



**Mwoa & another v overnor Nairobi County & 4 others (Environment and Planning  
Petition 001 of 2023) [2025] KEELC 5699 (KLR) (24 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5699 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND PLANNING PETITION 001 OF 2023**

**AA OMOLLO, J**

**JULY 24, 2025**

**IN THE MATTER OF ARTICLES 1, 3 (1), 10, 19, 20, 21, 22, 23, 27, 40, 47, 165(3) (B)  
(D), 165 (6), 201 (A), 227 (A) AND 258 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF VIOLATION AND THREATENED VIOLATION  
OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES  
2(1), 10, 19 (2), 20 (1), 10, 19 (2), 20 (1), 27, 28, 40, 47, 50, 73, 75, 201, 227,  
232, 258 AND 259 (1) (B) OF THE CONSTITUTION OF KENYA 2010.**

**AND**

**IN THE MATTER OF ACTUAL CONTINUING AND IMMINENT  
VIOLATION OF THE PHYSICAL AND LAND USE ACT**

**BETWEEN**

**KOKI MWOA ..... 1<sup>ST</sup> PETITIONER**

**AMINA SUALE ..... 2<sup>ND</sup> PETITIONER**

**AND**

**THE GOVERNOR NAIROBI COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**NAIROBI CITY COUNTY GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**

**ALI SHEIKH MOHAMED ..... 3<sup>RD</sup> RESPONDENT**

**CHUEB ALI ..... 4<sup>TH</sup> RESPONDENT**

**MOHAMED ABDI ALIAS MAS ..... 5<sup>TH</sup> RESPONDENT**



## JUDGMENT

1. The two petitioners took out the petition dated 10<sup>th</sup> July, 2023 which they subsequently amended on 4<sup>th</sup> March, 2024. They pleaded the articles of *the Constitution* in which the petition is founded. The articles cited are 1(3), 2(1), 10p; 19(2); 20; 21; 22(1); 73; 201; 227; 232; 258(1) and 259(1) (b).
2. The petitioners also relied on the provisions of section 61 of Physical Planning and Land Use Act which provides as hereunder;

“1) When considering an application for development permission, a county executive committee member—

(d) shall take into consideration the comments made by the members of the public on the application for development permission made by the person seeking to undertake development in a certain area.”

3. The facts and background of the petition is stated that sometime in January, 2009 Eastleigh Market Stalls erected on L.R 36/11/1037 were demolished by strangers claiming to have acquired the public land from the 2<sup>nd</sup> Respondent. Following the demolitions, over 300 persons including the Petitioners were left destitute having been deprived of their livelihood, which occasioned public out-cry.
4. That recently the Petitioners, who are residents of Eastleigh Kamkunji District, were made aware that there is an ongoing construction on the suit land by the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents have fenced off the land, there is heavy machinery on the property for excavation purposes and a private security guard has been placed at the premises, whose mandate is to deny all persons other than construction workers, entry to the premises.
5. Further thereto and contrary to physical land planning laws there is no display of the details of the construction ongoing, details of the contractors or any other display of approvals of the construction currently being undertaken on the suit property. The Petitioners, as Eastleigh Market Traders and as residents of Eastleigh have not been made aware of any development of the market and are therefore apprehensive that the construction being done on the suit premises is by 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents who have illegally and irregularly acquired approval from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
6. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents despite having a Constitutional obligation to be transparent, and accountable to the Residents of Nairobi County have failed to provide any information on the ongoing construction of L.R No. 36/11/1037. That the Respondents are acting in contravention of Article 10, 35, 40, 46, 47 and Chapter 12 of *the Constitution* of Kenya, 2010 and Section 61 of the *Physical and Land Use Planning Act*.
7. The Petitioners pleaded the particulars of unconstitutionality thus;

“Failure by the Respondents to grant full access to the information on the construction works currently being undertaken on L.R 36/11/1037, which is public land and gazetted as a public market and thereby contravening the following provisions of *the Constitution* and *Access to Information Act*:

- a. Article 35 which provides that every citizen has the right of access to information held by the state and information required for the exercise or protection of any right or fundamental freedom.



