



**Obiero v County Government of Bungoma & 3 others (Environment and Land
Petition E005 of 2024) [2025] KEELC 5420 (KLR) (17 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5420 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND PETITION E005 OF 2024**

**EC CHERONO, J
JULY 17, 2025**

BETWEEN

DOUGLAS NASHON OBIERO PETITIONER

AND

THE COUNTY GOVERNMENT OF BUNGOMA 1ST RESPONDENT

**THE BUNGOMA COUNTY OFFICE OF THE EXECUTIVE COMMITTEE
MEMBER DEPARTMENT OF LANDS URBAN/PHYSICAL PLANNING AND
HOUSING 2ND RESPONDENT**

**THE BUNGOMA COUNTY OFFICE OF THE EXECUTIVE
COMMITTEE MEMBER, ROADS, INFRASTRUCTURE AND PUBLIC
WORKS 3RD RESPONDENT**

MEGALASER INTERNATIONAL LIMITED 4TH RESPONDENT

RULING

1. The Petitioner, Douglas Nashon Obiero filed this Petition against the Respondents seeking the following orders;
 - a. A declaration that the Petitioner’s right to property has been violated by the Respondents act of encroachment onto, trespass upon and damage to the Petitioner’s property.
 - b. A declaration that the encroachment unto, trespass upon and expropriation of the Petitioner’s property known as E.BUKUSU/W.SNG’ALO/3XX4 by the Respondents for the expansion of Mactolo/Tonisio Road without consultation of the Petitioner, the Land Registrar and County Surveyor is illegal, null and void.
 - c. An order of permanent injunction restraining the Respondents by themselves, employees/ servants from further encroaching unto, trespass upon and damage the Petitioner’s property.



- d. An order of immediate restoration of the drainage culvert currently annexed to close proximity to the plaintiff suit land appropriately in consideration of the width of Mactolo/Tonisio Road.
 - e. An order compelling the Respondents to pay damages to the Petitioner as follows;
 - i. Compensatory damages based on full replacement of the suit property.
 - ii. Aggravated and exemplary damages.
 - iii. Loss of earnings in form of rental income as from 31st March 2023 at the rate of Kshs. 12500/ per month until judgment of this case.
2. By way of a response, the 1st, 2nd, 3rd, & 4th Respondents entered Appearance and filed grounds of opposition and Preliminary Objection dated 28th day February 2025 in which the following grounds are raised;
- a. That the Petition is still born, incompetent, bad in law and otherwise an abuse of the due process of the court.
 - b. That the 2nd, 3rd & 4th Respondents are improperly joined as parties to this proceedings not being constitutional and statutory legal entities that initiated the process the subject matter of these proceedings and who ought and cannot by dint of section 123 of the County Government Act 2012, be sued in their personal capacity in discharge of their public mandate vested in the County Government of Bungoma and whose offices are not capable of being sued and the plaint ought to be struck off as against them.
 - c. That the purported 2nd, 3rd & 4th Respondents are legal phantoms for they are neither human beings nor an incorporated or statutory legal entity capable of suing or being sued and this Honourable court is obligated to strike them off from the plaint as its an abuse of the Court process to purport to sue non-existent entities.
 - d. That the said Petition is misconceived, mischievous, unmeritorious, frivolous and vexatious and hence an abuse of the due process of the court.
3. The 5th Respondent also Entered Appearance and filed a Replying affidavit sworn by one Hassanali Babu Shabram on 15th January 2025. When this petition came up for directions on 25th March 2025, the parties agreed that the Notice of Preliminary objection be heard first.

1ST, 2ND, 3RD & 4TH RESPONDENTS' SUBMISSION.

