



Northern Block Residents Limited v National Environment Management Authority & 2 others (Environment and Land Case Judicial Review Application E001 of 2024) [2025] KEELC 5638 (KLR) (29 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5638 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE JUDICIAL REVIEW APPLICATION E001 OF 2024
OA ANGOTE, J
JULY 29, 2025

BETWEEN

NORTHERN BLOCK RESIDENTS LIMITED APPLICANT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 1ST RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT 2ND RESPONDENT

TREE HOUSE FIFTY- EIGHT LIMITED 3RD RESPONDENT

RULING

1. This ruling pertains to the Notice to Cross-Examine filed by the 3rd Respondent, Treehouse Fifty-Eight Limited, in which the 3rd Respondent seeks the leave of this Court to cross-examine two deponents on the contents of their sworn affidavits, in particular, Tom Kabuga, the director of the Applicant and Ruth Ndesandjo, a resident of Peponi Road.
2. Ruth Ndesandjo swore a Supporting Affidavit dated 31st January 2024 with respect to the Applicant's application dated 31st January 2024. The Applicant's Director, Tom Kabuga, has sworn the following affidavits on behalf of the Applicant:
 - i. A Further Affidavit sworn on 26th May 2025 in support of the Applicant's application dated 30th September 2024;
 - ii. A Supporting Affidavit sworn on 30th September 2024 in support of the Applicant's application dated 30th September 2024;
 - iii. A Further Affidavit sworn on 13th May 2024;



- iv. A Supporting Affidavit sworn on 31st January 2024 of the Applicant's application dated 31st January 2024; and
 - v. A Verifying Affidavit sworn on 31st January 2024 of the Applicant's application dated 31st January 2024.
3. The parties appeared before this court on 16th July 2025 and made oral submissions in respect of the Notice to Cross Examine.
 4. Mr. Sarvia, learned Counsel for the 3rd Respondent, submitted that the basis of the Notice to Cross examine the deponents of the Affidavits in support of the ex parte Applicant's case is to enable the 3rd Respondent to impeach the credibility of the deponents of the affidavits relied upon by the ex parte Applicant.
 5. Counsel asserted that the application has been made in good faith and is necessary for the advancement of justice and to ascertain the authenticity of the facts as deponed.
 6. Mr. Sarvia submitted that this dispute has been filed as a Judicial Review matter, which is ordinarily decided on the basis of affidavit evidence alone. He argued that in this suit, a Judicial Review remedy of prohibition has been sought directly against the 3rd Respondent, a private company, without going through a full trial, thereby prejudicing his client.
 7. He emphasized that the 3rd Respondent would not otherwise have an opportunity to contest the facts deponed unless it is granted leave to cross-examine the affidavits sworn on behalf of the Applicant.
 8. Counsel further submitted that the 3rd Respondent disputes the ex parte Applicant's locus standi and the deponents' connection to the suit property; that the 3rd Respondent intends to interrogate the nature of the ex parte Applicant's company and the legitimacy of its alleged representation of the residents, and that the right to cross-examine a deponent is a component of the right to a fair hearing as guaranteed under Article 50 of *the Constitution*.
 9. In support of his submissions, Counsel cited the decisions in *Law Society of Kenya v Faith Waigwa & 8 others* [2015] KEHC 3209 (KLR), *Ken Kavisi Mhuri v Nganya* (2021) eKLR, *R. v Registrar of Companies* (2011) eKLR and *G-G-R v H-P S* [2012] KEHC 5208 (KLR).
 10. In response, learned Counsel for the ex-parte Applicant, Mr. Muriithi, submitted that the matters raised by the 3rd Respondent are questions of pure law, which do not necessitate cross examination of the deponent, and that they can be addressed through legal argument. Counsel contended that this application is collaterally challenging this court's earlier ruling granting leave to the ex parte applicant to commence these proceedings.
 11. Counsel further submitted that the 3rd Respondent had failed to demonstrate the existence of exceptional circumstances to warrant this court to grant leave to cross-examine his clients. He maintained that the matters raised by the 3rd Respondent have already been addressed in the affidavits filed on record and that no party has been denied participation in these proceedings.
 12. Additionally, it was his argument that the 3rd Respondent has not identified any specific contradictions in the affidavit. He also maintained that the ex parte Applicant is challenging the decisions of the 1st and 2nd Respondents, which are public bodies.
 13. In a rejoinder, Mr. Sarvia submitted that the 3rd Respondent seeks to challenge the deponent's connection to the suit property and to interrogate the nature and extent of the damages the ex parte Applicant is claiming. He reiterated that the special circumstances justifying the application are that the