- b. Article 46 which entitles a person to the right information necessary for them to gain full benefit from goods and services.
  - c. Section 4(1) & (3) of the [Access to Information Act](#) which entitles every citizen the right of access to information held by the State or any other person where that information is required for the exercise or protection of any right or fundamental freedom and this right shall be provided expeditiously at a reasonable cost.”
8. They also averred that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have failed to uphold the provisions of article 10 and 73 of [the Constitution](#). That failure by the Respondents to recognize that transparency and accountability are some of the pillars of good public governance that leads to peace, political and economic stability.
  9. The Petition is supported by the affidavit of Koki Mwoa, the 1<sup>st</sup> Petitioner with the affidavit reiterating the facts set out in the amended petition. He deposes that recently, he became aware of an ongoing construction on L.R 36/11/1037 which land had been gazetted as public land in April 2017. They annexed a copy of the said gazette No. CZIX 0 97.
  10. He deposes that the land has been fenced off and there is machinery deposited on the land for excavation purposes. He avers that contrary to the physical planning laws, there is no display of approvals of the construction going on or details of the contractor.
  11. The petitioners contend that as Eastleigh Market traders or residents, they have not been made aware of any development of the market and they are apprehensive of the construction being done by unknown persons. He annexed a list of containing names of people said to be those of the market traders as KM3.
  12. Further, the Petitioners assert that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents despite having a constitutional obligation to be transparent and accountable to the Residents of Nairobi County have failed to provide any information on the ongoing construction on L.R No. 36/11/1037.
  13. They urged the court to grant the following orders;
    - a. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents contravened [the Constitution](#) by illegally and irregularly approving private development on public land contrary to the laid down procedures under [the Constitution](#) and the [Physical and Land Use Planning Act](#).
    - b. An order of mandamus compelling the 1<sup>st</sup> Respondent to call for public participation prior to approval of any development on L.R No. 36/11/1037 (Original No. 619/33) – Eastleigh Market, to allow transparency;
    - c. An order of mandamus compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to comply with the constitutional transparency and accountability requirement with regard to development on public property;
    - d. The court be at liberty to exercise its powers under Articles 23(3) of [the Constitution](#) of Kenya and fashion out any other appropriate relief it deems fit.
    - e. Costs of this Petition.



14. The petition was opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the 5<sup>th</sup> Respondent who filed their respective pleadings. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed grounds of opposition date 9<sup>th</sup> October, 2024 which listed the following facts;
- i. That the Petition as drawn and filed is fatally defective, incompetent and does not lie in law.
  - ii. That the grounds disclosed and the laws invoked in the petition are absolutely misconceived and cannot justify this court to grant the orders sought.
  - iii. That the petition is bad in law, sensational, frivolous, vexatious, speculative, made in bad faith and a proper candidate for dismissal with costs.
  - iv. That the grounds set out in the petition are otherwise an abuse of court process.
  - v. That the petition is intended to waste precious judicial time.
  - vi. That the provisions under which the Petition has been brought cannot be the basis for this Honourable Court to grant the prayers sought.
15. The 5<sup>th</sup> Respondent filed a Replying Affidavit sworn on 4<sup>th</sup> February, 2024 deposing inter alia that the petition does not disclose any reasonable cause of action and it is res judicata and abuse of the court process. The 5<sup>th</sup> Respondent deposes that the Petitioners are among the applicants before various courts seeking similar orders.
16. The 5<sup>th</sup> Respondent avers that the two Petitioners authorized their colleagues to file the said petitioners hence this petitioner is res judicata these suit;
- a. The Petition herein is similar to already heard and determined civil cases, petitioners and Judicial Review Applications including ELC Civil Suit 782 of 2013 & 615 & 589 of 2008 & Misc. Civil Application 37 of 2009 (Consolidated). The same relate to the same parties and issues as those raised herein and;
  - b. ELC Pet/E092/2024: Gabriel Mabeya & 2 Others Vs The National Land Commission and Nairobi City County and 5 Others, (that is ongoing).
17. He also stated that the Petitioners are guilty of the doctrine of avoidance for having sought prayers which ought to be brought as Judicial Review remedies. That there is no legal or factual basis demonstrated in the petition to warrant the prayers sought being granted.
18. Directions were given for prosecution of the petition by way of written submissions. The Petitioner filed submissions dated 10<sup>th</sup> November, 2024. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submissions are dated 9<sup>th</sup> October, 2024 while 5<sup>th</sup> Respondent's submissions are dated 6<sup>th</sup> March, 2025. They raise raises which will be addressed in the paragraphs under analysis and determination.