4. The 1st, 2nd, 3rd and 4th Respondents through the office of the County Attorney filed written submissions dated 10th May, 2024 and submitted on two issues. On this issue, the learned Counsel submitted that under Article 179 of *the Constitution* of Kenya 2010, the Executive authority of the County is vested in, and exercised by, a county Executive Committee and that the County Governor and the Deputy County Governor are the chief Executive and Deputy Chief Executive of the County and that the overall responsibility of the management and accountability of the County affairs and resources lie with County Governor as the Chief Executive. He submitted that the 2nd, 3rd and 4th Respondents are improperly joined as parties to these proceedings, not being constitutional and statutory entities that are capable of being sued in their names. He also submitted that under section 133 of the *County Governments Act* 2012, the 2nd, 3rd and 4th Respondents cannot be sued in their personal capacity. He further submitted that the offices they hold are not body corporate to be sued in their names as they clearly act on behalf of the constitutional and statutory created institution which is a legal entity capable of suing and being sued. In conclusion, the learned Counsel submitted that



the suit herein is a mis-joinder as against the 2nd, 3rd and 4th Respondents. The second issue is whether the 2nd, 3rd and 4th Respondents can be sued and/or are necessary parties in this suit. The learned Counsel answered in the negative and referred to Article 179 of *the Constitution* which provides that the executive authority of the County is vested in and exercised by a County Executive Committee member and that the County Governor and the Deputy Governor are the Chief Executive and Deputy chief of the County respectively. He submitted that the overall responsibility of the County affairs and resources lie with the County Governor as the Chief Executive. He argued that the 2nd, 3rd and 4th Respondents are improperly joined as parties to these proceedings not being constitutional and statutory legal entities capable of being sued in their names. He also referred to Section 133 of the County Government Act, 2012 which provides that a person who holds a constitutional or statutory office acts on behalf of that corporate legal entity and is incapable of suing and being sued in their persona capacity. He relied in the case of *John Mining Temoi & Another v Governor of Bungoma County & 17 Others* (2014) eKLR where it was held;

‘As regards the Chairman of the Bungoma County Public Service Board, it was Mr. Kituyi’s argument that it was improper to enjoin the said Chairman in his personal capacity for acts done by the Bungoma County Service Board. In rejoinder, Mr. Khaoya submitted that the 3rd Respondent was properly enjoined as he was the head of the Bungoma County Service Board and further that, he was a party to the Petition in the capacity of the office holder and not in his personal capacity.

The Chairman of a County Public Service Board is not liable to be sued or to sue on behalf of the said Board. The County Public Service Board as a body corporate, is a legal entity capable of suing and being sued under section 57 of the County Government Act, 2012. It therefore follows that the Chairman should not have been sued or enjoined in these proceedings for the actions and omissions of the County Public Service Board which is a legal entity on its own. In this regard, the inclusion of the Chairman of that Board in petition NO.2 ”A” of 2014 was irregular. However, since that Petition was consolidated with Petition NO. 2 of 2014 which had properly joined the Board, nothing turns out on it. However, the Chairman is hereby struck out of the proceedings with no order as to costs as he was not sued in his own personal, but in his official capacity.”

5. The learned Counsel also cited the case of *John Rimui Waweru & to 3Others v Githunguri Constituency Ranching Co. Ltd & 5 Others* (2015) KLR and submitted that the 2nd, 3rd and 4th Respondents are not liable to sue or be sued on behalf of the County Government of Bungoma which is a legal entity capable of suing and being sued.

PETITIONERS WRITTEN SUBMISSIONS

6. The Petitioner through the Firm of M/S Ateya & Company Advocates submitted that the unlawful acts/omissions by the Respondent themselves, employees, servants or agents was done in contravention of the Petitioner’s right to equal protection and enjoyment of the law (Article 27(1) of *the Constitution*), right to acquire and own private property (Article 40 of *the constitution*), right to fair administrative action (Article 47 of *the constitution*) and right to a fair hearing (Article 50 of *the constitution* of Kenya), due process and the Rules of Natural justice. He argued that the Respondents’ actions and omissions contravened the provisions of the *Land Registration Act* NO. 3 of 2012 under Article 20(1 and 21(1) of *the constitution* of Kenya which guides on the maintenance of boundaries.
7. The learned Counsel further submitted that the Petition filed herein is instituted on proper grounds of the law hence merited. He argued that the Preliminary as raised is premised on misinterpretation of



