no jurisdiction to hear by reason of the doctrine of Constitutional avoidance.

Vide the Notice of Preliminary objection, dated 30th July, 2025 the 3rd Respondent raised objection to the petition on the grounds that it offends the doctrine of constitutional avoidance and is incurably defective and incompetent in that the complaints raised by the Petitioners are premised on erroneous presumptions of fact that the 3rd Respondent allocated and/or permitted the construction upon or obstruction of the public access lane running behind plot numbers 310, 317 and 321 of Block 7 within Kisumu Municipality.

Submissions

Written submissions dated 30th July, 2025 and Supplementary submissions dated 8th December, 2025 were filed by Joshua Odhiambo Nyamori & Associates Advocates on behalf of the Petitioners/applicants.

Written submissions dated 31st July, 2025 were filed by the firm of Behan & Okero on behalf of the 3rd Respondent.

Issues for determination

- a) The substantive issue for determination is whether or not the 3rd Respondent is in contempt of court.
- b) Whether the Petitioners/Applicant are entitled to the relief sought in the application.

Analysis and determination

The court record shows that indeed when this matter first came up for directions on 1st July, 2025, the court did issue an interim conservatory order restraining the Respondents, their agents and/or employees from allocating, permitting construction upon or obstructing the public service lane running behind land parcel number KISUMU MUNICIPALITY/BLOCK 7/310 to 321 along Ang'awa street, Kisumu pending hearing and determination of the Notice of Motion application dated 24th June, 2025.

In the application dated 7th July, 2025 (the subject of this ruling), the Applicants claim that despite service with the said interim conservatory order dated 1st July, 2025 upon the Respondents, the Respondents through their agents or employees have willfully and flagrantly disobeyed the court order and ongoing construction of

illegal, multi-story building continued in total disregard of the law, directly on the subject service lane.

The 1st Applicant deposed in the Supporting Affidavit sworn on the 7th July, 2025 that inspite of the service of the court order, the construction has gone on unabated and that multiple new permanent and semi-permanent structures including double storey units are being erected directly on the public service lane.

That he personally witnessed the construction works continuing.

In *Johari School Limited -vs- Rosemary Wamburu t/a Johari School [2021]eKLR* the elements of contempt of court were stated to be;

- (a) the existence of valid court order whose terms are clear and unambiguous and binding on the Respondent.
- (b) proof that the respondent had knowledge or proper notice of the terms of the order.
- (c) proof that the respondent acted in breach of the terms of the order; and
- (d) that the conduct or action of the respondent was deliberate or willful.

There is no doubt that there was a court order dated 1st July, 2025 in clear and unambiguous terms and binding on the respondents. It is clear that the order was issued in the absence of the parties.

The Applicant claimed that the Respondents were served with the court order on the morning of 2nd July, 2025. A copy of Affidavit of Service marked MVP-01 was annexed to the Supporting Affidavit. The Affidavit of Service sworn by Joshua Odhiambo Nyamori has attached to it a screenshot of the email message accompanying documents. The same shows that the documents were sent to Alex Mbeka while the Affidavit stated that the documents had been sent via email to the known and publicly listed official email address of the officer of the County Government of Kisumu.

Although I find no evidence of personal service of the court order upon the 3rd Respondent who is sought to be cited for contempt of court, I note from the court record that the County Attorney of the 1st Respondent did appear in court on behalf of all the Respondents and participated in the proceedings and undertook to ensure compliance with the court order. No reason has been demonstrated why the County Attorney could not appear on behalf of the 3rd Respondent who is an entity of the 1st Respondent. I find

that the 3rd Respondent had knowledge of the existence of the court order.

Also annexed to the application were photographs which were stated in the Affidavit to demonstrate the activities of the Respondent that amount to contempt of court. There is however no evidence on the photographs that connects the 3rd Respondent to the images on the photographs or the images on the photographs to the suit lands or the public service lane.

It was submitted on behalf of the Applicants that the standard of proof for contempt of court cases is higher than proof on a balance of probabilities. In Mutitika vs Baharini Farm Limited [1985] KLR 227, it was held that “contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily.... It must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge...”

I find that this standard of proof has not been met herein. While the court will act swiftly to ensure that its integrity and dignity and the rule of law is upheld, there must be proof of the contempt to the required standard.

As the only matter listed for ruling is the application dated 7th July, 2025, I find that the application lacks merit and is hereby dismiss it. No order as to costs.

Orders accordingly.

Ruling dated and signed at Kisumu, read virtually this 18th day of December, 2025.

**E. ASATI
JUDGE.**

In the presence of:

Maureen: Court Assistant.

Joshua Nyamori for the Petitioners/Applicants.

No appearance for the 3rd Respondent.