3rd Respondent is a private company against whom direct reliefs are sought and who would otherwise be denied the opportunity to test the credibility of the factual averments made against it.

Analysis and Determination

14. The sole issue for determination is whether the 3rd Respondent has made out a case to warrant leave to cross-examine the deponents of the affidavits relied upon by the ex parte Applicant. The affidavits in question were sworn by Tom Kabuga, who averred that he is the director of the ex parte Applicant and Ruth Ndesandjo, who deponed that she was a resident of Peponi Road.

15. This court, sitting in exercise of its Judicial Review jurisdiction, is mindful that such jurisdiction is sui generis in nature. The Court of Appeal in *Ransa Company Ltd v Manca Francesco & 2 others* [2015] eKLR, elaborated on the distinct nature of judicial review in the following terms:

“As we appreciate, a Court sitting on Judicial Review exercises a sui generis jurisdiction which is very restrictive indeed, in the sense that it principally challenges the process, and other technical issues, like excessive jurisdiction, rather than the merits of the case. It is also very restrictive in nature of the remedies or reliefs available to the parties.”

16. Similarly, the Court of Appeal in *Emfil Limited v Registrar of Titles Mombasa & 2 others* [2014] KECA 348 (KLR) underscored the specialized scope of judicial review proceedings, stating as follows:

“Judicial Review proceedings, are proceedings of a sui generis nature subject to its own peculiar rules. While we appreciate Article 159 of *the Constitution* and the need to apply substantive justice, that article provides no justification for a court to ignore a specific procedure provided by law and deliberately chosen by a litigant, nor does it allow a court to bend backwards to accommodate persons who have deliberately failed to protect or assert their interest. Thus the court was bound to apply the specific provisions of Order 53 of the Civil Procedure Rules.”

17. The procedure governing judicial review proceedings is set out under Order 53 of the Civil Procedure Rules. Under this framework, an applicant is required to file a statutory statement outlining the reliefs sought and the grounds upon which they are premised, together with a verifying affidavit setting out the factual basis of the application.

18. Upon service, the respondents and any interested parties, may file replying affidavits in response, with the applicant being at liberty to file further affidavits upon notice to the Court. The proceedings are, by design, to be determined on the strength of affidavit evidence.

19. It is now settled that a judicial review court is not ideally placed to evaluate or resolve materially conflicting affidavit evidence. This principle was affirmed by the Supreme Court in *Saisi & 7 others v Director of Public Prosecutions & 2 others* (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR), where the Court observed as follows:

“...It is the court’s firm view that the intention was never to transform judicial review into to full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First, the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialised institutions are better placed to do so... The merits of a case are best analyzed in



a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced.”