the law in paragraph (b) to section 123 of the County Government Act, 2012 which gives guidelines of suspensions of County Government in exceptional circumstances, and therefore irrelevant in the matter before court. He submitted that the 2nd, 3rd and 4th Respondents being employees and/or servants working at the behest and acquiescence of the 1st Respondent are the primary cause that gave rise to the petition herein and form part of the evidence and that the 2nd, 3rd and 4th Respondents will not be prejudiced by the orders sought. He cited the following cases; Attorney General & Another v Andrew Mwaura Githinji & Another (2016) KLR, Republic Ex-parte the Minister for Finance & the Commissioner of Insurance as *Licensing and Regulating Officers v Charles Lutta Kasamani T/ A Kasamani & CO. Advocates & Another Civil Appeal (Application) NO. Nai. 281 of 2005* (UR), Consolata Kihara & 21 Others v The Director of Kenya Trypanosomiasis Research Institute Nairobi (2003) KLR 582, Oraro v Mbaja (2005) 1KLR 141, Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) E.A 696, Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others (2014) KLR, David Nyekorach Matsanga & Another v Philip Waki & 3 Others (2017) e

KLR and Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others (2015) eKLR.

LEGAL ANALYSIS AND DECISION\

8. I have considered the Notice of Preliminary Objection dated 28th February 2025, the rival submissions by counsel for the 1st, 2nd, 3rd, and 4th Respondents as well as Counsel for the Petitioner and the applicable law. Before determining whether or not the Objection raised is merited or not, it is useful to first define what a Preliminary objection is. The Black's Law Dictionary defines a Preliminary Objection as '...an objection that, if upheld, would render further proceedings before the Tribunal unnecessary'. It goes on to list an objection to the Court's jurisdiction as an example of a preliminary objection. In the celebrated case of Mukisa Biscuits Manufacturers Ltd v West End Distributors Ltd (1969)EA 696, the Court defined a Preliminary objection as follows;

"...as far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

9. The objection by the 1st, 2nd, 3rd, and 4th Respondents is that the 2nd, 3rd and 4th Respondents are improperly joined as parties to this proceedings not being constitutional and statutory legal entities that initiated the process the subject of these proceedings and who ought and cannot by dint of section 123 of the County Government Act 2012, be sued in their personal capacity in discharge of their public mandate vested in the County Government of Bungoma and whose offices are not capable of being sued and the Petition ought to be struck off. They argued that the 2nd, 3rd, and 4th Respondents are neither human beings nor an incorporated or statutory legal entity capable of suing or being sued and that the Petition herein be struck off for being an abuse of the Court process.
10. Looking at the Petition herein dated 8th July 2024, I note that the 2nd, 3rd and 4th Respondents have been sued as legal phantoms and not as human beings nor incorporated or legal entities capable of suing or being sued. Article 179 of *the Constitution* of Kenya 2010 provides that the Executive Authority of the County is vested in and exercised by a County Executive Committee and that the County Governor and the Deputy County Governor are the Chief Executive of the County and that the overall responsibility of the management and accountability of the County affairs and resources lie with the County Governor as the Chief Executive.



11. Section 6 of the County Government Act, 2012 provides that as an entity exercising Constitutional authority, a County Government shall be a body corporate with perpetual succession and shall have all the powers necessary for the discharge of its functions. Section 133 of the same Act provides that there is no personal liability of the officers of the County Government in discharging their constitutional and statutory mandate where such action or omission is done in good faith.