#### **Analysis and determination:**

19. One of the issues raised is that this petition is an abuse of the court process and is res judicata. In answering to the Preliminary Objection, the petition quoted the provisions of section 7 of the [Civil Procedure Act](#) and the often-cited case of Mukisa Biscuits Manufacturing Co. Ltd Vs West End



Distributors Ltd (1969) EA 696. They also quoted the case of Oraro vs Mbaja (2005) IKLR 141 which held thus;

“Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence. If the Applicant’s instant matter required the affidavit of Barak Eston Mbaja dated and filed on 7th October, 2004 to give it validity before the Court, then it could not be allowed to stand as a preliminary objection which must be on a pure point of law. The filing of the said affidavit was clearly out of order and, apart from amounting to a breach of established procedure, it had the unfortunate effect of provoking filing of the Respondent’s very detailed “affidavit in reply to an affidavit in support of preliminary objection”, which replying affidavit was expressed to be “under protest.”

20. They submit that when the test for res judicata is applied, this matter fails to satisfy the concept of res judicata. They contend that the previous suit was seeking maintenance of status quo of the suit property while this suit is seeking transparency and accountability of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on approval of development L.R No. 36/11/1037.
21. From their averments, the petitioners affirm that they are aware of the existence of one of the former suits cited by the 5<sup>th</sup> Respondent. They attack the res judicata doctrine on account that the parties are different hence they are not litigating under the same title. The Respondents annexed a copy of a ruling delivered in ELC 782 of 2013 (as consolidated). Further, he deposed that the petitioners signed authority to the plaintiffs in the former suit.
22. The Petitioners have also annexed a list of the traders removed from the disputed plot and in that list at No. 136 is the name of Mwathi Mugwe was is also the 1<sup>st</sup> Plaintiff in ELC 782 of 2013. From this copy of the ruling, the land in dispute is referenced No. 36/11/1037.
23. Hence the subject matter is the same as in this Petition. The petition claims that in this petition all they are seeking is accountability and transparency of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. However, in their petition, they do not disclose the date of commencement of the development whose approvals they want shared.
24. Explanation 4 and 6 of section 7 Civil Procedure Act states thus;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. (4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

25. Therefore, the Petitioners having granted authority to litigate through the plaintiffs in ELC 782 of 2013 cannot abandon the authority given and now say the parties litigating are different. In fact, even in



the present petition, they are also pleading on behalf of Eastleigh Market Traders as set out in paragraph 39 of the amended petition.

26. In regard to whether the Preliminary Objection meets the threshold of one, at this point, we are dealing with the main petition and not interlocutory proceedings. The res judicata doctrine is therefore raised as a defence the Respondents and they are permitted to so do under the law.
27. Further, the Petitioners have not denied being aware of the existence of case filed as ELC Petition E092 of 2024 which also references L.R No. 36/VII/1037 (Eastleigh Market) and which is seeking declaration inter alia that land the subject matter is public land. The parties sued in ELC Pet E092/2024 are similar except with addition of National Land Commission and the Attorney General. However, I note that E092/2024 was filed late after the commencement of this suit hence the Petitioners cannot be guilty of abuse of court process based on a latter suit.
28. The second limb of the objection is whether or not the Petition is res judicata ELC 782 of 2013. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted thus;

“Sometime in 2008, the defunct City Council of Nairobi placed an advertisement in the local daily inviting the private sector (corporate entities, private investors, organizations and persons of good will) for partnership to develop markets in various locations in the city and to be precise Eleven (11) sites and among them L.R NO.36/VII/10137.

Pursuant to that and the 2nd Respondent carrying out their civic duties on the 8th day of June 2008 the Councils General Purposes Committee deliberated on the above issue and referred it to the Social Services and Housing Committee whereby on the 18th day of November 2008 a Full Council meeting passed a resolution awarding construction of a complex mall on L.R NO.36/VII/1037 to Golden Lime International Limited and a partnership agreement was prepared.”