20. The rationale underpinning the affidavit-based nature of judicial review proceedings is grounded in the need for efficiency and expeditious disposal. Judicial review is concerned primarily with the legality of administrative action, rather than the resolution of disputed facts.
21. Consequently, such proceedings are generally ill-suited to evidentiary contests, particularly where the factual matrix is not in serious dispute. Moreover, public bodies appearing in judicial review proceedings are under a constitutional and statutory duty to act with candour and transparency.
22. This position was affirmed by the Supreme Court of the United Kingdom in *In the Matter of an Application by Noeleen McAleenon for Judicial Review (Northern Ireland)* [2024] UKSC 31 (delivered on 16 October 2024), as cited with approval in *Mbugua & Another v Registrar of Companies & Another (Application E14 of 2023)* [2024] KEHC 14436 (KLR) (Judicial Review), where the Court observed as follows;
 - “41. Judicial review is supposed to be a speedy and effective procedure, in respect of which disputes of fact which have a bearing on the legal question to be determined by the court - that is, whether the public authority has acted lawfully - do not generally arise. A public authority is subject to a duty of candour to explain to the court all the facts which it took into account and the information available to it when it decided how to act.
 42. Given the nature of the legal question to be determined by the court and the duty of candour, the usual position is that a judicial review claim can and should be determined without the need to resort to procedures, such as cross-examination of witnesses, which are directed to assisting a court to resolve disputed questions of fact which are relevant in the context of other civil actions, where it is the court itself which has to determine those facts. In judicial review proceedings the court is typically not concerned to resolve disputes of fact, but rather to decide the legal consequences in the light of undisputed facts about what information the public authority had and the reasons it had for acting. (This is not to say that such procedures are not available in judicial review: cross examination is available and will be allowed “whenever the justice of the particular case so requires”: *O’Reilly v Mackman* [1983] 2 AC 237, 283 per Lord Diplock; but usually, given the issues which arise in a judicial review claim, the justice of the case does not require it)”. (Emphasis added).”
23. The 3rd Respondent relied on the decisions in *Law Society of Kenya v Faith Waigwa & 8 others* [2015] KEHC 3209 (KLR) and *G G-R v H-P S* [2012] KEHC 5208 (KLR). However, these authorities are distinguishable from the matter presently before this Court. Both were ordinary civil suits and not judicial review proceedings brought under Order 53 of the Civil Procedure Rules, which prescribe a different procedural and evidentiary framework.
24. The 3rd Respondent also placed reliance on *Republic v Registrar of Companies Ex parte Manchester Outfitters Limited* [2011] KEHC 2647 (KLR) where the Court, in the course of judicial review proceedings, allowed cross-examination.



25. In that case, the Court observed that the affidavits filed by the ex parte Applicant and the Registrar of Companies contained materially conflicting averments regarding the directorship of the subject company. It held that without testing the credibility of those averments through cross-examination, a just determination could not be reached.
26. The facts in that matter were therefore materially different and justified departure from the usual affidavit-only approach applicable to judicial review.
27. This court takes into due consideration that Article 50(1) of *the Constitution* of Kenya, 2010 guarantees every person a right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or an independent tribunal or body.
28. The right to cross-examine a witness, in appropriate circumstances, is a component of the right to fair hearing. Further, Article 159(2) (d) of *the Constitution* enjoins this Court to administer justice without undue regard to procedural technicalities.
29. In the present case, 3rd Respondent seeks to challenge the locus standi of the ex parte Applicant and to interrogate its representation of the residents near the suit property. These issues are, however, legal in nature and have already been addressed in the 3rd Respondent's Replying Affidavit sworn on 18th March 2025 and responded to by the ex parte Applicant in the Further Affidavit sworn by Tom Kabuga on 26th May 2025.
30. As for the contention that the affidavits on record contain contradictory factual averments, the 3rd Respondent has not identified or particularised any specific contradictions that would necessitate the exceptional measure of cross-examination.
31. Further, the dispute herein is not strictly speaking between the ex parte applicant and the 3rd Respondent, but rather, whether due process was followed in issuing licenses and approvals by the 1st and 2nd Respondents. The 1st and 2nd Respondents are public bodies, whose decisions are challengeable by way of judicial review.
32. On the whole, the 3rd Respondent has not demonstrated the existence of exceptional circumstances to warrant the invocation of this Court's discretion in its favour. In addition, it has not established what prejudice, if any, it stands to suffer should the matter proceed to determination on the basis of affidavit evidence.
33. For the foregoing reasons, this court declines to grant the 3rd Respondent leave to cross examine the deponents, Tom Kabuga and Ruth Ndesandjo.
34. The application is accordingly dismissed with costs to be borne by the 3rd Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 29TH DAY OF JULY, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Gitau for Muriithi for Applicant

Mr. Sarvia for 3rd Respondent

Ms Felsan for 2nd Respondent

Court Assistant: Tracy