12. In *John Mining Temoi & Another v Governor of Bungoma County & 17 Others* (2014) eKLR, the High Court held;

“ As regards the Chairman of the Bungoma Public Service Board, it was Mr. Kituyi’s argument that it was improper to enjoin the said Chairman in his personal capacity for acts done by the Bungoma County Public Service Board. In rejoinder, Mr. Khaoya submitted that the 3rd Respondent was properly enjoined as he was the head of the Bungoma County Service Board and further that, he was a party to the Petition in the capacity of the office holder and not in his personal capacity.

The Chairman of the County Public Service Board is not liable to be sued or to be sued on behalf of the said Board. The County Public Service Board as a body corporate, is a legal entity capable of suing and being sued under Section 57 of the County Government Act, 2012. It therefore follows that the Chairman should not have been sued or enjoined in these proceedings for the actions and omissions of the County Public Service Board which is a legal entity on its own. In this regard, the inclusion of the Chairman of that Board in Petition NO.2 ‘A’ of 2014, was irregular. However, since that Petition was consolidated with Petition NO. 2 of 2014, which had properly joined the Board, nothing turns out on it. However, the Chairman is hereby struck out of the proceedings with no order as to costs as he was not sued in his own personal, but in his official capacity.”

13. Again in *John Rimui Waweru & 3 Others v Githunguri Constituency Ranching Co. Ltd & 5 Others* (2015) eKLR, the court held;

“ The plaintiffs have admitted in their submissions that they seek no personal liability as against the 5th Defendant, and therefore are suing him from acts arising from execution of his office as Governor of Kiambu County. There is thus a question of law raised as to whether in the circumstances the 5th Defendant can be sued in his capacity as Governor of Kiambu County, and the Court in this regard notes that section 133 of the County Government [Act \(NO. 17 of 2012\)](#) provides that members, staff and servants of a County Government are exempted from personal civil liability for any act done in good faith in the execution of their duty or upon directions. Article 176 of [the Constitution](#) in this respect states that a County Government for each County shall consist of a County Assembly and a County Executive, and under Article 179, the Governor is a member of the County Executive and also the Chief Executive of the County. To this extent, the Governor is both a member and staff of the County Government and is to be afforded the protection in section 133 of the County Government Act. The suit against the 5th Defendant is therefore improperly brought and is hereby struck out with costs payable to the 5th Defendant.”

14. From the pleadings and the submissions by the petitioner, it is clear to my mind that the 2nd, 3rd and 4th Respondents are being sued for acts and omissions arising from execution of their office as Executive Committee member, Department of Lands, Urban/Physical Planning and Housing, Roads Infrastructure and Public works and Chief officer Roads, Infrastructure and Public works. To that extent, they cannot be sued on behalf of the County Government of Bungoma which is a corporate



legal entity. Consequently, I agree with Counsel for the 1st, 2nd, 3rd and 4th Respondents that the 2nd, 3rd and 4th Respondents are not liable to be sued on behalf of the County Government of Bungoma which is a legal entity capable of suing and being sued on its own.

15. In view of the foregoing, I find the objection merited and the same is hereby upheld. It therefore follows that the Bungoma County office of the Executive Committee Member Department of Lands, Urban/ Physical Planning and Housing, Roads infrastructure and Public Works and Chief officer Roads, infrastructure and Public Works should not have been sued or enjoined in these proceedings for the actions and omissions of the County Government of Bungoma which is a legal entity on its own. In this regard, the inclusion of the 2nd, 3rd and 4th Respondents in this Petition was irregular, considering that the County Government of Bungoma has been included as a party. Consequently, the 2nd, 3rd, and 4th Respondents are hereby struck out with costs to be in the cause.
16. Orders accordingly.

READ, DELIVERED AND SIGNED AT BUNGOMA THIS 17TH DAY OF JULY, 2025.

HON. E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Ateya for the Petitioner.
2. Mr. Wekesa H/B for Mr. Makokha and Mr. Wattangah for the 1st, 2nd, 3rd 4th and 5th Respondents.
3. Bett C/A.