29. The Petition argued that the issues raised in the current petition are distinguishable from the former suit as they are now demanding for transparency and accountability from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. However, the accountability and the transparency sought for relates to developments undertaken or being undertaken on L. R. No. 36/II/1037. The question of development seems to have been the subject matter in ELC 782 of 2013 as brought out in the copy of the ruling annexed by the 5<sup>th</sup> Respondent.
30. For the suit to be determined as res judicata, the former suit ought to have been heard and determined on merits. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents sated that the former suit was struck out. The suit was struck out pursuant to an application taken out by the 1<sup>st</sup> Defendant which asked to be granted the following orders;
  - a. The Honourable court be pleased to dismiss both the plaintiffs suit herein, that is HCCC NO. 24 of 2007 and 615 of 2008 on account of fraudulent misrepresentation.
  - b. The Honourable court be pleased to dismiss all the plaintiffs suits herein that is HCCC NO. 24 of 2007 and HCCC NO. 615 of 2008 on account of non-compliance with the mandatory provisions of the Law.
  - c. In the alternative to the above prayers, the 1<sup>st</sup> Defendant Golden Line International Ltd, who are in possession of the suit property L.R. NO.36/VII/1037, be allowed to proceed with the development of the suit



property without interference by the Plaintiffs, their agents, employees or representatives.

31. After considering that application, Mutungi J on 19<sup>th</sup> February, 2014 held thus:

“In the premises and for the reasons set out above I find the 1<sup>st</sup> Defendants Notice of Motion dated 19<sup>th</sup> June 2013 to have merit and I accordingly order the plaintiffs suits HCCC NO. 24 of 2007 and HCCC NO. 615 of 2008 struck out for being incompetent. I have considered the circumstances of this case and in regard to the costs of the application and the suits I order that each party meets their own costs.”

32. Hence the former suit did not proceed on merits and I am persuaded to hold that it cannot be said to be res judicata. In so far as conducting civic education alleged by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, they did not file a replying affidavit to adduce facts submitted on. Thus, their submissions are not supported with evidence.

33. On merit of the Petition, under prayer 1 of the reliefs sought, they want a declaratory order issued that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents illegally and irregularly approved a private development. In the body of the petition, it is pleaded that they do not know who is undertaking development on the land hence it is not clear whether the development is private or public.

34. Since the 1<sup>st</sup> and 2<sup>nd</sup> Respondents do not deny that there is ongoing construction on the suit title, it is the right of the Petitioners to be told whether the developments is by done the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and if not, they shall make disclosures to the Petitioners. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents also owe the Petitioners a duty to share information that they approved the development by supplying them with copies of the approved plans for the development in line with prayer c of the Petition. Once they receive the information, the Petitioners can take up file a claim for non-compliance with article 10 of *the Constitution*. For now, I hold that the prayer for mandamus is premature.

35. I hold that the claim as against the 3<sup>rd</sup> to 5<sup>th</sup> Respondents was not proved as there was no evidence led that they were the ones undertaking the impugned developments. The petitioners pleaded at paragraph 36 & 37 thus;

“The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents have fenced off the land, there is heavy machinery on the property for excavation purposes and a private security guard has been placed at the premises, whose mandate is to deny all persons other than construction workers, entry to the premises.”

36. Probably, on this part the petitioners ought to have taken the route of giving oral evidence to link the 3<sup>rd</sup> to 5<sup>th</sup> Respondents with the ongoing construction. As of now, what is pleaded against the 3<sup>rd</sup> to 5<sup>th</sup> Respondents are mere statements of facts that have not been proved.

37. In light of the foregoing analysis, I find the petition is partially merited and guided by the provisions of article 23(3) of *the Constitution* allow it on the following terms:

- a. A declaration be and is hereby issued declaring that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents contravened *the Constitution* and the PLUPA by failing to cause to be displayed a site board disclosing the name of developer, and references to the development approval licences.
- b. An order of mandamus compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to comply with the constitutional transparency and accountability requirement with regard to development



on suit property by supplying to the Petitioners the development licenses to the ongoing construction within a period of 45 days of this judgement;

- c. Each party to meet their costs of the petition.

**Dated, Signed and Delivered at Nairobi this 24<sup>th</sup> Day of July, 2025**

**A. OMOLLO**

**JUDGE**

